



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

Interim Report

Queensland
Law Reform Commission

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

Interim Report

WP No 71
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Trusts and Settled Land Report (1971)

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

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Executive Summary

INTRODUCTION

[1] In this Interim Report, the Commission has recommended the enactment of new trusts legislation to replace the *Trusts Act 1973* (Qld).

[2] Historically, many of the statutory powers conferred on trustees were enacted to overcome particular limitations that had been recognised by the courts. As a result, trustees' powers have tended to develop in a piecemeal and ad hoc way.

[3] As explained below, the new legislation will modernise and simplify the conferral of trustees' powers and include a new statement of trustees' duties. It will also omit, in whole or in part, almost 30 provisions of the current Act that are now obsolete¹ or no longer appropriate in modern trusts legislation,² or that confer powers that will not be needed in light of the Commission's recommended new 'general property power'.

[4] Although many provisions of the current Act will, in substance, be retained, those provisions will be expressed in a more modern and simplified drafting style. Many of these provisions have their origins in various English *Trustee Acts* of the mid to late 1800s, and have remained relatively unchanged since that time. Given the increasing use, in modern times, of the trust (particularly the family trust) as a vehicle for arranging private commercial or other financial interests, simplifying the language of the legislation will also assist the many non-professional trustees to comprehend and comply with the law.

[5] The new legislation will not attempt to codify the law of trusts, but will, like the *Trusts Act 1973* (Qld), continue to supplement the general law in this area.

TRUSTEES' POWERS

[6] The Commission has recommended (Rec 7-1) that trustees should have, in relation to the trust property, all the powers of an absolute owner. This new 'general property power' will ensure that trustees' statutory powers are sufficient to manage the trust property effectively and efficiently. This approach also avoids the need to attempt to specify and authorise every conceivable type of transaction or disposition that may be needed for that purpose.

[7] Some of the management powers currently conferred on trustees (such as the powers to sell, lease and mortgage) will no longer be the subject of stand-alone provisions, but will be included in the new legislation in a non-exhaustive list of examples of powers conferred by the general property power (Recs 5-3(a), 7-5,

¹ See, eg, *Trusts Act 1973* (Qld) ss 17, 29, 30(2), 40, 41, 54(2)–(5), 55, 70.

² See, eg, *Trusts Act 1973* (Qld) ss 12(1)(b), (g), 33(3)–(4), 35, 48(4), 64, 113(2).

9-3, 9-5).³ However, many other provisions that currently confer specific management powers on trustees can simply be omitted.⁴

[8] In recognition of a settlor's autonomy, the Commission has recommended (Rec 7-3) that, with limited exceptions,⁵ a power conferred by the general property power should be capable of being expressly excluded or modified by the trust instrument.

[9] The new legislation should also provide that, in exercising a power conferred by the general property power, trustees must exercise the power in accordance with their duties, including the new general statutory duty of care (Rec 7-2).

TRUSTEES' DUTIES

[10] Currently, the duties of trustees are found largely in the case law. The Commission has recommended that the new legislation, while not codifying the duties of trustees, should include a statement of several key duties.

General duties in administering a trust

[11] To ensure that the greater flexibility provided by the general property power is subject to appropriate safeguards, and also to provide greater guidance to trustees, the Commission has recommended (Recs 6-1, 6-2) that the new legislation should include:

- a statutory duty of care, framed in terms that are generally consistent with section 22(1) of the *Trusts Act 1973* (Qld), that applies to trustees generally in administering the trust; and
- the 'core' duties of a trustee to act honestly and in good faith and for the benefit of the beneficiaries.

[12] To ensure their operation as an effective safeguard, the Commission has recommended (Rec 6-3(a)) that these new duties should not be capable of being excluded or modified by the trust instrument. It has also recommended (Rec 6-3(b)) that the imposition of these duties should not limit any other duties to which a trustee would be subject.

Duty to keep accounts and other records

[13] As a reminder to trustees (especially non-professional trustees), the Commission has recommended (Rec 6-4(a), (c)) the inclusion of a provision, in

³ See, eg, *Trusts Act 1973* (Qld) ss 25(1)–(3), 32(1)(a), (d)–(f), (3), 33(1)(i), 34, 44, 45 (to the extent that it confers the power to raise money by the mortgage of trust property), 47(1), 53.

⁴ See, eg, *Trusts Act 1973* (Qld) ss 32(1)(b), 33(1)(e)–(f) (to the extent that it confers powers to subdivide and undertake other development works), (h), (k), 36, 37, 38(1)–(2), 39(1), 45 (to the extent that it confers the power to raise money by the conversion or calling in of trust property), 50, 58, and Recs 5-6, 7-6, 9-7.

⁵ See, eg, Rec 7-7 concerning the powers to sell or lease trust property or to renew, extend or vary a mortgage of trust property.

general terms, requiring trustees to keep accurate accounts and records of the administration of the trust, and to maintain those accounts and records for a period of three years following the termination of the trust.

[14] It has further recommended (Rec 6-4(b)) a provision requiring trustees who are administering more than one trust to keep separate accounts and records for each trust.

Duty to provide accounts and other records

[15] To give some guidance to both trustees and beneficiaries about their respective obligations and entitlements, the Commission has recommended (Rec 6-5) the inclusion of a provision requiring a trustee, on request by a beneficiary, or a potential beneficiary, of a trust:

- to make the trust accounts available for inspection by the beneficiary or potential beneficiary; and
- at the expense of the beneficiary or potential beneficiary, to provide copies of the trust accounts.

[16] The recommended duty should not be absolute, but should be expressed to apply 'unless unreasonable in the circumstances'.

[17] Because the recommended provision would reflect the minimum disclosure requirements recognised under the general law, the Commission has further recommended (Rec 6-6) that the provision should not limit any other entitlement that the beneficiary or potential beneficiary would have to obtain other information from the trustee, or any entitlement that the beneficiary or potential beneficiary would have to apply to the court for an order requiring the trustee to provide other information.

APPOINTMENT OF TRUSTEES

Disqualification from appointment as trustee

[18] The Commission has recommended (Recs 3-1, 3-2(a)) that the new legislation should provide that an appointment of either of the following persons as trustee is void:

- a minor (unless the appointment is expressed to take effect on the minor attaining his or her majority, whether before or after the creation of the trust);
- a person who is an undischarged bankrupt.

Grounds on which a trustee may be replaced

[19] The Commission has recommended (Rec 3-5(a)) that the new legislation should not include the current grounds that enable a trustee to be replaced if he or she:

- remains out of the State for more than one year without having properly delegated the execution of the trust; or
- is a minor (this requirement being unnecessary because the appointment of a minor as trustee will generally be void).

[20] It has further recommended (Rec 3-5(b)–(c)) that the new legislation should include, as new grounds on which a trustee may be replaced, that the trustee:

- has become a bankrupt; or
- is a person who is disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001* (Cth) and is not given permission under section 206F or 206G of that Act to manage all corporations.

Replacement of a last surviving or continuing trustee who has impaired capacity

[21] To avoid the need to apply to the court for the replacement of a last surviving or continuing trustee who has impaired capacity, the Commission has recommended (Rec 3-8) a new provision to enable either of the following persons to appoint a replacement trustee:

- a person who is, for the time being, the administrator of the trustee under the *Guardianship and Administration Act 2000* (Qld) or under the corresponding law of another Australian jurisdiction; or
- a person who is, for the time being, 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).

MODERNISATION OF ACT TO MEET CURRENT CONDITIONS

[22] The Commission has made a number of recommendations to ensure that the legislation continues to meet modern conditions. Some of the Commission's recommendations involve new provisions, while others involve changes to existing provisions.

Authorisation of person to exercise a trustee's powers of investment

[23] While trustees are ordinarily required to act personally, the Commission recognises that, for many trusts, the management of their investments can require considerable expertise, and that it may be in the interests of the beneficiaries for the trustees to be able to authorise a person to exercise their powers of investment. It has therefore recommended (Rec 4-3) that, subject to the expression of a contrary intention in the trust instrument, a trustee may authorise a person to exercise the trustee's powers of investment.

Delegation by an individual trustee

[24] The Commission has also recommended an enlargement of the circumstances in which an individual trustee may delegate the exercise of the powers, authorities and discretions vested in the trustee. Currently, a trustee may delegate the trust only if he or she is out of, or is about to leave, the State or if he or she is, or may be about to become, temporarily incapable of acting as a trustee by reason of physical infirmity. The Commission has recommended (Rec 4-6(a)) that the new legislation should also permit a trustee to delegate in anticipation of the trustee becoming unable to act because of impaired decision-making capacity.

[25] However, because the delegation of a trust should be a temporary measure, the Commission has recommended (Rec 4-6(b)) that it should not be possible for a trustee to delegate the execution of a trust for more than 12 months.

Application of capital for the maintenance and advancement of a beneficiary

[26] The *Trusts Act 1973* (Qld) currently provides that a trustee may not apply more than \$2000 or half the capital, whichever is the greater, for the maintenance and advancement of a beneficiary. That limit has not changed since the Act was introduced in 1973. The Commission has recommended (Rec 10-2) that the limit should be increased to \$100 000 or half the capital of the trust, whichever is the greater.

COURT POWERS

[27] The Commission has recommended a number of new powers to give the court greater oversight of trustees and other persons who may exercise power under the trust instrument:

- where the court has removed a person as a trustee of a trust, the court is to have the additional power to disqualify the person from being appointed as a trustee in respect of any trust for a stated period (Rec 12-2);
- if the trust instrument creates an office, however described, in respect of which the person appointed to that office from time to time, not being a trustee, is vested with a power or powers under the instrument, the court is to have the power to make orders to remove the person from that office and to appoint a new person to that office (Rec 12-4); and
- the court is to have the power to review a trustee's remuneration, notwithstanding that the remuneration is authorised by the trust instrument or by statute (Rec 12-10).

JURISDICTION TO HEAR MATTERS IN RELATION TO TRUSTS

[28] The Commission has recommended (Rec 15-2) that, in cases where the trust property does not exceed in amount or value the monetary limit of the District Court's jurisdiction, the District Court should have the same powers that are conferred on the Supreme Court under the new legislation.

[29] This approach recognises that the District Court has a substantial general civil jurisdiction, and clarifies the extent to which the District Court currently has jurisdiction under the *District Court of Queensland Act 1967* (Qld) in relation to the 'execution of a trust'. It also ensures that parties to proceedings have the benefit of any savings that would flow from the lower costs of litigating in the District Court.

THE APPROVAL OF CY PRES APPLICATIONS IN RELATION TO CHARITABLE TRUSTS

[30] The Commission has recommended (Recs 13-1, 13-2(a)–(b)) that, where the value of the trust property does not exceed \$1 million, the trustees of a charitable trust may apply to the Attorney-General for the approval of a *cy pres* scheme, in lieu of making an application to the court. This is intended to provide a more cost-effective alternative for the approval of *cy pres* schemes for smaller charitable trusts that might otherwise fail because the specified purposes of the trust are impossible or impracticable to carry out.

[31] This recommendation involves an extension of the Attorney-General's traditional role in the enforcement of charitable trusts. The new mechanism will also include a number of measures to ensure transparency and procedural fairness in the exercise of the Attorney-General's new jurisdiction (Rec 13-2(c)–(f)).

CONSULTATION AND DRAFT LEGISLATION

[32] The Commission welcomes submissions on the preliminary recommendations made in this Interim Report. The closing date for submissions is **16 September 2013**.

[33] The preliminary recommendations made in this Interim Report may be subject to further refinement or modification in the final stage of the review, particularly as the Commission develops the draft legislation that will implement its final recommendations.

Chapter 1

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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.

BACKGROUND

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

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

² Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971), referred to throughout this Interim Report as the '*Trusts and Settled Land Report* (1971)' or the '1971 Report'.

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

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

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

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

THE DISCUSSION PAPER

1.7 In December 2012, the Commission completed a Discussion Paper examining a large range of issues relating to the provisions of the *Trusts Act 1973* (Qld).⁴ The Discussion Paper included a number of preliminary proposals and questions on which the Commission sought submissions.

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

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

1.10 The Commission received responses to the Discussion Paper from a number of organisations, including the Bar Association of Queensland, Crown Law, the Financial Services Council, the Public Trustee, the Queensland Civil and Administrative Tribunal, the Queensland Law Society and QSuper, as well as from

³ These changes are discussed in more detail in Chapter 2.

⁴ Queensland Law Reform Commission, *A Review of the Trusts Act 1973 (Qld)*, Discussion Paper, WP No 70 (2012), referred to throughout this Interim Report as the '*Trusts Discussion Paper* (2012)'.

individuals including Professor WA (Tony) Lee, the Registrar of Titles, a legal practitioner who practises in trusts and succession law, and a legal academic.

1.11 The Commission would like to thank all of those respondents for their contribution to this Interim Report.

THIS INTERIM REPORT

1.12 This Interim Report makes preliminary recommendations about a wide range of matters, including the appointment and discharge of trustees, trustees' powers, duties and protections, the appointment of agents and delegation of trustees' powers, the powers of the court, the approval of cy pres schemes for charitable trusts, and the jurisdiction to hear disputes in relation to trusts.

1.13 This Interim Report also examines the interaction of the provisions in the legislation, particularly those that confer powers or impose duties on trustees, with the expression of a contrary intention in the trust instrument. At present, the *Trusts Act 1973* (Qld) takes a unique approach to this issue by providing that most of the provisions in the Act are invariable and cannot be excluded or modified by the trust instrument.⁵ This issue is considered on a topic-by-topic basis throughout the Interim Report.

1.14 The key preliminary recommendations made by the Commission in relation to these issues are summarised in the Executive Summary at the beginning of this Interim Report. In particular, the Commission has recommended a new approach to trustees' management powers to the effect that the legislation should provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'), the exercise of those powers being subject to the trustee's duties, including a new general statutory duty of care. This would ensure that the statutory powers of trustees are sufficient to manage the trust property effectively, whilst avoiding the need for the legislation to specify in detail all of the powers that the trustee may need for that purpose.

1.15 The Commission's preliminary recommendations about these issues may be subject to further refinement or modification in the final stage of the review, particularly as the Commission develops the draft legislation that will implement its final recommendations.

PRELIMINARY RECOMMENDATION: NEW TRUSTS LEGISLATION

1.16 In addition to the Commission's preliminary recommendations for the enactment of new provisions to clarify the duties of trustees and to modernise and simplify the conferral of trustees' powers, it has also recommended the omission of a number of provisions of the *Trusts Act 1973* (Qld) that are now obsolete, or no longer appropriate in modern trusts legislation, or that confer powers that will not be needed in light of the Commission's recommended new 'general property power'.

⁵

This is discussed in more detail in Chapter 2.

1.17 Although many provisions of the current Act will, in substance, be retained, most of those provisions will require substantial redrafting. The drafting style of the Act is generally quite dated, with many lengthy and dense provisions. This reflects the fact that many of its provisions have their origins in various English *Trustee Acts* of the mid to late 1800s, and have remained relatively unchanged since that time.⁶

1.18 In view of the substantive recommendations made by the Commission and the extent of the redrafting that is required in relation to those provisions that are to be retained, the Commission recommends the enactment of new trusts legislation to replace the current Act.

1.19 The Commission does not, however, propose to change the fundamental role of the legislation in supplementing the general law — that is, the Commission does not propose that the current Act should be replaced with a trusts code.

CONSULTATION

1.20 The Commission welcomes submissions on the preliminary recommendations made in this Interim Report. Submissions may be in any format and may respond to some, or all, of the preliminary recommendations.

1.21 Details on how to make a submission are set out at the front of this Interim Report. The closing date for submissions is **16 September 2013**.

TIMEFRAME FOR THE REVIEW

1.22 The Commission is required to provide its final report, including draft legislation, to the Attorney-General by 31 December 2013.

⁶

In fact, 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

Overview of the *Trusts Act 1973* (Qld)

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INTRODUCTION

2.1 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). It also outlines the scope and application of the current Act.

HISTORICAL BACKGROUND

2.2 Before the enactment 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.

2.3 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.

2.4 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.

2.5 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

2.6 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 remainderman); 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 *Trusts and Settled Land Report* (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 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 *Ibid* 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 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

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).

2.7 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.

2.8 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.

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.*

THE 1971 REPORT

2.9 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

2.10 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

2.11 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 *Trusts and Settled Land Report* (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 *Trusts and Settled Land Report* (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.

2.12 The Commission's recommendations to extend the statutory 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

2.13 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

2.14 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

2.15 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

THE SCOPE OF THE CURRENT ACT

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

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 *Trusts and Settled Land Report* (1971) 99–101, draft Trusts 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 *Trusts Discussion Paper* (2012) ch 3.

- the appointment of trustees and the vesting of trust property, without a court order (Part 2);
- investments of trust property by trustees (Part 3);
- the general management and administrative powers of trustees (Part 4);
- 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);
- particular indemnities and protections of trustees, and the barring of claims (Part 6);
- the powers of the court to oversee the administration of trusts, including orders to appoint, and vest property in, trustees (Part 7);
- 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);
- gifts made by prescribed trusts for philanthropic purposes (Part 9); and
- miscellaneous matters, including remedies for the wrongful distribution of trust property (Part 10).

THE APPLICATION OF THE ACT

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

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 Act³³ 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

33

See, eg, *Public Trustee Act 1978* (Qld); *Trustee Companies Act 1968* (Qld).

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)

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

Application to all trusts, whenever created

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

Trust instrument may confer additional or larger powers on trustee

2.20 Section 4(2) ensures that a settler 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.

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

2.21 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.

2.22 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.

2.23 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.³⁴ 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

³⁴

There are also some individual provisions that 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).

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.³⁵ In particular, this includes powers of and relating to the sale of trust property.³⁶

2.24 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.³⁷

³⁵ See *Trusts Act 1973* (Qld) ss 10, 31(1), 60, 65, 79, 111.

³⁶ *Trusts Act 1973* (Qld) ss 31(1), 32(1)(a), (c), 34–37.

³⁷ See *Trusts Discussion Paper* (2012) ch 4, n 47. 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.

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INTRODUCTION

3.1 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:

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

- 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

3.2 This chapter examines the provisions in Part 2 of the *Trusts Act 1973* (Qld) that deal with the appointment and discharge of trustees without recourse to the court, 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.³ It also examines the related issue, which is not addressed in the Act, of capacity to act as a trustee.

WHO MAY BE APPOINTED AS A TRUSTEE

No general disqualifications

3.3 As a general principle, any person who is capable at law of holding property in his or her own right may be a trustee.⁴ It may happen, however, that a person who is appointed as a trustee is not able to act because he or she lacks the capacity to exercise the discretions required by the office.⁵ For example:⁶

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 ...

3.4 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. However, as explained later in this chapter, section 12(1) of the Act provides that, in specified circumstances, trustees are liable to be removed and replaced by new trustees, including where the trustee 'is incapable of acting' or 'is an infant'.⁷ In this way, although the Act does not disqualify particular persons from being

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

³ *Trusts Act 1973* (Qld) s 19, which deals with the appointment of custodian trustees, is considered in Chapter 4. The provisions of pt 2 of the *Trusts Act 1973* (Qld) apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust: s 10.

⁴ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1401].

⁵ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 6 November 2012) [8000]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [21.05].

⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 6 November 2012) [8000].

⁷ *Trusts Act 1973* (Qld) s 12(1)(f)–(g). Neither that Act nor the *Acts Interpretation Act 1954* (Qld) defines 'infant'. At common law, 'infant' (or, in modern terminology, a 'minor') refers to a person who has not attained the age of majority (*Thurgood v Director of Australian Legal Aid Office* (1984) 9 Fam LR 916, 922 (Wilcox J)), which is 18 years of age: *Law Reform Act 1995* (Qld) s 17.

appointed as trustees, it provides a mechanism for their removal and replacement, should the need arise.

3.5 The trustee legislation in the other Australian jurisdictions also provides for the replacement of a trustee who ‘cannot act’ or ‘is incapable of acting’ as trustee⁸ and, in most of those jurisdictions, the legislation also provides for the replacement of a trustee who is a minor.⁹

Whether the appointment of a minor or certain other persons should be void

3.6 Generally, a contract entered into by a minor is not enforceable against the minor.¹⁰ A minor may hold freehold land under the *Land Title Act 1994* (Qld),¹¹ but is not eligible to apply for, buy or hold leasehold land under the *Land Act 1994* (Qld).¹²

3.7 A trustee who is a minor is liable to be removed under section 12(1)(g) of the *Trusts Act 1973* (Qld). However, the Act does not disqualify a minor from being appointed as trustee, or otherwise provide that the appointment is void. In this respect, the Act reflects the general law principle that the appointment of a minor as a trustee is not void, but that the minor is liable to be removed as a trustee because he or she has only a limited capacity to act and may not ‘do any act as trustee which involves the exercise of a discretion’.¹³

3.8 In contrast, the trustee legislation in the ACT and New South Wales provides that the appointment of a minor as trustee is void.¹⁴ Because the appointment is void, no right can be reserved to the minor to act as trustee on attaining his or her majority, as could occur when the court ordered that a minor be removed from being a trustee.¹⁵

3.9 In its recent review of the law of trusts, the Law Reform Commission of Ireland 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

⁸ *Trustee Act 1925* (ACT) s 6(2)(e); *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 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).

¹¹ A minor’s date of birth will be recorded in the freehold land register: *Land Title Act 1994* (Qld) s 28(1)(d).

¹² *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].

¹³ G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 239.

¹⁴ *Trustee Act 1925* (ACT) s 7A; *Conveyancing Act 1919* (NSW) s 151A, discussed in *Trusts Discussion Paper* (2012) [5.9]. This is also the case in England: *Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 20.

¹⁵ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1402].

unless they have reached the age of eighteen'.¹⁶ Its recommendation, however, was somewhat wider, namely, that any purported appointment of a minor to act as trustee should be void from when the appointment would take effect.¹⁷

3.10 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).¹⁸ It considered that this qualification had 'greater compatibility with the fundamental principle of settlor autonomy'.¹⁹

3.11 Apart from the issue of minority, the Law Reform Commission of Ireland did not recommend that any other categories of persons should be disqualified from appointment as trustees. 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.²⁰

3.12 The Law Commission of New Zealand has made the preliminary proposal that new legislation should 'restrict appointment based on capacity to be a trustee'. In particular, it proposed that the following categories of persons should be precluded from appointment as a trustee.²¹

- A person under 18 years of age;
- An undischarged bankrupt;
- A person who is subject to a property order made under section 31 of the *Protection of Personal and Property Rights Act 1988* or a person for whom a trustee corporation is acting as manager under section 32 or 33 of the Act; and
- A corporation which is in receivership or in liquidation.

3.13 The Law Commission of New Zealand based these restrictions on capacity, rather than suitability to be a trustee. In its view, persons who 'lack full capacity should not be able to be appointed as trustee'.²² That Commission commented that, irrespective of their suitability for office, 'such persons are not able to function effectively as trustees because of their limited capacity to deal with property'.²³ It noted that some respondents had favoured a fuller list of exclusions,

¹⁶ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.09].

¹⁷ Ibid [2.12].

¹⁸ Ibid.

¹⁹ Ibid [2.11]. However, the Law Reform Commission of Ireland did not explain the mechanism by which the minor would act as an additional trustee on attaining his or her majority, given that the original appointment would be void.

²⁰ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.159]–[2.160].

²¹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 113 (Proposal P22(1)).

²² Ibid [6.20].

²³ Ibid [6.17].

precluding appointments based on suitability.²⁴ However, it considered that there is ‘an element of subjectivity in judgements about suitability’, which are best left to the settlor, rather than imposed through legislation.²⁵

Discussion Paper

3.14 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should provide that the appointment of a minor (or other particular categories of persons) is void or, alternatively, whether it is sufficient that section 12(1) of the Act provides for the replacement of certain trustees, including minors.²⁶

Consultation

Minority

3.15 The Queensland Law Society, the Bar Association of Queensland and Professor Lee were of the view that the *Trusts Act 1973* (Qld) should not be amended to provide that the appointment of a minor as trustee is void.

3.16 The Queensland Law Society, which, as explained below, favoured a prohibition on the appointment of a bankrupt, considered that minors should not ‘be penalised in the same way, because minority is not an incapacity attributable to a “character flaw”’. It considered that the appointment of a minor as trustee ‘should have no immediate effect, but act a little like reserving leave in a probate application except that the minor automatically joins the trusteeship committee when of age (18 years)’.

3.17 Professor Lee considered that the current approach recognised settlor autonomy and was flexible:

Suppose that a testator aged 50 appoints his four children as trustees of his estate, two of whom are adults at the time of the will but two are minors. The testator believes that all his children will be adults before he dies but he dies unexpectedly when one minor child is 15 and the other [17] years of age. There are good reasons why their appointment as trustees should be left as it is. An important reason is that that is the wish of the testator. Another is that it may take more than a year to administer the estate by which time the elder will be an adult and the younger nearly an adult. ... If their appointment was void the adult trustees could ignore them and perhaps pursue some agenda of their own.

3.18 He suggested, however, that it could be useful to clarify in the legislation that ‘a trustee who is a minor has no powers, duties or rights as trustee; but has all those powers, duties and rights upon the attainment of majority’.

24 Ibid.

25 Ibid [6.21].

26 *Trusts Discussion Paper* (2012) 47.

3.19 Three respondents expressed a different view in relation to the appointment of minors.

3.20 A legal practitioner who practises in trusts and succession law considered that the appointment of a minor should be void unless the settlor expresses a contrary intention, for example, by appointing 'X, upon his attaining the age of 18 years whether before or after the creation of this trust/date of my death'. He noted that, in 36 years of practice, he had never seen an unconditional appointment of a minor.

3.21 The Public Trustee also noted that the appointment of a minor as trustee was a 'relatively rare occurrence'. He favoured a legislative prohibition on appointing a minor as a trustee.

3.22 The Financial Services Council considered that, on balance, 'the position will be clearer if the appointment is void'. It expressed some support for 'the Irish view that the minor should be entitled to take up the appointment on attaining majority'. However, it ultimately did not think that 'this rare situation justifies the added complexity this would introduce to the legislation'.

Bankruptcy

3.23 Although the Queensland Law Society acknowledged that bankruptcy can be the result of misfortune, it nevertheless considered that bankruptcy was 'some evidence of a doubtful capacity to be prudent and reasonable'. For that reason, it submitted that the legislation should provide that, unless the trust instrument provides to the contrary, a person who is a bankrupt cannot be appointed as a trustee; and, if a person becomes a bankrupt after being appointed as a trustee, the appointment should be nullified.

3.24 A legal practitioner who practises in trusts and succession law did not express a view as to whether the appointment of a bankrupt as trustee should be void, but referred to the different situations that may arise. He observed that it is a concerning situation where 'a serial scammer and bankrupt' is appointed as the executor and trustee of an elderly person. On the other hand, he considered that a person who becomes a bankrupt before, or during, the trusteeship of a parent's estate might be perfectly appropriate, and that the disqualification of the person solely on the ground of bankruptcy could be to the detriment of the beneficiaries.

The Commission's preliminary view

Minority

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

3.26 The Commission agrees with the suggestion made by the legal practitioner at [3.20] above that the appointment of a minor as trustee should be void unless it is conditional on the minor attaining his or her majority. The new legislation should therefore provide that the appointment of a minor is void unless the instrument (if any) creating the trust provides that the appointment is to take effect on the minor attaining his or her majority, whether before or after the creation of the trust.

Bankruptcy

3.27 The Commission is also of the view that an appointment as trustee of a person who is an undischarged bankrupt should be void. Although different considerations may apply in the case of a person who is bankrupt *after* his or her appointment as trustee has taken effect, the Commission considers that it is undesirable that a trust should, at the outset, or on the later appointment of a trustee, have a trustee appointed who is already a bankrupt. While the person's bankruptcy is not necessarily an indication that the person is unfit to be a trustee, the fact of the person's bankruptcy has the potential to complicate, and adversely affect, the administration of the trust, especially in relation to the willingness of third parties to deal with the trustee and in relation to the capacity of the trustee to defend or initiate litigation.

3.28 The proposed provision should apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

LIMITATION ON THE MAXIMUM NUMBER OF TRUSTEES

An upper limit of four trustees

3.29 Section 11 of the *Trusts Act 1973* (Qld) imposes a mandatory upper limit of four on the permissible number of trustees of private trusts.²⁷ For trusts made or coming into operation after the commencement of the Act,²⁸ section 11(2) provides that:

- 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.

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

²⁸ *Trusts Act 1973* (Qld) s 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.

3.30 For the purpose of this section, a custodian trustee is not counted as a trustee.²⁹

3.31 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

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

3.33 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.

3.34 An upper limit of four trustees is also imposed, in certain circumstances, by the trustee legislation in the ACT and New South Wales,³⁴ Victoria³⁵ and Western Australia.³⁶

Exceptions

3.35 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.

²⁹ *Trusts Act 1973* (Qld) s 11(4). A custodian trustee 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). See the discussion of custodian trustees in Chapter 4.

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 6.

³¹ See *Trusts and Settled Land Report* (1971) 13.

³² Queensland, *Parliamentary Debates*, Legislative Assembly, 5 April 1973, 3718 (WE Knox, Minister for Justice).

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 in the case of land vested in trustees for charitable, ecclesiastical, or public purposes; where the net proceeds of the sale of the land are held for like purposes; or 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 *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.

³⁵ *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.

³⁶ *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.

3.36 The first exception — in section 11(3)(a) — is where the trust property is, or is to be, vested in trustees for charitable purposes. This follows the English approach,³⁷ which is mirrored in Victoria.³⁸ 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.³⁹ 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’.⁴⁰

3.37 The second exception to the limit of four trustees — in section 11(3)(b) — is where the Minister⁴¹ gives a certificate in writing approving the number of trustees in whom the trust property is, or is to be, vested.⁴² This exception was added in 1981⁴³ to facilitate the administration of superannuation funds.⁴⁴

Discussion Paper

3.38 In the Discussion Paper, the Commission sought submissions on whether:⁴⁵

- the upper limitation of four trustees for private trusts is appropriate;
- charitable trusts should continue to be an exception to the limitation on the maximum number of trustees; and
- the Minister should retain the discretion to approve more than four trustees.

Consultation

Maximum of four trustees for private trusts

3.39 All of the respondents who addressed this issue — namely, the Queensland Law Society, the Bar Association of Queensland, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law — were of the view that the legislation should continue

37 See n 33 above.

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

39 *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].

40 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].

41 The relevant Minister is the Attorney-General and Minister for Justice: *Acts Interpretation Act 1954* (Qld) s 33(2)(a); *Administrative Arrangements Order (No 1) 2013* (Qld) s 2.

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

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

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

45 *Trusts Discussion Paper* (2012) 50.

to provide for a maximum of four trustees for a private trust. The Bar Association of Queensland commented:

The upper limitation does not pose a difficulty in practice. It is generally undesirable to have the trust property registered in the name of a large number of individuals because of the time and expense involved, when a trustee is appointed or ceases to act, in transferring the trust property into the names of the new trustees (although custodians may be used). If in a particular case there is a need for a greater number of persons to be involved in making decisions in relation to the management or distribution of the trust property, there are other mechanisms that can be used to facilitate that, such as (i) the appointment of a corporate trustee with a number of board members greater than four; or (ii) the inclusion of committee provisions within the trust deed (eg constituting an investment committee or a distributions committee) with specific powers exercisable by the committee.

Exception for charitable trusts

3.40 The Bar Association of Queensland, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law were all of the view that charitable trusts should continue to be an exception to the limitation on the maximum number of trustees.

3.41 The Bar Association of Queensland noted that charitable trusts 'are in many cases formed by a group of more than four persons (often lay persons) who wish to be involved in the furtherance of a particular charitable purpose'. It considered that the current exception 'is helpful in that it enables a relatively simple trust deed to be utilised, rather than introducing complexities' (such as appointing a corporate trustee with a number of board members greater than four, or the inclusion of committee provisions within the trust deed).

3.42 The Queensland Law Society advised that it did not have a settled position on this issue. Its submission was prepared with the assistance of the Succession Law Committee and the Not for Profit Committee, each of which favoured a different approach.

3.43 The Not for Profit Committee of the Queensland Law Society considered that charitable trusts should continue to be an exception for the reasons set out in the Discussion Paper. It also considered that a further reason for the exception is that charitable trusts 'are often perpetual and therefore where trustees are individuals the charitable trust will continue to exist after they are deceased'. In its view:

Consequently, there may be a greater need for replacement trustees and the settlor may therefore wish to appoint additional trustees while still alive rather than leaving this responsibility with the then surviving trustee.

3.44 However, the Succession Law Committee of the Queensland Law Society considered that the function of charitable trustees is not so different from private trusts as to justify the exception. Professor Lee also submitted that charitable trusts should not be an exception to the limitation on the maximum number of trustees.

Minister's discretion to approve more than four trustees

3.45 The Queensland Law Society, the Bar Association of Queensland and a legal practitioner who practises in trusts and succession law were in favour of retaining the Minister's discretion to approve more than four trustees. The Bar Association of Queensland considered that 'the discretion serves a particular purpose — to facilitate the administration of superannuation funds — that continues to be relevant'.

3.46 However, the Queensland Law Society expressed the view that the discretion was not justified 'if the only basis for it is by analogy to superannuation funds ... which have come under more detailed regulation', principally through the *Superannuation Industry (Supervision) Act 1993* (Cth).

3.47 Professor Lee considered that there are circumstances in which it may be desirable to have more than four trustees. He gave the example of a family trust where the settlor has five adult children, noting that 'it might be invidious to exclude one child merely because of this rule'. In his view, however, the power to approve the appointment of additional trustees should also be given to the court, as there is no reason to restrict the power to the Minister.

The Commission's preliminary view

3.48 The new legislation should retain the upper limitation of four trustees for private trusts that is currently provided by section 11(1)–(2) of the *Trusts Act 1973* (Qld). In the Commission's view, that limitation facilitates the administration of private trusts.

3.49 Different considerations apply, however, in the case of charitable trusts, where a larger number of trustees is likely to assist the administration of the trust and the promotion of its objects. For this reason, the Commission is of the view that the new legislation should also retain the exception for charitable trusts that is currently provided by section 11(3)(a) of the Act.

3.50 While the Commission considers that an upper limitation of four trustees is generally appropriate for private trusts, it can envisage circumstances where it may be desirable to have a greater number of trustees. For that reason, the new legislation should include a mechanism for approval to be given for the appointment of more than four trustees of a private trust. However, the new legislation should not continue to confer that power on the Minister for Justice and Attorney-General, as is currently the case under section 11(3)(b). While the Minister has a special role in relation to charitable trusts, the Minister does not have any particular role in relation to private trusts. Given that charitable trusts are not subject to the limitation on the number of trustees, the exercise of this power will arise only in relation to private trusts. The Commission is therefore of the view that the new legislation should make provision for the approval of more than four trustees of a private trust to be given by the court, rather than by the Minister.

THE APPOINTMENT OF REPLACEMENT OR ADDITIONAL TRUSTEES WITHOUT RECOURSE TO THE COURT: OVERVIEW

3.51 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, without recourse to the court.⁴⁶

3.52 The section has its origins in section 36 of the English *Trustee Act 1925*, which has its origins in section 27 of *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.

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

Appointment of replacement trustees

3.54 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).⁵⁰ 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.⁵¹

3.55 The grounds on which trustees may be replaced, the persons who may appoint new trustees to replace them, and the discharge of trustees who are replaced are considered below.

Appointment of additional trustees without the replacement of an existing trustee

3.56 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

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.

⁴⁷ See HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 7 November 2012) [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 7 November 2012) [8110].

⁵⁰ See *Trusts Act 1973* (Qld) s 12(1)–(4), (7).

⁵¹ *Trusts Act 1973* (Qld) s 12(2)(a).

appointment of new trustees in circumstances that do not involve the replacement of an existing trustee.

3.57 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)’.⁵² 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.

3.58 In view of the Commission’s earlier recommendation that the power to approve the appointment of more than four trustees should be conferred on the court, rather than on the Minister,⁵³ the provision based on section 12(5) will need to refer to the situation where the court has approved the appointment of more than four trustees.

3.59 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

3.60 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.

THE CIRCUMSTANCES IN WHICH A TRUSTEE SHOULD BE ABLE TO BE REPLACED WITHOUT RECOURSE TO THE COURT

3.61 Section 12(1) of the *Trusts Act 1973* (Qld) specifies a range of circumstances in which a trustee or trustees may be appointed to replace an existing trustee:

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

⁵² 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.

⁵³ See [3.50] above.

- (b) remains out of the State for more than 1 year without having properly delegated the execution of the trust;⁵⁴ 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 persons exercising the power) to be a trustee or trustees in the place of the trustee first in this subsection mentioned. (note added)

3.62 Section 12(1) does not prevent a settlor from providing in the trust instrument that a trustee may be replaced in other additional circumstances. On the contrary, section 12(3) and (8) specifically contemplates that a trust instrument might provide for the replacement of a trustee on other grounds. In particular, 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).

3.63 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.⁵⁵

3.64 This part of the chapter considers the ground of removal in section 12(1)(b) of the Act — remaining out of the jurisdiction for more than a year without delegating the execution of the trust — together with the following circumstances, which are not currently specific grounds for replacement under section 12(1), although their occurrence may in some situations satisfy section 12(1)(e) (that the trustee is unfit to act):

- bankruptcy; and

⁵⁴ See the discussion in Chapter 4 of s 56 of the *Trusts Act 1973* (Qld) and the power to delegate.

⁵⁵ *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).

- disqualification from managing corporations.

3.65 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. 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 replaced by a non-judicial mechanism or whether it would be more appropriate for the question of replacement in that circumstance to be decided by the court. As a general proposition, the Commission considers that the grounds that are appropriate for the replacement of trustees without recourse to the court are those that do not require the persons exercising the power to make decisions about complex legal or factual questions or to exercise a significant adjudicative function. The greater the complexity involved, the stronger the argument that the ground is more appropriate as one for replacement by the court, rather than by a non-judicial process.

Remaining out of the jurisdiction for more than a year

3.66 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:⁵⁶

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

3.67 It has been suggested that the provision 'is not used as much today because of improved distance communications'.⁵⁷ The omission of this ground for replacement has recently been considered by two law reform commissions.

3.68 The Law Reform Commission of Ireland has recommended that its equivalent provision should be deleted.⁵⁸ It 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.⁵⁹

3.69 Section 43(1) of the *Trustee Act 1956* (NZ) is also expressed in similar terms to section 12(1) of the Queensland legislation, including section 12(1)(b). The Law Commission of New Zealand has recently proposed that section 43 of the *Trustee Act 1956* (NZ) should be replaced by a new provision, which would apply to the removal of trustees by the court or by persons with a power to appoint and remove trustees. Under its proposal, the separate grounds of remaining out of the jurisdiction for more than a year, being unfit to act, and being incapable of acting (in Queensland, found in section 12(1)(b), (e) and (f) of the *Trusts Act 1973* (Qld)) would be replaced by a more general provision that provides for the replacement of a trustee who 'is no longer suitable to continue to hold office as a trustee because

⁵⁶ 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).

⁵⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 7 November 2012) [8150].

⁵⁸ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.54].

⁵⁹ *Ibid* [2.53].

of circumstance or conduct', and which includes a non-exhaustive list of circumstances in which a trustee is no longer suitable.⁶⁰

Bankruptcy

3.70 The bankruptcy of a trustee is not a specific ground for replacement under section 12(1) of the *Trusts Act 1973* (Qld). 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.⁶¹

3.71 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'.⁶² It considered 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'.⁶³

3.72 However, the Law Commission of New Zealand has made the preliminary proposal that bankruptcy should be included in the non-exhaustive list of factors that would enable a trustee to be replaced on the ground that he or she is 'no longer suitable to continue to hold office as a trustee because of circumstance or conduct'.⁶⁴

Disqualification from managing corporations

3.73 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'.⁶⁵

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

- by operation of section 206B, which is automatic in the circumstances to which that section applies;

⁶⁰ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 116 (Proposal P23(2)(c)).

⁶¹ *Trusts Act 1973* (Qld) s 12(1)(e). In addition, s 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.

⁶² Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.68].

⁶³ *Ibid* [2.67].

⁶⁴ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 116 (Proposal P23(2)(c)(iii)).

⁶⁵ *Corporations Act 2001* (Cth) s 206A(2).

- by the court (on application by the Australian Securities and Investment Commission ('ASIC')),⁶⁶ and
- by ASIC itself.⁶⁷

3.75 Section 206B provides that a person is automatically disqualified from managing corporations in a range of circumstances, including if the person:⁶⁸

- is an undischarged bankrupt under the law of Australia, its external territories or another country; or
- has executed a personal insolvency agreement under Part X of the *Bankruptcy Act 1966* (Cth) or a similar law of an external Territory or a foreign country and the terms of the agreement have not been fully complied with.

3.76 In addition, a person is automatically disqualified under section 206B if the person:

- is convicted on indictment of an offence that concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation, or that concerns an act that has the capacity to affect significantly the corporation's financial standing;
- is convicted of an offence that is a contravention of the *Corporations Act 2001* (Cth) and is punishable by imprisonment for a period greater than 12 months, or that involves dishonesty and is punishable by imprisonment for at least 3 months;
- is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months;
- is, at that time, disqualified from managing Aboriginal and Torres Strait Islander corporations under Part 6-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); or
- is disqualified, under an order made by a court of a foreign jurisdiction that is in force, from being a director of a foreign company or from being concerned in the management of a foreign company.

3.77 As mentioned above, other provisions of the *Corporations Act 2001* (Cth) give the court the power to disqualify a person from managing corporations. These provisions involve matters of discretion, rather than the factual circumstances mentioned in section 206B. For example, section 206D provides that, on application by ASIC, the court may disqualify a person for up to 20 years if, within the last seven years, the person has been an officer of two or more corporations when they have failed, and the court is satisfied that the manner in which the

⁶⁶ See *Corporations Act 2001* (Cth) ss 206C–206EE. See s 58AA for the meaning of 'court'.

⁶⁷ See *Corporations Act 2001* (Cth) s 206F.

⁶⁸ *Corporations Act 2001* (Cth) s 206B(3)–(4).

corporation was managed was wholly or partly responsible for the corporation failing and that the disqualification is justified.

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

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

3.80 Section 206G applies if the person was not disqualified by ASIC. It therefore has a wider application, being the relevant provision if the person is disqualified from managing corporations by the operation of section 206B or by a court order made under another provision in Part 2D.6 of the Act. It gives the court the power to grant the person leave to manage corporations, a particular class of corporations, or a particular corporation.

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

3.82 It is not an express ground for the replacement of a trustee under section 12(1) of the *Trusts Act 1973* (Qld) that the trustee has become disqualified from managing corporations, although, as with bankruptcy, the circumstances that resulted in the person's disqualification may be sufficient to justify his or her replacement as a trustee on the ground that the person is unfit.

3.83 The Law Commission of New Zealand has made the preliminary proposal that the non-exhaustive list of factors that would enable a trustee to be replaced on the ground that he or she is 'no longer suitable to continue to hold office' should include as a factor that 'the trustee becomes precluded from serving as a director under the *Companies Act 1993* because of a breach of that Act or the *Securities Act 1978*'.⁶⁹

Discussion Paper

3.84 In the Discussion Paper, the Commission proposed that section 12(1)(b) of the *Trusts Act 1973* (Qld) should be omitted.⁷⁰ In its view, section 12(1)(b) of the *Trusts Act 1973* (Qld) 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, it considered that, given the various 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

⁶⁹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 116 (Proposal P23(2)(c)(v)).

⁷⁰ *Trusts Discussion Paper* (2012) 57.

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.⁷¹

3.85 The Commission also proposed 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.⁷² It expressed the view that it is 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.⁷³

3.86 The Commission also sought submissions on whether:⁷⁴

- section 12(1) of the *Trusts Act 1973* (Qld) should 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;
- any new ground should be added to section 12(1) of the Act to enable a non-performing trustee to be replaced or, alternatively, whether the present grounds in section 12(1) are sufficient.

Consultation

Remaining out of the jurisdiction for more than a year

3.87 The Commission's proposal to omit section 12(1)(b) was supported by all of the respondents who addressed that issue — the Queensland Law Society, the Bar Association of Queensland, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law.

3.88 The Queensland Law Society further suggested that section 12(1)(b) should be replaced with a more specific provision that addresses the effect of residency on taxation issues:

we believe there is a case for it [section 12(1)(b)] being replaced with a prohibition that a trustee must not remain out of Queensland for so long as would cause the tax residency of the trust to alter, thus attracting the operation of an otherwise avoidable [Capital Gains Tax] event. Clearly an active mind may place a dominant emphasis on the particular qualities and capacity of the intended trustee, notwithstanding his or her propensity to take residence and the central management and control of the trust outside of Australia. Therefore this should be subject to a contrary intention, with the intention set out in the trust deed to take precedence.

71 Ibid [5.45].

72 Ibid 59.

73 Ibid [5.53].

74 Ibid 57, 59.

Bankruptcy

3.89 The Bar Association of Queensland, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law agreed with the Commission's proposal 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. The Bar Association of Queensland commented that 'the test for whether a person is an undischarged bankrupt is clear, and can appropriately serve as a trigger to engage the power of replacement of a trustee' under section 12(1).

3.90 As noted earlier, the Queensland Law Society submitted that the supervening bankruptcy of a trustee should have the effect of 'nullifying an existing appointment, unless there is a contrary intention stated in the trust deed'.

Disqualification from managing corporations

3.91 The Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law were all of the view 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 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.

3.92 However, the Bar Association of Queensland did not support such a change. It commented:

The circumstances under which a person may be disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001* (Cth) are wide-ranging. It is not appropriate for such circumstances to provide a ground for replacement of a trustee under s 12(1).

Replacement of a non-performing trustee

3.93 Two respondents suggested that consideration might be given to including additional grounds in section 12(1) to facilitate the removal of a non-performing trustee.

3.94 Professor Lee suggested that section 12(1) could articulate the general principle that a trustee whose conduct in the administration of the trust jeopardises the proper management of the trust property, or the interests or welfare of the beneficiaries, may be replaced under that provision.

3.95 The Queensland Law Society commented that 'some thought might be given to the case where one of several trustees persistently disagrees with co-trustees (where the trust instrument does not contain a "majority decision" mechanism)'. In its view:

This would usually result in the trustees as a committee not being able to proceed in a way that favours the majority, or being put to the expense and inconvenience of other trustees seeking the advice and direction of the court. The provision would have to be carefully framed because the necessary

evidence would usually involve the disclosure of minutes and proceedings at trustee meetings.

3.96 However, the Bar Association of Queensland, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law each expressed the view that the present grounds in section 12(1) are sufficient (subject to their various responses relating to trustees who are undischarged bankrupts or disqualified from managing corporations).

3.97 The Bar Association of Queensland considered that, in a case where a trustee is not refusing to act (so that section 12(1)(d) does not apply), the issue of whether the trustee should be replaced for non-performance is more appropriately dealt with by the court:

it would be difficult to arrive at a satisfactory definition of 'non-performing'. There could conceivably be a dispute between trustees as to whether a particular trustee is 'non-performing' or not. Where a trustee is not performing his functions, and his conduct is not such as to engage s 12(1)(d) (refusal to act), it is appropriate that the Court determines whether the trustee should be removed, in order to consider the particular circumstances and whether they impact on the trustee's ability to discharge his functions as trustee. An application can be made under s 80, relying on the last limb of s 80(2) ('... or who for any other reason whatsoever appears to the court to be undesirable as a trustee'). This is a sufficient mechanism to deal with the issue of a non-performing trustee.

The Commission's preliminary view

3.98 Apart from the matters discussed below, the new legislation should continue to provide for the replacement of a trustee on the grounds currently mentioned in section 12(1)(a), (c)–(f) and (h) of the *Trusts Act 1973* (Qld). The new provisions should also be expressed in a more modern and simplified drafting style.

Remaining out of the jurisdiction for more than a year

3.99 The Commission remains of the view that it is no longer appropriate that a trustee should be liable to be replaced on the ground that he or she remains out of the State for more than one year without having properly delegated the execution of the trust. While such a ground would once have provided a means to replace a trustee who, through absence from the jurisdiction, could not fulfil his or her duties, that is no longer the case. Accordingly, the new legislation should not include a provision to the effect of section 12(1)(b) of the *Trusts Act 1973* (Qld).

Bankruptcy

3.100 The Commission also remains of the view that a trustee who is an undischarged bankrupt should be liable to be replaced. The inclusion of bankruptcy as a specific ground avoids the need to establish that a trustee who is bankrupted is otherwise unfit to act as a trustee. The inclusion of this ground does not mean that a trustee who is bankrupted will necessarily be replaced. In particular circumstances, it may be in the interests of the beneficiaries for the trustee to remain in office, especially in the case of a small testamentary trust where the only

alternative trustee would be a professional trustee who would charge for performing that role.

3.101 Because of the earlier recommendation in this chapter that the legislation should provide that the appointment of a person as trustee is void if the person is an undischarged bankrupt, the new provision dealing with the non-judicial replacement of trustees will apply only where the bankruptcy has occurred after the trustee has been appointed. This new ground for replacement should therefore refer to a trustee who becomes a bankrupt.

Disqualification from managing corporations

3.102 As explained earlier, the *Corporations Act 2001* (Cth) provides that a person ceases to be a director of a company if the person is disqualified from managing corporations under Part 2D.6 of that Act and has not been given permission to manage the corporation under section 206F or 206G of the Act.⁷⁵

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

3.104 In expressing this as a new ground for the replacement of a trustee, the new legislation will need to reflect the fact that a person may, despite his or her initial disqualification, be given permission under section 206F or 206G of the *Corporations Act 2001* (Cth) to manage corporations or particular corporations. However, in this respect, the new provision cannot simply follow the wording of section 206A(2) of the *Corporations Act 2001* (Cth), since that provision links the person's ceasing to be a director of a particular company with an absence of permission to manage *that company*.⁷⁶

3.105 Obviously, the new ground for replacement should apply if a person is disqualified from managing corporations and either does not apply for permission to manage corporations or makes an application that is wholly refused. The more difficult situation that needs to be addressed in the new legislation is where the disqualified person is given permission to manage a particular corporation or class of corporations, in which case the person does not cease to be a director of those corporations. The Commission is of the view that the new provision should enable a trustee to be replaced if, despite being given permission to manage a corporation or some corporations under section 206F or 206G of the *Corporations Act 2001*

⁷⁵ See [3.73] ff above.

⁷⁶ *Corporations Act 2001* (Cth) s 206A(2) provides:

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

(Cth), the person is nevertheless still disqualified from managing other corporations, whether they be named corporations or a class of corporations. However, a trustee should not be liable to be replaced on this ground if he or she is given permission to manage corporations generally and is no longer subject to any restriction in terms of the corporations that he or she may manage.

Minors

3.106 Earlier in this chapter, the Commission has recommended that the appointment of a minor should be void unless the appointment is expressed to take effect on the minor attaining his or her majority.⁷⁷ In light of that recommendation, it is not necessary for the new legislation to include minority as a ground for the replacement of a trustee, as is currently the case under section 12(1)(g) of the *Trusts Act 1973* (Qld).

'Non-performing' trustees

3.107 The Commission does not consider it necessary to include any additional ground to facilitate the removal of a 'non-performing' trustee. If a trustee is refusing to act, the legislation will make provision for the replacement of the trustee under the provision based on section 12(1)(d). However, if the allegation of non-performance goes more to the standard of the trustee's performance, replacement on that ground is a matter that is more appropriately dealt with by the court.

3.108 The Commission notes the suggestion by the Queensland Law Society that the legislation should include, as a new ground for the replacement of a trustee, a change in the trustee's residency status where that has negative taxation implications for the trust. The Commission's view is that it is not the role of the trust legislation to regulate the conduct of trustees in this way. Further, the issues involved in determining whether a trustee should be removed on this basis will be relatively complex and, therefore, are more appropriately a matter to be determined by the court, rather than by a non-judicial process.

PERSONS WHO SHOULD BE ABLE TO APPOINT REPLACEMENT TRUSTEES

3.109 Section 12(1) of the *Trusts Act 1973* (Qld) confers the power to appoint replacement trustees on the following persons, in descending order:⁷⁸

- 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;

⁷⁷ See [3.26] above.

⁷⁸ An exercise of power under s 12(1) of the *Trusts Act 1973* (Qld) would be reviewable under s 8 of the Act. See, eg, *Re Whitehouse* [1982] Qd R 196, which is discussed in Chapter 12.

- if there are no surviving or continuing trustees — the personal representative of the last surviving or continuing trustee.

3.110 Some overseas 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. This part of the chapter considers the three categories of persons who may appoint replacement trustees under section 12(1) of the Act, together with the issue of whether the new legislation should also make provision for any additional categories of persons to exercise the power to replace trustees without recourse to the court. In that respect, the Commission considers the position of:

- the administrator or attorney of a last surviving or continuing trustee who has impaired capacity;
- a person appointed by the will (or another document) of a last surviving or continuing trustee; and
- the beneficiaries under the trust.

3.111 In considering whether additional categories of persons should be able to exercise the power to appoint replacement trustees, the Commission is mindful that, in many cases, the appointment of a replacement trustee or trustees will, in effect, result in the forced removal of an existing trustee.⁷⁹ The issue therefore is whether the particular category of person would be appropriate to exercise a power that has that effect or whether, if there 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.

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

3.112 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 to replace an existing trustee. It is only if there is no such person, or no such person who is 'able and willing to act', that the power to appoint replacement trustees is exercisable by the surviving or continuing trustee or trustees for the time being.

3.113 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 this 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.⁸⁰

⁷⁹ The exception is where a trustee is appointed under s 12(1)(c) of the *Trusts Act 1973* (Qld) to replace a trustee who seeks to be discharged from the trust.

⁸⁰ *Re Sheppard's Settlement Trusts* [1888] WN 234.

3.114 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’.⁸¹

Discussion Paper

3.115 In the Discussion Paper, the Commission considered that 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, it considered that, if persons are nominated for that purpose but with the power to appoint new trustees by majority, it might be useful to provide for the situation where they are deadlocked and there is no majority decision. It suggested that the inclusion of such a provision would clarify this situation, by confirming when the power to appoint replacement trustees shifts from the appointors to the surviving or continuing trustees.⁸²

3.116 The Commission sought submissions on these two related issues.⁸³ In relation to the second issue, the Commission was not suggesting that the law should be changed to require appointors to act by majority, but was merely recognising that a trust instrument might provide for appointors to act on that basis.

Consultation

Where appointors to exercise power jointly

3.117 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law considered that the legislation should provide that, if persons who are nominated for the purpose of jointly 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. The Bar Association of Queensland commented that ‘this would be a helpful clarification’.

3.118 The Queensland Law Society suggested that the new provision should refer to the time within which the appointors are unable to agree.

Where appointors to exercise power by majority decision

3.119 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and the Financial Services Council considered that, if persons who are nominated for the purpose of appointing new trustees, by majority decision, are unable to form a majority view, they should be taken to be not ‘able and willing’ to

⁸¹ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 98–9. This recommendation has not been implemented.

⁸² *Trusts Discussion Paper* (2012) [5.64].

⁸³ *Ibid* 61–2.

exercise the power. The Bar Association of Queensland commented that ‘this would be a helpful clarification’.

3.120 The Queensland Law Society again suggested that the new provision should include some reference to time.

3.121 However, a legal practitioner who practises in trusts and succession law noted that he could not recall ever having seen appointors with the power to act by majority. In his view, appointors (and trustees) should act unanimously.

Other issues

3.122 Although the Financial Services Council was in favour of clarifying when appointors are ‘able and willing’ to exercise the power to appoint replacement trustees under section 12(1) of the *Trusts Act 1973* (Qld), it commented that similar provisions would ‘seem to raise potential problems’ in relation to section 12(5) and should not apply to that subsection.

The Commission’s preliminary view

3.123 Section 12(1) and (5) of the *Trusts Act 1973* (Qld) refers to the situation where the person nominated in the trust instrument for the purpose of appointing new trustees is not able and willing to act. However, the Act does not address the situation in which two or more persons are nominated for that purpose and they are not able to agree on the appointment of a replacement trustee.

3.124 In the Commission’s view, the new legislation should clarify when appointors are not able and willing to act, as this will provide greater certainty for trustees to whom the power to appoint replacement trustees then shifts. The new provisions should reflect the existing case law,⁸⁴ but should provide not only for the situation where the appointors must exercise their powers jointly, but also for the less common situation in which the trust instrument provides for them to exercise their powers by majority decision.

3.125 Accordingly, the new legislation should provide that appointors are taken to be not ‘able and willing’ to exercise the power to appoint replacement trustees in either of the following situations.

3.126 The first situation is if:

- two or more persons (the ‘appointors’) have the power under a trust instrument to appoint new trustees;
- the trust instrument requires the appointors to exercise their power jointly or is silent as to the manner in which the appointors are to exercise their power; and
- the appointors are unable to agree on the appointment of a new trustee.

3.127 The second situation is if:

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See [3.113] above.

- more than two persons (the ‘appointors’) have the power under a trust instrument to appoint new trustees;
- the trust instrument provides for the appointors to exercise their power by majority; and
- the appointors are unable to form a majority view on the appointment of a new trustee.

3.128 The Commission notes the concern expressed by the Financial Services Council about the effect of this recommendation in relation to section 12(5) of the *Trusts Act 1973* (Qld). However, given that the shift of power from appointors to trustees under section 12(5) occurs in the same circumstances as under section 12(1), the Commission considers that the provisions based on these subsections should adopt a consistent approach in relation to the clarification of this issue.

3.129 The Commission does not consider it necessary or desirable to include in these provisions any reference to the time within which the appointors are unable to agree. The time that is reasonable for a decision to be made, and the event from which time would run, will necessarily vary from case to case. In the event of a dispute, what is reasonable will be a question of fact for the court to determine in the circumstances of the particular case.

The surviving or continuing trustee or trustees

3.130 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’.⁸⁵

3.131 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.⁸⁶ 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. An advantage of this provision is that it makes it ‘possible for all existing trustees to retire, appointing new trustees at the same time’.⁸⁷ It also enables a sole trustee who wishes to be discharged to appoint a new trustee or trustees in his or her place.⁸⁸

⁸⁵ The Ontario Law Reform Commission has observed in relation to this terminology 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’: Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 99.

⁸⁶ *Travis v Illingworth* (1865) 2 Dr & Sm 344, 346–7; 62 ER 652, 653 (Kindersley V-C).

⁸⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 7 November 2012) [8180].

⁸⁸ See [3.233] ff below as to whether more than one trustee must be appointed in these circumstances.

3.132 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 6, trustees of a private trust must ordinarily exercise their powers jointly, although a trust instrument could provide for trustees to exercise their powers by majority.

3.133 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 among the trustees.

3.134 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.⁸⁹ 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.⁹⁰

The personal representative of the last surviving or continuing trustee

3.135 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.

3.136 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, was the only trustee who had not ceased, by reason of death or some other cause, to hold office as a trustee’.⁹¹

3.137 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 is acting under 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.

3.138 It has been a long-standing feature of trustee legislation to empower the personal representative of the last surviving or continuing trustee to appoint

⁸⁹ See [6.263] below in relation to trustees who are required to act jointly.

⁹⁰ 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. This power is considered in Chapter 12.

⁹¹ *Re Geelong Waterworks and Sewerage Trust* [1955] VLR 302, 308 (Smith J).

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). In the Discussion Paper, the Commission noted that it 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. It acknowledged, however, that, while the personal representative will not necessarily have a personal connection with the trust, in some circumstances there may be a legal connection. For example, if there was a cause of action subsisting against the trustee, that cause of action would survive against the deceased trustee's estate,⁹² which is represented by the deceased's personal representative.⁹³

3.139 The Commission observed that, in the absence of a provision to this effect, it would be necessary, on the death of a 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 that reason, the Commission considered that section 12(1) of the *Trusts Act 1973* (Qld) should continue to provide that the personal representative of a last surviving or continuing trustee may appoint replacement trustees.⁹⁴

3.140 The Commission remains of this view. Consequently, the new legislation should continue to make provision for the personal representative of a last surviving or continuing trustee to appoint replacement trustees.

Exercise of power if more than one personal representative

3.141 Under the general law, most powers of executors may be exercised by them severally — that is, an individual executor may act independently of his or her co-executors and bind the estate.⁹⁵ The position in relation to the exercise of powers by administrators is less clear. For a long time it was considered that administrators were required to exercise their powers jointly.⁹⁶ More recently, it has been suggested that 'there is no decisive authority which answers the question whether one administrator, acting without his co-administrator, has the same power of disposition as an executor acting without the concurrence of his co-executor'.⁹⁷

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

⁹² *Succession Act 1981* (Qld) s 66(1).

⁹³ *Trusts Discussion Paper* (2012) [5.73].

⁹⁴ *Ibid* [5.74].

⁹⁵ *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492, 499 (Griffith CJ); *Attenborough v Solomon* [1913] AC 76, 81 (Viscount Haldane LC). See also the discussion in RA Sundberg, 'Powers of One of Several Personal Representatives' (1985) 59 *Australian Law Journal* 649.

⁹⁶ *Hudson v Hudson* (1737) 1 Atk 460; 26 ER 292; *Stanley v Bernes* (1828) 1 Hagg Ecc 221; 162 ER 564.

⁹⁷ *Fountain Forestry Ltd v Edwards* [1975] 1 Ch 1, 14 (Brightman J). Sundberg has suggested that, in Australia, executors and administrators are in the same position with respect to the exercise of their powers, relying on the reference by Barton J in *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492, 508 to the decision in *Jacomb v Harwood* (1751) 2 Ves Sen 266; 28 ER 172: see RA Sundberg, 'Powers of One of Several Personal Representatives' (1985) 59 *Australian Law Journal* 649, 650–1.

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*.

...

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

... (emphasis added)

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

3.144 However, the real and personal estate of a deceased person does not include property of which the deceased was trustee.⁹⁸ Accordingly, the reference in section 49(1) to the *Trusts Act 1973* (Qld) to the powers conferred on personal representatives by the *Trusts Act 1973* (Qld) would not include the power conferred by section 12(1) of the *Trusts Act 1973* (Qld), since it is not a power that is exercisable in relation to the real and personal estate of the deceased.

3.145 As a result, there is some uncertainty as to whether the requirement in section 49(4) for personal representatives to exercise their powers jointly 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. If the requirement imposed by section 49(4) to act jointly is referable to the powers mentioned in section 49(1), then that requirement would not apply to the power conferred on personal representatives by section 12(1) of the *Trusts Act 1973* (Qld).

Discussion Paper

3.146 In the Discussion Paper, the Commission expressed the view that it would be desirable 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.⁹⁹ It therefore proposed that, 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.¹⁰⁰

⁹⁸ See *Succession Act 1981* (Qld) s 45(1).

⁹⁹ *Trusts Discussion Paper* (2012) [5.80].

¹⁰⁰ *Ibid* 65.

Consultation

3.147 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law submitted that the legislation should clarify that the power conferred on the personal representatives of a last surviving or continuing trustee, if exercised by them, must be exercised jointly.

3.148 The Bar Association of Queensland agreed with the Commission's comment in the Discussion Paper that, if the requirement imposed by section 49(4) of the *Succession Act 1981* (Qld) for personal representatives to act jointly was referable to the powers mentioned in section 49(1) of that Act, then that statutory requirement would not apply to the power conferred on personal representatives by section 12(1) of the *Trusts Act 1973* (Qld).

3.149 Professor Lee considered that the law was sufficiently clear that personal representatives would be required to act jointly, but suggested that whether the position should be made clearer was ultimately a question of drafting.

The Commission's preliminary view

3.150 Given the present uncertainty as to whether the requirement in section 49(4) of the *Succession Act 1981* (Qld) for personal representatives to exercise their powers jointly applies generally or is limited to the powers mentioned in section 49(1) of that Act,¹⁰¹ the Commission considers that it is desirable for the new legislation to clarify this issue.

3.151 Accordingly, the Commission confirms its earlier proposal for the new legislation to provide that, if there are two or more personal representatives of a last surviving or continuing trustee, the personal representatives are to exercise their power of appointment jointly.

The administrator or attorney of a last surviving or continuing trustee

3.152 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.¹⁰² However, if the last surviving or continuing trustee loses the decision-making capacity to act as a trustee 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 to replace the trustee with impaired capacity.¹⁰³

¹⁰¹ See [3.145] above.

¹⁰² See [3.135] ff above.

¹⁰³ See *Trusts Act 1973* (Qld) s 80 (Power of court to appoint new trustees).

3.153 This part of the chapter examines whether it would be desirable to provide that, if a last surviving or continuing trustee has impaired capacity, 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

Administrators and managers

3.154 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 affairs.¹⁰⁴ 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 does not contain an express power for an administrator or manager to exercise the powers vested in the represented person as a trustee.

3.155 In Tasmania,¹⁰⁵ Victoria,¹⁰⁶ and Western Australia,¹⁰⁷ however, the guardianship legislation makes provision, in certain circumstances, for the administrator of a represented person to exercise a power vested in the represented person in the character of a trustee. These provisions are framed generally and are not limited to the power to appoint new trustees to replace a trustee with impaired decision-making capacity. They would, for example, enable the administrator of a trustee with impaired capacity to invest and manage the trust property and to make distributions in accordance with the terms of the trust.

3.156 Where the trustee with impaired capacity is not a sole trustee, the provisions in these jurisdictions would enable the administrator of the incapable trustee to replace one or more of the other trustees on the grounds specified in the jurisdiction’s counterpart to section 12(1) of the *Trusts Act 1973* (Qld). Clearly, this would include replacing *another* trustee who has impaired capacity, as that is a power that the represented adult could exercise if he or she had capacity.¹⁰⁸ However, it is doubtful whether the administrator of the represented adult could,

¹⁰⁴ *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.

¹⁰⁵ *Guardianship and Administration Act 1995* (Tas) s 56(2)(t).

¹⁰⁶ *Guardianship and Administration Act 1986* (Vic) s 58C(2). 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.

¹⁰⁷ *Guardianship and Administration Act 1990* (WA) s 72(1), sch 2 pt B item (h). 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. 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. See the discussion of this issue in *Trusts Discussion Paper* (2012) [5.107]–[5.108]. See also *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.

¹⁰⁸ *Trustee Act 1898* (Tas) s 13(1); *Trustee Act 1958* (Vic) s 41(1); *Trustees Act 1962* (WA) s 7(1)(f).

under these provisions, appoint new trustees to replace the represented adult, as the trustee legislation does not confer on a trustee the power to replace himself or herself on the ground of incapacity.¹⁰⁹

3.157 Further, as explained in the Discussion Paper, it would be difficult under the guardianship legislation in Tasmania, Victoria and Western Australia to obtain the appointment of an administrator if the sole purpose of the appointment was to exercise the powers vested in the represented person as a trustee.¹¹⁰ In that situation, it is unlikely that the Board or Tribunal would be satisfied that the adult is in need of an administrator of *his or her estate*;¹¹¹ that the needs of the adult could not be met by other less restrictive means;¹¹² or that the order would be in the best interests of the adult.¹¹³

Attorneys under an enduring power of attorney

3.158 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 has impaired capacity for a financial matter.¹¹⁴ 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

3.159 In England, 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, including 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). In this situation, although the appointment is made by the trustee's attorney, the decision to replace the trustee and the choice of new trustees is that of the beneficiaries.

109 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.

110 See *Trusts Discussion Paper* (2012) [5.109].

111 See *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).

112 *Guardianship and Administration Act 1995* (Tas) s 51(2); *Guardianship and Administration Act 1986* (Vic) s 46(2)(a); *Guardianship and Administration Act 1990* (WA) s 4(4).

113 *Guardianship and Administration Act 1995* (Tas) s 51(3); *Guardianship and Administration Act 1986* (Vic) s 46(3).

114 *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.

Discussion Paper

3.160 In the Discussion Paper, the Commission observed that the conferral on an incapable trustee's administrator of the power to replace the trustee could have the effect that the power to appoint new trustees is conferred on a person who has no connection with the trust. This raised, 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.¹¹⁵

3.161 The Commission noted that, while 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 this respect, the Commission observed that, statistically, it is more likely that the person who is appointed as an adult's administrator will be the Public Trustee rather than a person with whom the adult has a relationship.¹¹⁶

The nature of the guardianship jurisdiction

3.162 In considering the threshold issue of whether the administrator, or attorney for financial matters, of a sole trustee who has impaired capacity should have the power to appoint new trustees to replace that trustee, the Commission gave detailed consideration to the nature of the guardianship jurisdiction.¹¹⁷

3.163 In particular, the Commission noted that the central concern of the guardianship legislation is to promote and safeguard the rights and interests of the adult with impaired capacity, rather than the interests of third parties. This is reflected in numerous aspects of the legislative scheme, including, for example:

- the definition of 'financial matter', for an adult, to mean 'a matter relating to the *adult's* financial or property matters';¹¹⁸
- the requirement for QCAT, in deciding whether to appoint an administrator for an adult, to be satisfied that, without an appointment, the *adult's* needs will not be adequately met or the *adult's* interests will not be adequately protected;¹¹⁹

¹¹⁵ *Trusts Discussion Paper* (2012) [5.115].

¹¹⁶ *Ibid* [5.116]. The Commission referred to the Public Trustee's most recent Annual Report, which noted 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.

¹¹⁷ See *Trusts Discussion Paper* (2012) [5.117] ff.

¹¹⁸ *Guardianship and Administration Act 2000* (Qld) sch 2 s 1; *Powers of Attorney Act 1998* (Qld) sch 2 s 1.

¹¹⁹ *Guardianship and Administration Act 2000* (Qld) s 12(1)(c).

- the requirement for administrators and attorneys to apply the General Principles when exercising power for a financial matter;¹²⁰ and
- the requirement for administrators and attorneys to exercise their power ‘honestly and with reasonable diligence to protect the *adult’s* interests’.¹²¹

3.164 In relation to the last of these requirements, the Commission noted that, if the adult trustee was also one of the beneficiaries of the trust, that could place the adult’s 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.

3.165 The Commission considered that a further issue was 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 considered that it would be incongruous within the context of the guardianship legislation for an administrator or attorney to be able to exercise a power to which the terms of his or her appointment did not extend.

3.166 The Commission suggested that 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.

3.167 In this way, an administrator or attorney, as the case may be, 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; nor would it be necessary to ensure that such a power fell within the terms of the administrator’s or attorney’s appointment. The Commission noted that a similar approach is 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.

Whether the power should be exercisable by both administrators and attorneys

3.168 In the Discussion Paper, the Commission also gave detailed consideration to the issue of whether it would be appropriate to confer the power to appoint trustees to replace a trustee with impaired capacity on both administrators and attorneys.¹²²

3.169 On the one hand, it noted that an advantage of limiting the power to administrators is that, unlike attorneys, the appointment of an administrator

¹²⁰ *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34(1); *Powers of Attorney Act 1998* (Qld) s 76.

¹²¹ *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66(1).

¹²² *Trusts Discussion Paper* (2012) [5.128] ff.

necessarily involves a determination by QCAT that the adult has impaired capacity for at least some aspects of his or her financial matters.

3.170 The Commission also noted that, 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 could pass good title.

3.171 On the other hand, the Commission suggested that the utility of any proposed amendment might be limited if the power to appoint replacement trustees was not extended to attorneys for financial matters, since an adult who has impaired capacity for financial matters will not always have an administrator.

Whether the power must be exercised jointly

3.172 In the Discussion Paper, the Commission also raised the issue of how, if the power to appoint replacement trustees was conferred on the administrator or attorney of a trustee with impaired capacity, that power should be exercised if the trustee had more than one administrator or more than one attorney for financial matters. The Commission noted that the guardianship legislation allows for the appointment of joint or several, or joint and several, administrators and attorneys.¹²³ The Commission suggested, however, that the simplest approach for the *Trusts Act 1973* (Qld) might be to require administrators and attorneys to act jointly in exercising the power, regardless of the manner in which their powers as administrators or attorneys may be exercised.¹²⁴

Questions

3.173 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should be amended to confer, on either or both of the following persons, the power to appoint a person or persons in the place of a last surviving or continuing trustee who has impaired capacity for the administration of the trust:¹²⁵

- 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;
- 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).

¹²³ *Guardianship and Administration Act 2000* (Qld) s 14(4)(f); *Powers of Attorney Act 1998* (Qld) s 43(2)(f).

¹²⁴ *Trusts Discussion Paper* (2012) [5.132].

¹²⁵ *Ibid* 79.

3.174 The Commission also sought submissions on the two subsidiary issues discussed above:¹²⁶

- whether a person who is the administrator or attorney for financial matters of a last surviving or continuing trustee who has impaired capacity should be able to exercise the power to appoint new trustees to replace the trustee only if the administrator or attorney has been appointed to exercise power for all of the trustee's financial matters or, alternatively, regardless of whether the administrator or attorney has been appointed to exercise power for all, or only some, of the trustee's financial matters; and
- whether, if the trustee has more than one administrator or more than one attorney for financial matters, the legislation should provide that, in exercising this power, the administrators or attorneys must act jointly.

Consultation

Replacement of trustee with impaired capacity by the trustee's administrator or attorney

3.175 The submissions were fairly evenly divided on the threshold issue of whether the legislation should confer the power to appoint replacement trustees on the administrator or attorney (or both) of a last surviving or continuing trustee who has impaired capacity.

3.176 The conferral of such a power on both administrators and attorneys was supported by a legal practitioner who practises in trusts and succession law, by members of QCAT who have experience in that Tribunal's guardianship jurisdiction, by the Public Trustee and by the Financial Services Council.

3.177 However, the Queensland Law Society, the Bar Association of Queensland and Professor Lee submitted that provision should not be made to confer this power on the administrator or attorney of a last surviving or continuing trustee who has impaired capacity.

3.178 The Bar Association of Queensland commented:

Some members practising in this area are firmly of the view that the addition of a power of appointment exercisable by administrators or attorneys would be a highly undesirable step that would be likely to be productive of more disputes rather than provide an efficiency in the administration of trusts.

3.179 It expressly endorsed the observation in the Discussion Paper that a person who is appointed as an adult's administrator is not necessarily someone in whom the adult has reposed his or her trust and confidence, and might have little or no connection with the trust.

3.180 The Queensland Law Society was also of the view that the power to appoint a replacement trustee should not be conferred on the administrator or attorney of a last surviving or continuing trustee who is incapable of acting. As

¹²⁶

Ibid.

mentioned later, it considered that, in this situation, it should be possible for the beneficiaries of the trust, acting unanimously, to appoint replacement trustees.¹²⁷ It considered that the power to appoint replacement trustees should not be extended beyond that proposal. However, it submitted that, if substitute decision-makers were to be given this power, the power should be limited to a trustee's administrator 'for the simple reason that the administrator is already subject to some degree of due process'.

3.181 Professor Lee, who was also opposed to the conferral of this power on a trustee's administrator or attorney, commented that the focus of the *Guardianship and Administration Act 2000* (Qld) is the property of the adult concerned, and that this should not be extended to looking after the property of beneficiaries of a trust of which the adult is a trustee. He considered that such an extension would compromise the purpose of the *Guardianship and Administration Act 2000* (Qld).

3.182 Professor Lee referred to section 98 of the *Trusts Act 1973* (Qld), which enables an application for the appointment of a new trustee to be made by any person beneficially interested in the trust property, and stated that recourse to the court 'should not be seen as to be avoided at all costs'. He also considered that the appointment of a new trustee was different in nature from the usual functions of an administrator or attorney and raised different considerations.

Mechanism and conditions for the exercise of power of appointment by a trustee's administrator or attorney

3.183 Members of QCAT who have experience in that Tribunal's guardianship jurisdiction generally considered that the *Trusts Act 1973* (Qld), rather than the guardianship legislation, should be amended to provide that the administrator or attorney for financial matters, for the time being, of a last surviving or continuing trustee who has impaired capacity may appoint new trustees to replace the incapable trustee. However, they also suggested that, where the matter arises in the guardianship jurisdiction, it would be desirable, in terms of simplicity and the saving of costs, for QCAT to have the power, when appointing an administrator, to make a discrete order conferring on the administrator or attorney the powers vested in the adult as trustee. In this respect, they favoured the approach taken in the Western Australian legislation.¹²⁸

3.184 A legal practitioner who practises in trusts and succession law considered that an administrator or attorney under an enduring power of attorney should be able to exercise the power to appoint replacement trustees only if he or she had been appointed to exercise power for all of the trustee's financial matters or if the power was specifically conferred on the administrator or attorney.

3.185 The Public Trustee expressed the view that the power should be exercisable if the appointment of the administrator or attorney, through the *Guardianship and Administration Act 2000* (Qld) or through an instrument pursuant to the *Powers of Attorney Act 1998* (Qld), provides for it, and that the definition of 'financial matter' in both Acts should be amended to include such appointments.

127 See [3.222] below.

128 See n 107 above.

3.186 The Financial Services Council also considered that an administrator or attorney should be able to exercise this power only if he or she is appointed for all financial matters or for matters that expressly include that function.

Exercise of power if more than one administrator or attorney

3.187 The Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law submitted that, if a trustee has more than one administrator or attorney for financial matters, the power to replace the trustee must be exercised by the administrators or attorneys, as the case may be, acting jointly. The Public Trustee considered that this would be consistent with the way in which attorneys and administrators are ordinarily required to exercise their powers under section 80 of the *Powers of Attorney Act 1998* (Qld) and section 39 of the *Guardianship and Administration Act 2000* (Qld). The Financial Services Council endorsed this view.

The Commission's preliminary view

3.188 In an ageing society, the situation in which a last surviving or continuing trustee loses decision-making capacity is likely to occur with increasing frequency. Currently, if the trust instrument does not nominate a person for the purpose of appointing new trustees, it will be necessary in this situation for an application to be made to the court for the appointment of new trustees to replace the trustee who has impaired capacity.

3.189 It is the Commission's view that, in this situation, the new legislation should facilitate the appointment of replacement trustees without recourse to the court. Accordingly, it should provide that, if a last surviving or continuing trustee has impaired capacity for the administration of the trust, trustees may be appointed to replace the trustee by a person who is, for the time being, either of the following:

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

3.190 In making such an appointment, the administrator or attorney would be exercising power under the trusts legislation, rather than under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld). As a result, the administrator or attorney would not be required to apply the General Principles under those Acts, which would not be an appropriate requirement in these circumstances. This approach also avoids the need to extend the definition of 'financial matter' in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) in a way that would change the focus of those Acts, or to confer jurisdiction on QCAT to appoint an administrator to exercise this power.

3.191 The Commission has considered whether the power to appoint replacement trustees should depend on the terms on which an administrator or attorney for financial matters is appointed. In the Commission's view, the power to

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

3.192 This approach also has the advantage of providing greater certainty, since it avoids the need to determine whether or not the appointment of new trustees is within the scope of the administrator's or attorney's appointment.¹²⁹ Although that would not be a difficult exercise where the administrator or attorney is appointed to exercise power for *all* of the adult's financial decisions, there would inevitably be a degree of uncertainty as to whether an administrator's appointment encompassed this power when, as is often the case, an administrator is appointed to exercise power for the adult's 'complex financial decisions'.

3.193 The Commission's preferred approach in relation to this issue is also consistent with the current approach in section 12(1) of the *Trusts Act 1973* (Qld), where the power of appointment conferred on the personal representative of a last surviving or continuing trustee could be exercised by a person with a limited grant of administration, such as a grant to collect and preserve the deceased's assets.

3.194 The new legislation should provide that, if the trustee has more than one administrator or more than one attorney, the administrators or attorneys, as the case may be, must exercise the power jointly. This is consistent with the usual position for appointors and trustees and with the Commission's earlier recommendation in relation to the appointment of trustees by the personal representatives of a last surviving or continuing trustee.

3.195 Finally, the new legislation should also provide for the appointment to be made in writing.

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

3.196 As mentioned earlier, if there is no appointor (or no appointor who is able and willing to act), 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.

3.197 It has been held in relation to a predecessor of section 12(1) 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.¹³⁰ Instead, section 12(1) provides that, if a last surviving or continuing

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However, if an attorney's appointment under an enduring power of attorney is limited to personal matters and does not authorise the attorney to exercise power for any financial matters, the attorney will not be authorised to exercise the recommended power to replace a last surviving or continuing trustee. To that extent it will be necessary to have regard to the scope of the attorney's appointment.

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

trustee has died, the appointment of replacement trustees may be made by the trustee's personal representative.¹³¹ As explained earlier, such an appointment may be made by a personal representative only if he or she is acting under a grant.¹³²

3.198 In Ontario, the trustee legislation includes a provision in similar terms to section 12(1) of the *Trusts Act 1973* (Qld).¹³³ Additionally, however, the legislation enables a sole trustee or a last surviving or continuing trustee to appoint a replacement trustee by will.¹³⁴

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.

3.199 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 not have become the personal representative of 'the sole trustee or the last surviving or continuing trustee'.

3.200 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, and recommended that the provision should be included in its proposed new *Trustee Act*.¹³⁵

3.201 The Commission is not aware of any other jurisdiction that makes provision for replacement trustees to be appointed, on the death of a last surviving or continuing trustee, by the will or other document executed by the deceased trustee.

Discussion Paper

3.202 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should 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 or whether it is sufficient that section 12(1) of the Act

131 See [3.135] ff above.

132 *Trusts Act 1973* (Qld) s 12(4). See [3.137] above.

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

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

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

3.203 enables the personal representative of a last surviving or continuing trustee who has died to appoint replacement trustees.¹³⁶

Consultation

Appointment by a last surviving or continuing trustee to take effect on his or her death

3.204 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law considered that 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 the trustee's death. The Queensland Law Society commented:

It is preferable that (when the Trustee Deed is silent on appointment) the last surviving or continuing trustee be given the power to appoint a replacement taking effect on his death, because the last surviving or continuing trustee has a better connection with the trust than the personal representative of the last surviving or continuing trustee. There is nothing extraordinary or novel about furnishing an individual with a power to appoint a replacement for himself on the happening of a future event — such drafting is finding its way into the 'principal' or 'appointor' powers in inter-vivos trusts. ... This mechanism should give way to a contrary intention.

3.205 The Queensland Law Society further suggested that, if the last surviving or continuing trustee failed to make an appointment under the provision, the power to appoint a replacement trustee 'could go by default to the personal representative, as defined in s 5, *Succession Act 1981*, of the last surviving or continuing trustee'.¹³⁷ Similarly, the legal practitioner commented that, in case the last surviving or continuing trustee did not make an appointment, the existing provision allowing the personal representative of that trustee to appoint replacement trustees would need to be retained.

3.206 The Bar Association of Queensland also expressed the view that it would be helpful to allow a last surviving or continuing trustee to make an appointment that is to take effect on his or her death. It noted:

Whilst steps can be taken during the last trustee's lifetime, such as the appointment of an additional trustee to ensure continuity, in some circumstances that may be inappropriate. For example, a trustee may have in mind a particular family member to succeed him or her as trustee, but not wish that person to take office prior to his or her death.

3.207 However, Professor Lee submitted that section 12(1), which enables the personal representative of a last surviving or continuing trustee to appoint replacement trustees, is sufficient and should be retained as it is in this respect. In

¹³⁶ *Trusts Discussion Paper* (2012) 67.

¹³⁷ *Succession Act 1981* (Qld) s 5 defines 'personal representative' to mean 'the executor, original or by representation, or administrator of a deceased person'. Accordingly, it is not necessary for the executor of a deceased person's will to obtain a grant of probate in order to fall within the definition of 'personal representative'.

particular, he was opposed to a provision that might encourage a sole trustee to delay appointing an additional trustee.

Appointment by a last surviving or continuing trustee to take effect on his or her incapacity

3.208 The Queensland Law Society submitted that, in addition to providing for a last surviving or continuing trustee to make an appointment that takes effect on his or her death, the legislation should make provision for such a trustee to make an appointment that would take effect on his or her incapacity. A legal practitioner who practises in trusts and succession law also raised this issue.

3.209 The Queensland Law Society further commented that the provision should be limited to a case of proven and permanent incapacity. In its view, it would be difficult to legislate for the situation of temporary incapacity.

The Commission's preliminary view

3.210 The Commission is generally in favour of facilitating the replacement of trustees without recourse to the court, and acknowledges that there is some merit in the provision of the Ontario *Trustee Act* that allows a sole or last surviving or continuing trustee to appoint a person to replace the trustee on his or her death. However, the nature of an appointment made under such a mechanism is that it may not take effect for some considerable period of time. Apart from the obvious considerations that, by the time the appointment takes effect, the person appointed may no longer wish to accept the appointment, or may no longer be an appropriate person to be a trustee, the Commission has a more fundamental concern about this mechanism.

3.211 In the other circumstances in which a person may appoint a replacement trustee, whether under the provision based on section 12(1) of the *Trusts Act 1973* (Qld) or under the Commission's recommendation in relation to administrators and attorneys, the appointment will take effect as soon as it is made. There is therefore no need to address the possibility that the person with the power to appoint the replacement trustee might wish to change his or her mind about the appointment between the making of the appointment and the time when it takes effect. However, if a last surviving or continuing trustee could make an appointment that may not take effect for a considerable period of time, the legislation would need to make provision for the revocation of the appointment by the trustee in the intervening period and would need to address a range of subsidiary matters, such as whether the revocation should be required to be made in the same manner as required for the original appointment and whether an appointment should be revoked by a subsequent, inconsistent appointment or even by conduct.

3.212 The new legislation will retain the power to appoint replacement trustees that is currently conferred on the personal representative of a last surviving or continuing trustee who has died, and the Commission has also recommended that the power to appoint replacement trustees should be conferred on the administrator, or attorney for financial matters, of a last surviving or continuing trustee who has impaired capacity for the administration of the trust. Given the complexities that would need to be introduced into the legislation to give a last

surviving or continuing trustee the power to appoint a replacement trustee on the happening of a future event, and the uncertainty that such a power could create, the Commission has decided against recommending any further mechanism for the replacement of a last surviving or continuing trustee who has died or who has impaired capacity.

Beneficiaries

3.213 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.¹³⁸ In *Re Brockbank*,¹³⁹ 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)).¹⁴⁰

Reforms and proposals in other jurisdictions

3.214 In England, the effect of *Re Brockbank* has, to a large extent, been changed by sections 19 and 20 of the *Trusts of Land and Appointment of Trustees Act 1996* (UK), which enable beneficiaries, in specified circumstances, to direct that new trustees be appointed.¹⁴¹

3.215 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).¹⁴²

3.216 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.¹⁴³ It also considered that permitting beneficiaries to direct trustees in relation to their resignation or the appointment of new trustees 'confuses their respective roles'.¹⁴⁴

Discussion Paper

3.217 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should make provision for beneficiaries to appoint new

138 *Saunders v Vautier* (1841) Cr & Ph 240; 41 ER 482.

139 [1948] 1 Ch 206.

140 *Ibid* 209 (Vaisey J).

141 For a discussion of these provisions, see *Trusts Discussion Paper* (2012) [5.92] ff.

142 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).

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

144 *Ibid* [4.51].

trustees or direct that new trustees be appointed and, if so, in what circumstances. It asked, for example, whether beneficiaries should have the power to appoint, or direct the appointment of, new trustees if:¹⁴⁵

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

Consultation

3.218 The Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law were all of the view that the *Trusts Act 1973* (Qld) should not make provision for beneficiaries to appoint new trustees or direct that new trustees be appointed, in the circumstances mentioned in the Discussion Paper. The Bar Association of Queensland, the Public Trustee and Professor Lee expressly endorsed the statement of the Scottish Law Commission that such a provision confuses the roles of trustees and beneficiaries, and could inhibit the impartial administration of the trust and affect the balance of rights and interests in the existing trust structure. The Public Trustee further commented that, 'where absolutely entitled, a power on the part of beneficiaries to direct the identity of the trustee enables beneficiaries to effectively outvote the existing trustees (that is, during the course of the administration of the trust)'.

3.219 The Financial Services Council considered that the Act should not make provision for beneficiaries to appoint new trustees, or to direct that new trustees be appointed, in situations where there is at least one continuing trustee who has capacity. It further submitted that, if the Commission takes a different view, beneficiaries should not have the power to direct that new trustees be appointed unless all of the beneficiaries have full legal capacity.

3.220 The Bar Association of Queensland commented that, in the circumstances mentioned, it is more appropriate for the court to make the appointment under section 80 of the Act 'so that due consideration is given to the suitability of the proposed new trustee'.

3.221 Similarly, a legal practitioner who practises in trusts and succession law observed that it is always open to the beneficiaries to apply to the court for the removal of trustees if they consider that they are in breach of trust. Generally, he considered that it can be assumed that the settlor 'would have good reason to appoint certain persons to be trustees instead of the ultimate beneficiaries'.

3.222 However, the Queensland Law Society considered that beneficiaries should, in certain situations, have the power to direct the appointment of replacement trustees. Generally, it was of the view that beneficiaries should have the power to replace an original trustee only in the case of proven impaired capacity, although it was not opposed to beneficiaries having a wider power to replace a subsequent trustee whose appointment was not the product 'of a

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Trusts Discussion Paper (2012) 71.

conscious act on the part of the active mind of the trust'. In relation to the replacement of a trustee who has impaired capacity, it commented:

Beneficiaries should only have power to direct a replacement of trustee where the sole or last surviving or continuing trustee has proven impaired capacity, and all such beneficiaries who themselves have capacity or (for those who do not) their respective enduring attorneys under valid enduring attorney for financial power, act unanimously.

3.223 The Queensland Law Society further suggested that it would be necessary to include the persons who are 'beneficiaries' for this (and other provisions), noting that the challenge would be how to deal with discretionary trusts:

The testing proposition will be discretionary trust structures. Those who are specifically named, or identified by specific description, should in our view be classed as 'beneficiaries'.

The Commission's preliminary view

3.224 The new legislation should not make provision for beneficiaries to appoint new trustees or to direct that new trustees be appointed. In the Commission's view, the conferral of such a power would be inconsistent with the nature of the trust relationship and could, as suggested by the Scottish Law Commission, inhibit the impartial administration of trusts.

3.225 The Commission considers that the interests of beneficiaries are better served by other provisions of the legislation that allow them to apply to the court for the review of a trustee's act, omission or decision by which they are aggrieved, or for the appointment of new trustees.¹⁴⁶

THE REMOVAL OF A TRUSTEE (WITHOUT REPLACEMENT) WITHOUT RECOURSE TO THE COURT

3.226 The replacement of a trustee under section 12(1) of the *Trusts Act 1973* (Qld) does not authorise the removal of a trustee without the concurrent appointment of a new trustee to replace the outgoing trustee. Obviously, the replacement, rather than the mere removal, of a trustee has the advantage that it maintains (or, where a trustee is replaced by more than one trustee, increases) the existing number of trustees.

Consultation

3.227 The Financial Services Council suggested, in relation to section 12(1) of the Act, that it would be useful to provide that, in the relevant circumstances, the persons who have the power to replace trustees may also simply remove a trustee.

¹⁴⁶

See *Trusts Act 1973* (Qld) ss 8, 80, 98, which are discussed in Chapter 12.

The Commission's preliminary view

3.228 The Commission recognises that it may sometimes be difficult to find a person who is willing to be appointed in the place of a trustee whose replacement would otherwise be authorised by section 12(1). For that reason, the Commission agrees with the suggestion made by the Financial Services Council that the legislation should additionally provide for the removal of a trustee without the concurrent appointment of a replacement trustee. The Commission considers that such a change would provide additional flexibility, especially where it may be difficult to replace the trustee.

3.229 It should not, however, be possible for a trustee to be removed by this non-judicial mechanism if that would leave the trust without the required number and type of trustees that has been recommended by the Commission later in this chapter.¹⁴⁷ In that situation, only the replacement of the trustee should be permitted. For example, if there were two trustees who were both individuals and one became incapable, the incapable trustee could not simply be removed, but would have to be replaced, since the removal of the trustee would leave the trust with a sole trustee who was an individual.

3.230 Although the power to remove a trustee under this recommendation should be expressed in similar terms to the recommended power to replace a trustee, it will be necessary to make some modifications to accommodate the different circumstances in which the power to remove a trustee will be exercised.

3.231 First, the power to remove a trustee should be able to be exercised by 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 who is able and willing to act, by the surviving or continuing trustee or trustees for the time being. However, unlike the provision based on section 12(1), the new provision in relation to removal should not also make provision for a trustee to be removed by the personal representative of a last surviving or continuing trustee or by the administrator or attorney of a last surviving or continuing trustee who has impaired capacity. In both of those situations, replacement should be the only option and those persons will have that power under the Commission's recommendations in relation to section 12(1).

3.232 Secondly, although the circumstances in which a trustee should be able to be removed should generally be the same as those in which a trustee may be replaced, it is not necessary to provide for the situation where the trustee seeks to be discharged, as that will be provided for separately in the provision that is to be based on section 14 of the *Trusts Act 1973* (Qld).

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See [3.273] ff and Recommendation 3-10 below.

THE MINIMUM NUMBER AND TYPE OF TRUSTEES WHO MUST REMAIN IN ORDER FOR A TRUSTEE TO BE DISCHARGED

3.233 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.¹⁴⁸ 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'.¹⁴⁹ If 'retiring' trustees are not effectively discharged:¹⁵⁰

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.

3.234 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, and it is possible for a trust to be created with a sole trustee.

3.235 However, the two provisions of the Act that deal with the discharge of a trustee without recourse to the court — sections 12(2)(c) and 14 — both stipulate a minimum number and type of trustees who must remain to administer the trust in order for the discharge of the outgoing or retiring trustee to be effective, although the requirements of the two provisions are not consistent.

Discharge of a trustee who is replaced under section 12(1)

3.236 Section 12(2)(c) of the *Trusts Act 1973* (Qld) deals with the discharge of a trustee who is replaced by a new trustee, without recourse to the court, on one of the various grounds mentioned in section 12(1). It provides:

12 Power of appointing new trustees

...

(2) On the appointment of a trustee or trustees for the whole or any part of the trust property—

...

(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—

¹⁴⁸ 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.

¹⁴⁹ LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 440, citing *Webster v Le Hunt* (1861) 9 WR 918.

¹⁵⁰ M Jacobs, 'Trustees — Obtaining an Effective Discharge on Retirement' (1986) *Trust Law & Practice* 16, 17.

- (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; ... (emphasis added)

3.237 The effect of this provision is that a trustee is not generally discharged under the section unless:

- in the case of any trust (including a trust for a charitable or public purpose or for any purpose of recreation or other leisuretime use or occupation) — there will remain to act as trustees of the trust:
 - the Public Trustee or a person discharging similar functions in another Australian jurisdiction;¹⁵¹
 - a trustee company under the *Trustee Companies Act 1968* (Qld) or under the laws of another Australian jurisdiction;¹⁵² 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.

3.238 As explained in Chapter 13, section 103 of the Act extends the recognition of what is a charitable purpose to the provision, ‘in the interests of social welfare’, of ‘facilities for recreation or other leisuretime occupation’. In relation to local governments, the Commission notes that, under the *Land Act 1994* (Qld), the Minister may dedicate ‘unallocated State land’ as a reserve for ‘community purposes’,¹⁵³ which include gardens, open space, parks, public halls, recreation, showgrounds and sport.¹⁵⁴ The Act further provides that the Minister may appoint a local government (among others) as a trustee of land comprising a reserve.¹⁵⁵

3.239 Section 12(2)(c) provides for two exceptions to the ordinary requirements for discharge: 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

¹⁵¹ *Trusts Act 1973* (Qld) ss 5(1) (definition of ‘trustee corporation’), 12(10)(a); *Acts Interpretation Act 1954* (Qld) s 33A.

¹⁵² *Trusts Act 1973* (Qld) ss 5(1) (definition of ‘trustee corporation’), 12(10)(b); *Acts Interpretation Act 1954* (Qld) s 33A.

¹⁵³ *Land Act 1994* (Qld) s 31(1).

¹⁵⁴ *Land Act 1994* (Qld) s 4, sch 1.

¹⁵⁵ *Land Act 1994* (Qld) s 44(1), sch 6 (definitions of ‘statutory body’, ‘trust land’). The *Land Act 1994* (Qld) s 82 also provides that the trustees of a cemetery may transfer their trusteeship to a local government, provided that the Minister, the trustee and the local government agree.

section 12 if that will leave a single 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 a combination of such trustees.

3.240 The Queensland provision is consistent with the trustee legislation in Victoria, Western Australia and New Zealand.¹⁵⁶

3.241 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.¹⁵⁷ Those provisions were based on an older version of the English provision dealing with the replacement of trustees, although they now reflect the terms of the current English provision in this respect.

3.242 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.¹⁵⁸ 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*'¹⁵⁹ — a formulation that was subsequently included in 37(1)(c) of the English *Trustee Act 1925*. In 1996, however, section 37 of that Act 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. As a result, it is no longer necessary for the two trustees to be individuals. The requirements for the discharge of a trustee will also be satisfied if there will remain two corporate trustees or an individual and a corporate trustee to administer the trust.

3.243 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 were to be conferred by the new Act.¹⁶⁰

Discharge of a trustee who is replaced under section 14

3.244 A trustee may 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.¹⁶¹ 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:

¹⁵⁶ *Trustee Act 1958* (Vic) s 42(1)(c); *Trustees Act 1962* (WA) s 7(2)(c); *Trustee Act 1956* (NZ) s 43(2)(c).

¹⁵⁷ *Trustee Act 1925* (ACT) s 6(7); *Trustee Act 1925* (NSW) s 6(6); *Trustee Act* (NT) s 11(2)(c); *Trustee Act 1936* (SA) s 14(2)(c); *Trustee Act 1898* (Tas) s 13(2)(c).

¹⁵⁸ *Trustee Act 1893*, 56 & 57 Vict, c 53, s 10(2)(c).

¹⁵⁹ *Law of Property Act 1922*, 12 & 13 Geo 5, c 16, s 110(9).

¹⁶⁰ *Trusts and Settled Land Report* (1971) 14.

¹⁶¹ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1576].

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. (emphasis added)

3.245 A trustee may retire under section 14 only if, after the trustee's discharge, there will be, to perform the trust:

- the Public Trustee;¹⁶²
- a trustee company under the *Trustee Companies Act 1968* (Qld);¹⁶³ or
- at least two individuals.

3.246 This requirement reflects a similar policy to that which underpins section 12(2)(c), 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.¹⁶⁴
- Unlike section 12(2)(c)(ii), section 14 does not make provision, in the case of a trust for a charitable or public purpose or for any purpose of recreation or other leisuretime 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

¹⁶² *Trusts Act 1973* (Qld) s 5(1) (definition of 'trustee corporation').

¹⁶³ *Trusts Act 1973* (Qld) s 5(1) (definition of 'trustee corporation').

¹⁶⁴ Note, however, that trustee companies are now licensed under the *Corporations Act 2001* (Cth), rather than under State legislation: see *Trusts Discussion Paper* (2012) ch 7, n 165.

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.

3.247 Similar to the position in Queensland, the legislation in Victoria and Western Australia allows a trustee to retire (without being replaced) if there will remain *two individuals*, the Public Trustee (in Victoria, State Trustees) or a trustee corporation to administer the trust.¹⁶⁵

3.248 In the ACT and New South Wales, a trustee may retire 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.¹⁶⁶ There is no requirement for the two trustees to be individuals. In the Northern Territory, South Australia and Tasmania, the equivalent provision applies where there are more than two trustees,¹⁶⁷ which means that the retirement of a trustee under the provision will still leave at least two trustees, although it is not necessary that those trustees are individuals.

Discussion Paper

3.249 In the Discussion Paper, the Commission considered that the argument for allowing a trustee to be discharged even though there would be only a sole continuing trustee is essentially one of convenience — namely, that it is sometimes difficult to find an individual who is willing to be appointed as a trustee.¹⁶⁸

3.250 The Commission also considered whether, if the Act were amended to allow a trustee to be discharged even if there would remain only one trustee, the Act should require that trustee to be of a particular type. It noted that the appointment of a corporate trustee would avoid the problem of further appointments that arises on the death of a trustee who is an individual, although it acknowledged that there is nevertheless a risk that a corporate trustee may go into liquidation. On the other hand, it observed that 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, the Commission considered it likely that the number of trusts with a corporate trustee would substantially outweigh those with an individual as trustee.¹⁶⁹

3.251 The Commission also referred to the exception in section 12(2)(c) that applies if only one trustee was originally appointed. It considered that this exception

¹⁶⁵ *Trustee Act 1958* (Vic) s 44(1); *Trustees Act 1962* (WA) ss 6(1) (definition of 'trustee corporation'), 9(1). The reference in the Victorian provision 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).

¹⁶⁶ *Trustee Act 1925* (ACT) s 8(2); *Trustee Act 1925* (NSW) s 8(2).

¹⁶⁷ *Trustee Act* (NT) s 12(1); *Trustee Act 1936* (SA) s 15(1); *Trustee Act 1898* (Tas) s 14(1).

¹⁶⁸ *Trusts Discussion Paper* (2012) [5.143].

¹⁶⁹ *Ibid* [5.145].

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. The Commission noted, however, that 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.¹⁷⁰

3.252 The Commission sought submissions on the minimum number and type of trustees who should remain to administer the trust in order for a trustee to be discharged under sections 12(2)(c) and 14, and what, if any, exceptions should apply in relation to those requirements.¹⁷¹

Consultation

Ordinary requirements for discharge when a trustee is replaced

3.253 The submissions expressed a range of views on the question of what the ordinary requirements should be for a trustee to be discharged when replaced under section 12(1) of the Act.

3.254 The Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law considered that the current requirements of section 12(2)(c)(i) should be retained. The Financial Services Council commented that 'the reason for requiring two trustees appears to be to provide checks and balances'. It noted that:

The justification for requiring individuals to be appointed, as opposed to persons, appears to be firstly that, as noted, corporations might be more likely to have no assets of their own and secondly that one individual might control the trust by being the sole shareholder and director of two corporate trustees.

3.255 The legal practitioner also considered that the current requirement for two individual trustees 'provides a balancing factor'.

3.256 The Bar Association of Queensland submitted that a trustee who is replaced under section 12(1) should be discharged if there will remain either a trust corporation or at least two trustees (who need not be individuals) to administer the trust. In its view:

The current requirement that, if there is not a trust corporation remaining in office, there must be two individuals in order for the outgoing trustee to receive a discharge is unnecessarily technical. Option (ii) is undesirable because the settlor, upon establishing the trust, may specifically wish to avoid a situation arising in which there is only one trustee, not being a trust corporation. The restriction on discharge provides a powerful control against such a situation arising.

¹⁷⁰ Ibid [5.146].

¹⁷¹ Ibid 83, 88.

3.257 Professor Lee, on the other hand, suggested that the requirement for discharge should be that there will remain either a corporation (which he did not restrict to the Public Trustee or a trustee company) or at least two individuals. He did not consider it desirable to frame the requirement in terms of two trustees who need not be individuals.

3.258 However, the Queensland Law Society submitted that the legislation should enable a trustee to be discharged, even if there would remain a sole trustee who is not a trustee corporation. In its view:

This overcomes the problems being encountered at present where mother and father as the head of a family establish a family discretionary trust, appointing themselves as trustees. Later (particularly if the investment mix involves real property where the trustee has greater exposure to liability) they decide to appoint a \$2.00 corporate trustee to replace them.

Exceptions to the ordinary requirements for discharge when a trustee is replaced

3.259 The Bar Association of Queensland submitted that the exceptions currently contained in section 12(2)(c), namely, 'where only 1 trustee was originally appointed or where the trust instrument otherwise provides', are sufficient and that no additional exceptions are needed.

3.260 A legal practitioner who practises in trusts and succession law suggested there should be an exception if a contrary intention appears in the trust instrument. Similarly, the Queensland Law Society did not favour any exceptions other than those expressed in a sufficient contrary intention in the trust instrument.

3.261 Professor Lee was also in favour of retaining the current exception where the trust instrument otherwise provides that one trustee is sufficient. However, he was concerned that such a provision might be routinely included in trust precedents and suggested that there should also be a requirement that the settlor specifically authorises a provision in a trust instrument that creates such an exception to the usual requirement.

Ordinary requirements for discharge when a trustee retires without being replaced

3.262 Respondents generally took the same approach to the discharge of a retiring trustee under section 14 as they took to the discharge of a trustee under section 12(2)(c).

3.263 A legal practitioner who practises in trusts and succession law expressed the view that, for a trustee to be discharged from future obligations, there should remain the Public Trustee, a trustee company, or at least two individuals.

3.264 The Bar Association of Queensland submitted that the requirements in section 14 should correspond with its favoured option for section 12(2)(c)(i), that there remain either a trustee corporation or at least two trustees (who need not be individuals).

3.265 Similarly, Professor Lee submitted, consistent with his view in relation to section 12, that at least two individuals or a corporation should remain.

3.266 The Queensland Law Society was of the view that it is sufficient that there will remain at least one trustee (whether an individual or a corporate trustee).

3.267 The Public Trustee and the Financial Services Council submitted that section 14 should also have an equivalent to section 12(2)(c)(ii).

Exceptions to the ordinary requirements for discharge when a trustee retires without being replaced

3.268 The Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law submitted that section 14 should include, as an exception to the ordinary requirements for discharge, that a sole individual trustee was originally appointed by the trust instrument, or that the trust instrument allows a trustee to be properly discharged even though there will remain only one trustee. The Registrar of Titles was also of the view that the exceptions in section 12(2)(c) should be replicated in section 14.

3.269 Professor Lee also considered that the section should 'allow the settlor to permit the retirement of a trustee even if only one individual trustee remains'.

3.270 The Queensland Law Society considered that the section should be subject to a contrary intention in the trust instrument.

Other issues

3.271 The Bar Association of Queensland, the Public Trustee and the Financial Services Council each considered that section 14 should employ the wider definition of 'trustee corporation' used in section 12(10).

The Commission's preliminary view

3.272 The new legislation should include provisions to the general effect of sections 12(2)(c) and 14 of the *Trusts Act 1973* (Qld). However, the Commission recommends some changes in terms of the minimum number and type of trustees that must remain in order for a trustee to be discharged from the trust under either provision. Although the two provisions apply in different situations, the requirements for discharge in terms of the remaining trustees should be the same, as should the exceptions to those requirements.

Ordinary requirements for discharge of a trustee

3.273 There is an obvious risk in allowing a trustee to be discharged when that would leave a single individual trustee remaining — namely, the possibility that the remaining trustee may then die or lose the decision-making capacity to administer the trust, which would leave the trust without a trustee or an effective trustee. Although the Commission has earlier recommended an additional mechanism by which trustees may be appointed without recourse to the court to replace a trustee

who has impaired capacity, that mechanism may not always be available,¹⁷² in which case it would still be necessary to apply to the court for the appointment of new trustees.

3.274 To avoid this situation, the Commission considers that the new legislation should continue to require, for the discharge of a trustee, that there will remain at least two individuals to act as trustees.

3.275 However, the Commission considers that the alternative requirement for the discharge of a trustee should be that there will remain a corporation to act as trustee, rather than the current alternative requirement of the Public Trustee or a trustee company. This new requirement would obviously be satisfied if there would remain as trustee either the Public Trustee, who is a corporation sole,¹⁷³ or a licensed trustee company within the meaning of the *Corporations Act 2001* (Cth).¹⁷⁴ However, it would not be limited to those corporations, and would also be satisfied if there would remain as trustee a company that is not a licensed trustee company.

3.276 By referring to a 'corporation', a trustee would also be discharged if there would remain as trustee an interstate Public Trustee or equivalent entity.¹⁷⁵ Accordingly, it is not necessary for the new legislation to employ the wider definition of 'trustee corporation' that currently appears in section 12(10) of the *Trusts Act 1973* (Qld).

3.277 In light of the role that local governments perform as trustees of certain community reserves,¹⁷⁶ the provisions based on sections 12(2)(c) and 14 should additionally provide that, in the case of any trust for a charitable or public purpose, or for any purpose of recreation or other leisuretime use or occupation, a trustee may also be discharged if there will remain a local government to act as trustee of the trust.

Exceptions

3.278 The provisions based on sections 12(2)(c) and 14 of the *Trusts Act 1973* (Qld) should incorporate the two exceptions that currently appear in section 12(2)(c) of the Act, namely:

- where only one trustee was originally appointed; and
- where the trust instrument provides otherwise.

¹⁷² The mechanism recommended at [3.188] ff above will be available only if an administrator has been appointed for the trustee or the trustee has appointed an attorney for financial matters under an enduring power of attorney.

¹⁷³ *Public Trustee Act 1978* (Qld) s 8(1).

¹⁷⁴ See *Corporations Act 2001* (Cth) s 601RAA (definition of 'licensed trustee company').

¹⁷⁵ See *Public Trustee Act 1985* (ACT) s 8(1)(a); *NSW Trustee and Guardian Act 2009* (NSW) s 5; *Public Trustee Act* (NT) s 9(1); *Public Trustee Act 1995* (SA) s 4(4)(a); *Public Trustee Act 1930* (Tas) s 4; *State Trustees (State Owned Company) Act 1994* (Vic); *Public Trustee Act 1941* (WA) s 4(2).

¹⁷⁶ See [3.238] above.

3.279 Both exceptions recognise a settlor's role in choosing the most appropriate structure for a trust.

3.280 The *Trusts Act 1973* (Qld) does not impose a minimum number of trustees for the creation of a trust, and the Commission does not propose any change to that position in the new legislation. Many trusts are presently created with a single trustee, and the Commission considers that such a trustee should continue to be able to be replaced by a single trustee. Similarly, if a trust is created with a single trustee and an additional trustee is appointed, one of the two trustees should be able to retire even though there will be only one trustee remaining. As explained earlier, that is not currently possible under section 14 of the Act.

DISCHARGE DEPENDENT ON RETIRING TRUSTEE TRANSFERRING TRUST PROPERTY

3.281 In the ACT and New South Wales, the counterpart to section 14 of the *Trusts Act 1973* (Qld) 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.

Discussion Paper

3.282 In the Discussion Paper, the Commission sought submissions on whether section 14 of the *Trusts Act 1973* (Qld) should include a provision to the effect of section 8(4) of the *Trustee Act 1925* (ACT) and of the *Trustee Act 1925* (NSW).¹⁷⁷

Consultation

3.283 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law were all of the view that section 14 of the *Trusts Act 1973* (Qld) should include a provision to the effect of section 8(4) of the *Trustee Act 1925* (NSW). The Bar Association of Queensland expressed the view that:

This would be helpful given that practical difficulties can sometimes arise in connection with ensuring that the necessary steps are taken to transfer the trust property. An outgoing trustee may be less inclined to delay taking those steps if the Act expressly provides that they must be taken in order to ensure his or her discharge.

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Trusts Discussion Paper (2012) 88.

3.284 The Queensland Law Society supported the inclusion of such a provision. However, it suggested that the legislation should go further and list all of the circumstances in which a trustee can change, which should be categorised into whether the circumstances are voluntary or involuntary. The scheme could then make provision, depending on the circumstances, for the 'discharge', 'complete discharge' or 'ultimate discharge' of the trustee.

The Commission's preliminary view

3.285 The Commission is of the view that the provision based on section 14 of the *Trusts Act 1973* (Qld) should include a provision to the general effect of section 8(4) of the *Trustee Act 1925* (ACT) and of the *Trustee Act 1925* (NSW) and provide that, if in order to vest any part of the trust property in the continuing trustees alone, it is necessary that the property should be transferred, the retiring trustee is not discharged in respect of that part of the property until it is duly transferred.

3.286 The Commission considers that a provision in these terms provides an incentive for a trustee who wishes to retire to take all necessary steps to facilitate the transfer of the trust property.

3.287 However, the Commission does not agree with the further suggestion made by the Queensland Law Society, which would effectively codify the circumstances in which a trustee would be relieved from the obligation to account and from potential liability for breaches that occurred before the trustee was discharged.

POSITIVE STATEMENT OF DISCHARGE WHEN A TRUSTEE IS REPLACED

3.288 Section 12(2)(c) of the *Trusts Act 1973* (Qld) provides that 'a trustee is *not discharged* under this section unless ...', and then proceeds to state the number and type of remaining trustees that will satisfy the requirements of that provision. It is implicit under section 12(2) that, if the requisite number and 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.

3.289 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)

Discussion Paper

3.290 In the Discussion Paper, the Commission sought submissions on whether section 12 of the *Trusts Act 1973* (Qld) should 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.¹⁷⁸

Consultation

3.291 The Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law submitted that section 12 of the *Trusts Act 1973* (Qld) should 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. The legal practitioner suggested that the trustee should be discharged from the date when the trustee receives notice that he or she has been replaced.

3.292 The Queensland Law Society supported such a change if the legislation also made express provision for the 'discharge', 'complete discharge' and 'ultimate discharge' of trustees and included its suggested definitions of those terms.

3.293 However, the Bar Association of Queensland considered that a positive statement of discharge is not needed.

3.294 Professor Lee was also opposed to the inclusion of a positive statement about the discharge of the trustee based on the provisions in the ACT and New South Wales legislation. In his view, there might be a misconception that the trustee is being discharged from liability for breach of trust, which a newly appointed trustee cannot give to a retiring trustee.

The Commission's preliminary view

3.295 As explained above, it is implicit in section 12(2)(c) of the *Trusts Act 1973* (Qld) that a trustee is discharged from the trust if he or she is replaced under that section and there will remain the required number and type of trustees, but there is no express statement to that effect. In contrast, section 14 of the Act includes an express statement that the written consent of the other trustees to the retirement of a trustee discharges that trustee from the trusts.

3.296 In the Commission's view, the provision based on section 12 of the *Trusts Act 1973* (Qld) should include a positive statement of when a trustee is discharged, similar to that contained in section 6(6) of the *Trustee Act 1925* (NSW).

3.297 Because of the need for certainty, the outgoing trustee should be discharged from the date when new trustees are appointed in his or her place, and not from the date when the outgoing trustee receives notice that he or she has been replaced.

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Ibid 83.

EVIDENCE AS TO A VACANCY IN A TRUST

3.298 Where a replacement trustee has dealings with a third party, the issue may arise as to whether the trustee has been properly appointed:¹⁷⁹

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.

3.299 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:

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.

3.300 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.¹⁸⁰ Provisions having a similar purpose are also included in the trustee legislation in the ACT, New South Wales, Victoria, Western Australia and New Zealand.¹⁸¹

3.301 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.

¹⁷⁹ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 127.

¹⁸⁰ For a discussion of the differences between the Queensland and English provisions, see *Trusts Discussion Paper* (2012) ch 5, n 171.

¹⁸¹ *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.

Discussion Paper

3.302 In the Discussion Paper, the Commission sought submissions on whether section 13 of the *Trusts Act 1973* (Qld) should also provide protection to persons other than purchasers in good faith of trust property, for example, whether it should extend protection to a debtor making a payment to trustees.¹⁸²

Consultation

3.303 The Bar Association of Queensland, the Public Trustee and the Financial Services Council were in favour of extending the protection afforded by section 13 of the *Trusts Act 1973* (Qld) so that it also applies to debtors.

3.304 A legal practitioner who practises in trusts and succession law suggested that the protection in section 13 should be extended to debtors, creditors, and beneficiaries, while the Queensland Law Society favoured an extension to all third parties.

3.305 However, Professor Lee expressed the view that it is unnecessary to extend the protection afforded by section 13 to debtors.

The Commission's preliminary view

3.306 The new legislation should include a provision to the general effect of section 13 of the *Trusts Act 1973* (Qld). However, the protection afforded by the provision should be extended so that it also applies to a debtor who makes a payment in good faith. In the absence of such a provision, a debtor who made a payment to a person who was not, in fact, properly appointed as a trustee might not receive a good discharge in respect of the payment. The Commission does not consider it necessary or desirable to widen the provision further to apply to all third parties.

3.307 In the Commission's view, the drafting of the new provision should also clarify certain ambiguities in the current provision, especially as to whether the purchaser or debtor has relied on the statement and, in relation to the matters addressed in section 13(2), whether the vesting should only be as valid as it would be if the statement were, in fact, true.

VESTING OF TRUST PROPERTY IN NEW AND CONTINUING TRUSTEES

3.308 Section 15 of the *Trusts Act 1973* (Qld) deals with the vesting of trust property in new trustees who are appointed under section 12 and with the divesting of trust property from trustees who are discharged under section 14 of the Act. It provides:

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Trusts Discussion Paper (2012) 85–6.

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.¹⁸³ (note added)

3.309 The effect of section 15(1) is that, subject to the provisions of any other Act, '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'.¹⁸⁴ Similarly, the effect of section 15(2) is that, subject to the

¹⁸³ See *ibid* [5.174]–[5.176] for a discussion of the background to s 15(5)–(6) of the *Trusts Act 1973* (Qld).

¹⁸⁴ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 7 November 2012) [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.

3.310 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).

Vesting of property with specific transfer requirements

3.311 As mentioned above, 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.¹⁸⁵ It is arguable whether those requirements, although permitted by the *Corporations Act 2001* (Cth), would fall within the expression 'subject to the provisions of any other Act'.

3.312 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.¹⁸⁶ 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).

3.313 In the ACT and New South Wales, the trustee legislation takes a detailed approach stating when particular kinds of property vest.¹⁸⁷

3.314 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

¹⁸⁵ 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.

¹⁸⁶ *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.

¹⁸⁷ See *Trustee Act 1925* (ACT) s 9(3)–(6); *Trustee Act 1925* (NSW) s 9(3)–(5). See *Trusts Discussion Paper* (2012) [5.179].

other body, or in the manner directed by or under an Act of Parliament.¹⁸⁸ The Tasmanian trustee legislation includes a similar provision, except that it does not refer to registered land.¹⁸⁹

3.315 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.¹⁹⁰ 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.

3.316 It has been said that the provision places a trustee's power to call for a transfer of the trust property 'on a clear statutory footing'.¹⁹¹

Discussion Paper

3.317 In the Discussion Paper, the Commission sought submissions on whether:¹⁹²

- the expression 'subject to the provisions of any other Act' in section 15(1) and (2) of the *Trusts Act 1973* (Qld) creates an adequate exception for property that is the subject of specific legislative or other transfer requirements;
- section 15 of the *Trusts Act 1973* (Qld) should 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; and
- instead of section 12(2)(d) and 15(3), section 15 of the *Trusts Act 1973* (Qld) should include a provision imposing a more explicit duty on any trustee who wishes to be discharged, on any continuing and new or additional trustees, and on 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.

¹⁸⁸ *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).

¹⁸⁹ *Trustee Act 1898* (Tas) s 15(3).

¹⁹⁰ *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).

¹⁹¹ *Synergy Concepts Pty Ltd v Rylegrove Pty Ltd (In liq)* (Unreported, Supreme Court of New South Wales, Santow J, 16 July 1997). See also *BL and M Grollo Homes Pty Ltd v Comptroller of Stamps* [1983] 1 VR 445, 447 (Tadgell J; Starke J agreeing); *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550, 562 (Brereton J).

¹⁹² *Trusts Discussion Paper* (2012) 94–5.

Consultation

'Subject to the provisions of any other Act'

3.318 Professor Lee and a legal practitioner who practises in trusts and succession law submitted that the expression 'subject to the provisions of any other Act' in section 15(1) and (2) of the *Trusts Act 1973* (Qld) creates an adequate exception for property that is the subject of specific legislative or other transfer requirements. Professor Lee commented:

The phrase makes it clear that vesting is subject to the provisions of any other Act, so that vesting cannot occur in disregard of those provisions and the lengthy provisions in other jurisdictions ... seem to me to be long-winded and to state the obvious.

3.319 Similarly, the Registrar of Titles considered that section 15(1)–(2), in conjunction with section 15(3), creates an adequate exception where there are specific legislative or other requirements for the transfer of trust property.

3.320 The Public Trustee considered that, if there is any doubt about the words 'subject to the provisions of any other Act', the legislation could instead provide expressly that 'any vesting of property consequent upon a change of trusteeship is subject to the provisions of any other Act'. The Financial Services Council endorsed this view.

3.321 The Bar Association of Queensland, on the other hand, considered that the expression 'subject to the provisions of any other Act' was unsatisfactory, for the reason mentioned at [3.311] above. However, it submitted that the expression need not be amended if the legislation includes a provision to the effect that, if property does not vest until transfer or registration, the appointment of new trustees gives the new and continuing trustees the right to call for a transfer of the property and to sue for the recovery of the property.

Right to call for a transfer of, and to sue for or recover, the property

3.322 The Queensland Law Society, the Bar Association of Queensland, Professor Lee and a legal practitioner who practises in trusts and succession law were all of the view that section 15 of the *Trusts Act 1973* (Qld) should include a provision to the effect of section 9(7) of the *Trustee Act 1925* (NSW). Professor Lee considered that trustees already have these powers, but commented that it is desirable to state them in the legislation.

3.323 The Public Trustee also agreed with this approach, although he considered that there was no particular need to provide expressly that the trustees may 'sue for or recover the property'. The Financial Services Council endorsed this view.

Clarifying the duty to do all acts to vest the trust property in the names of the new trustees

3.324 The Queensland Law Society, the Public Trustee and a legal practitioner who practises in trusts and succession law considered that, instead of section

12(2)(d) and 15(3) of the *Trusts Act 1973* (Qld), section 15 should include a provision imposing a more explicit duty on any trustee who wishes to be discharged, on any continuing and new or additional trustees, and on 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.

3.325 As mentioned earlier, the Queensland Law Society favoured the introduction of a legislative scheme to clarify the relevant law relating to the discharge of trustees, which would use the defined terms 'discharge', 'complete discharge' and 'ultimate discharge'. It considered that, if these suggested definitions were adopted, section 15(3) could be preserved and employ its suggested requirements for 'complete discharge' (ie, that the trustee would be required to co-operate in signing all necessary papers to transfer trust property and in providing all necessary records and information).

3.326 The Public Trustee also considered that it would be appropriate to impose a duty on retiring trustees to secure the transfer of all trust property. This respondent also commented that section 15(5) should be retained, so that the vesting provision remains subject to obtaining the consent of any person whose consent is required for the transfer to be effected.

3.327 Professor Lee commented that section 15(3) currently places an explicit duty on trustees, but considered that it would be desirable to include a provision that refers to the other persons who may be involved in the transfer of the property.

3.328 However, the Bar Association of Queensland was opposed to replacing sections 12(2)(d) and 15(3) with a new provision containing a more explicit statement of various persons' duties with respect to the transfer of trust property, suggesting that they are 'satisfactory as they stand'. It also considered that a provision of the kind on which the Commission sought submissions was undesirable because it 'is not needed and could potentially confuse the question of exactly what is required in order for an outgoing trustee to receive a discharge'.

The Commission's preliminary view

'Subject to the provisions of any other Act'

3.329 The Commission considers that the reference in section 15(1)–(2) of the *Trusts Act 1973* (Qld) that those provisions are 'subject to the provisions of any other Act' is generally effective to indicate that other legislation that has specific transfer requirements for particular types of property will override the general vesting provisions of section 15. However, to make the legislation clearer in this respect and to remove any ambiguities, the new legislation should provide, in a separate subsection, that, if any other Act imposes, or authorises the imposition of, specific requirements for the transfer of property, the provisions based on section 15(1)–(2) apply subject to those other requirements.

Right to call for a transfer of the property

3.330 Where the transfer of particular property is subject to specific requirements, the property will not vest in a new trustee until those requirements

are complied with. To clarify the rights of the new and continuing trustees during the period pending the transfer of the property, the new legislation should provide, in similar terms to section 9(7) of the *Trustee Act 1925* (NSW), that, if property does not vest until transfer or registration, the instrument of appointment or discharge nevertheless vests in the new and continuing trustees, or the continuing trustees, as the case may be, the right to call for a transfer of the property.

3.331 The Commission does not consider it necessary to further provide, as section 9(7) of the *Trustee Act 1925* (NSW) does, that the relevant instrument also vests the right to sue for, or recover, the property.

Clarifying the duty to do all acts to vest the trust property in the names of the new trustees

3.332 The Commission generally considers that sections 12(2)(d) and 15(3) of the *Trusts Act 1973* (Qld) are satisfactory in terms of the scope of the obligation imposed to do those acts that are necessary to have the property registered in the names of any continuing and new trustees. However, section 12(2)(d) should specify the persons who are subject to that obligation and section 15(3) should also do so more clearly. Those persons should be:

- the trustee who is replaced by the appointment of new trustees or who wishes to be discharged;
- any continuing trustees; and
- any new trustees.

3.333 In the Commission's view, it is not necessary to refer expressly to 'any person in whom the trust property is vested in consequence of the death of a sole trustee'. Under the provision based on section 16(2), the trust property will vest in such a person if the person is appointed as a new trustee or, in the case of a person to whom a grant is made, if the person notifies the Public Trustee that he or she intends to assume the trust.

Vesting of property where the outgoing trustee is unable to execute the required transfers

3.334 If a trustee who is replaced under section 12(1) of the *Trusts Act 1973* (Qld) is unable or unwilling to execute the necessary transfer documents to vest the property in the new and continuing trustees, those trustees will need to apply to the Supreme Court for a vesting order under section 82 of the Act.

3.335 In a recent Issues Paper, 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’.¹⁹³

3.336 Subsequently, that Commission has proposed a different mechanism for facilitating the transfer of trust property in non-contentious cases. Under its proposal, the new legislation would empower the Public Trustee to issue a statutory certificate of vesting confirming that a departing trustee had been validly removed. The legislation would also provide that the certificate is sufficient and complete proof of change of ownership of property and must be accepted under the *Land Transfer Act 1952* (NZ) and as proof of transfer of any other registered interest recorded in a register under New Zealand law.¹⁹⁴

Discussion Paper

3.337 In the Discussion Paper, the Commission sought submissions on:¹⁹⁵

- 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; and
- whether it would be desirable to develop a mechanism to avoid the need to apply to the court for a vesting order in these circumstances or whether a vesting order is the best way to safeguard the beneficiaries’ interests.

Consultation

3.338 Most respondents who addressed this issue did not consider that there was a problem with outgoing trustees being unable or unwilling to sign transfer documents.

3.339 The Queensland Law Society commented that it was not aware of any problems with trustees procuring the transfer of trust property. Similarly, the Financial Services Council stated that it could not recall any situation having arisen where what appeared to be an unnecessary application to the court was required to facilitate the transfer of assets where a trustee had been appointed. A legal practitioner who practises in trusts and succession law stated that he had never experienced any problems with the former trustees being unable or unwilling to sign transfer documents on his appointment as a trustee, although he noted that a vesting order was usually made on his appointment. Professor Lee considered that, where a trustee is replaced under section 12, the trustee ‘usually accepts the position and signs any necessary documents’. The Bar Association of Queensland commented, however, that it is difficult to know how often this is an issue.

3.340 Professor Lee considered that, if an outgoing trustee cannot or will not sign transfer documents, the appropriate course is for an application to be made to

¹⁹³ Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [4.48].

¹⁹⁴ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 132–3 (Proposal P28).

¹⁹⁵ *Trusts Discussion Paper* (2012) 96.

the court for a vesting order. He did not suggest the introduction of a new mechanism to deal with this situation.

3.341 The Bar Association of Queensland distinguished between an inability to execute transfer documents and an unwillingness to execute them. In its view, the inability to execute transfer documents can be dealt with appropriately by an application for a vesting order under section 82, which it considered should be straightforward. In relation to the second situation, it considered that the risk of a trustee refusing to execute transfer documents:

could possibly be lessened by including in s 12 an additional provision to the effect that the outgoing trustee's discharge is conditional on him or her doing all acts necessary to comply with s 12(d). Alternatively, the second situation can continue to be dealt with, as at present, by way of an application under s 82.

3.342 It did not suggest that any other mechanism should be provided to facilitate the execution of transfer documents.

3.343 Like the Bar Association of Queensland, the Public Trustee drew a distinction between the inability to act and an unwillingness to act. In the case of inability, the Public Trustee considered that, although 'the Public Trustee does not with any frequency see issues where a trustee replaced under section 12 does not sign necessary transfer documents', there may be some merit in a provision such as that initially proposed by the Law Commission of New Zealand, which, as explained above, raised the possibility of empowering the remaining trustees to sign the necessary documents.¹⁹⁶

3.344 However, in the case of a trustee who is unwilling to sign transfer documents, the Public Trustee saw no compelling need to provide an alternative mechanism to the current mechanism of applying to the court for a vesting order. The Financial Services Council endorsed this view.

3.345 The Queensland Law Society and a legal practitioner who practises in trusts and succession law commented that, although they were not aware of problems in this regard, consideration could be given to empowering the registrar of the Supreme Court to sign such documents.

The Commission's preliminary view

3.346 The Commission does not recommend any new mechanism to deal with the situation in which an outgoing trustee is either unable or unwilling to execute transfer documents. In both cases, the Commission considers that the appropriate course is for the new and continuing trustees to apply to the court for a vesting order. In its view, a mechanism whereby the new and continuing trustees were deemed to have a temporary power of attorney to sign documents on behalf of the incapable or unwilling trustee (as initially suggested by the Law Commission of New Zealand) is likely to be productive of uncertainty and, in the case of an unwilling trustee, of disputes as to whether the transfer is valid.

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See [3.335] above.

3.347 The Commission notes the suggestion in the submissions that the registrar of the Supreme Court might be empowered to sign transfer documents. While that is an appropriate course where the registrar is carrying out the terms of an order made by the court, the Commission does not consider it appropriate, in this context, to confer the judicial power on the registrar to determine whether the transfer documents should be signed.

DEVOLUTION OF TRUST PROPERTY AND TRUST POWERS UPON DEATH

3.348 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.¹⁹⁷ However, the section does not apply to a personal representative as such,¹⁹⁸ since the vesting of property on the death of a sole executor or administrator is a matter of succession law.¹⁹⁹

Death of one of two or more trustees

3.349 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.

3.350 The subsection does not additionally provide for the vesting of the trust property itself because, where two or more persons hold property as joint tenants (whether or not as trustees),²⁰⁰ the property automatically passes, by operation of the right of survivorship (the *jus accrescendi*) to the surviving joint tenant or joint tenants.²⁰¹

Death of a sole trustee

3.351 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.

¹⁹⁷ The vesting of trust property when a corporate trustee ceases to exist, or is in liquidation, is governed by the *Corporations Act 2001* (Cth): see *Trusts Discussion Paper* (2012) [5.205].

¹⁹⁸ *Trusts Act 1973* (Qld) s 16(9).

¹⁹⁹ See *Administration of Estates Report* (2009) vol 1, ch 10.

²⁰⁰ See [3.358] ff below for a discussion of the vesting of trust property held by two or more trustees as tenants in common.

²⁰¹ Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000) [9-003].

3.352 Section 16(2)(a) provides that, once a new trustee is appointed²⁰² and written notice of the appointment is given to the Public Trustee,²⁰³ the trust property vests in the new trustee in accordance with the provisions of section 15.

3.353 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.

3.354 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'.²⁰⁴ 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.

3.355 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.

3.356 That is not the case in all of the other Australian jurisdictions. With the exception of Queensland,²⁰⁵ 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'.²⁰⁶

3.357 In Tasmania, Victoria and Western Australia, legislation provides that, until new trustees are appointed, the personal representative of a sole or last surviving

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An appointment may be made by any of the persons authorised by s 12(1) of the *Trusts Act 1973* (Qld). Because s 16(5) confers on the Public Trustee the same powers, authorities and discretions as if the Public Trustee 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. Further, as explained earlier in this chapter, s 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.

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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).

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Re Benett [1906] 1 Ch 216, 225 (Vaughan Williams LJ).

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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.

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HAI Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 8 November 2012) [8600]. See also *Re Crunden and Meux's Contract* [1909] 1 Ch 690, 695 (Parker J).

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.²⁰⁷ 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',²⁰⁸ such persons will not be able to exercise trust powers with respect to that property.²⁰⁹ They will simply hold the trust property as bare trustees until new trustees are appointed.²¹⁰

Death of a trustee who holds trust property as tenant in common with one or more trustees

3.358 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 well as all trusts and powers, will devolve upon the surviving trustees'.²¹¹ They note, however, that:²¹²

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 ...

3.359 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.²¹³

3.360 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).²¹⁴ That provision dealt with the devolution, on the death

²⁰⁷ *Conveyancing and Law of Property Act 1884* (Tas) s 34; *Trustee Act 1958* (Vic) s 22; *Trustees Act 1962* (WA) s 45.

²⁰⁸ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 8 November 2012) [8600].

²⁰⁹ *Robson v Flight* (1865) De GJ & S 608; 46 ER 1054; *Re Crunden and Meux's Contract* [1909] 1 Ch 690.

²¹⁰ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 8 November 2012) [8600].

²¹¹ *Ibid* [8590].

²¹² *Ibid*.

²¹³ See [3.356]–[3.357] above. See also the discussion of this issue in GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [21.135].

²¹⁴ [1955] St R Qd 362, 368 (O'Hagan J).

of a person, of an estate or interest in property that was vested in the person solely on trust or by way of mortgage, and was later replaced by sections 16 and 17 of the *Trusts Act 1973* (Qld).

3.361 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 the trust property vests has the powers, authorities and discretions of a trustee in relation to the trust property.

Discussion Paper

3.362 In the Discussion Paper, the Commission expressed the view that section 16 of the *Trusts Act 1973* (Qld) deals effectively with the vesting of trust property and powers, and should be retained.²¹⁵ However, the Commission sought submissions on whether, although it is not strictly necessary, there would be any benefit in clarifying that section 16(2) for the *Trusts Act 1973* (Qld) applies to the devolution and vesting of trust property held by a trustee as a tenant in common with another trustee.²¹⁶

Consultation

3.363 The Queensland Law Society considered that a provision clarifying 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 'may be of assistance', although it noted that the Registrar of Titles already applies the principle of *Re Livanos* in relation to the transmission of partnership land held as tenants in common.

3.364 A legal practitioner who practises in trusts and succession law also considered that there may be some utility in including such a provision.

3.365 The Public Trustee stated that he takes the same view in relation to the application of *Re Livanos* as expressed by the Commission in the Discussion Paper. He did not press for a legislative clarification, but commented that to the 'extent that the Commission sees any benefit the Public Trustee is content for section 16(2) to provide greater clarity'. The Financial Services Council was also of that view.

3.366 However, the Bar Association of Queensland submitted that such an amendment would not be of any benefit. Professor Lee was also opposed to any legislative amendment to deal with this issue.

215 *Trusts Discussion Paper* (2012) [5.200].

216 *Ibid* 100.

The Commission's preliminary view

3.367 The Commission considers that section 16 of the *Trusts Act 1973* (Qld) deals effectively with the vesting of trust powers on the death of a trustee and with the vesting of trust property on the death of a sole trustee. Accordingly, the new legislation should include a provision in those terms.

3.368 The Commission does not consider it necessary to make express provision for the vesting of trust property on the death of a trustee who holds trust property as tenants in common with another trustee. As explained above, in this situation, the interest in the property that was vested in the deceased trustee vests in accordance with section 16(2) of the *Trusts Act 1973* (Qld), while sections 16(5)–(6) and 12(6) ensure that the person in whom the property vests under section 16(2) has the powers, authorities and discretions of a trustee in relation to the trust property. The Commission is concerned that, rather than clarifying matters, it could, in fact, create some confusion in the legislation by attempting to address an issue that is not a legal or practical problem in Queensland.

DEVOLUTION OF MORTGAGE ESTATES ON DEATH

3.369 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'. Despite being contained in the *Trusts Act 1973* (Qld), the section is not concerned with the devolution or vesting of trust property.

3.370 Section 17(1) 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. Section 17(2) further ensures that, while the property is vested in the Public Trustee, the Public Trustee has the same powers, authorities and discretions as if he or she were the original mortgagee of the property. The provision would, for example, enable the Public Trustee to give a discharge of the mortgage to the mortgagor.

3.371 The other Australian jurisdictions do not have an equivalent provision. Instead, on the death of a sole mortgagee, the mortgagee's estate or interest in the mortgaged property vests in accordance with the provisions in the administration and probate legislation of the jurisdiction that deal generally with the vesting of a deceased person's real and personal property.²¹⁷

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See *Administration of Estates Report* (2009) vol 1, [10.11]–[10.22].

Historical background

3.372 Section 17 of the *Trusts Act 1973* (Qld) and its predecessor, section 12 of the *Trustees and Executors Act 1897* (Qld), have their origins in section 30 of the English *Conveyancing and Law of Property Act 1881*.²¹⁸

3.373 Section 30 of the *Conveyancing and Law of Property Act 1881* 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. At the time of its enactment, a mortgage of land was created by the conveyance of the freehold estate to the mortgagee, the mortgagor retaining an 'equity of redemption'.²¹⁹ The mortgagee had two separate rights: the legal estate (which was real property) and the right to the money lent (which was personal property).²²⁰ The application to these separate rights of the different vesting rules that applied, at the time, to real and personal property²²¹ resulted in an 'inconvenient arrangement' when a sole mortgagee died:²²²

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.
(notes omitted)

3.374 Section 30 of the *Conveyancing and Law of Property Act 1881* overcame this difficulty by ensuring that the mortgage estate vested in the personal representative of a sole mortgagee. It was subsequently repealed by the *Law of Property Act 1925*.²²³ By providing that a mortgage of freehold could not be created by conveyance of title,²²⁴ the *Law of Property Act 1925* had the effect that both the

²¹⁸ Like s 30 of the English *Conveyancing and Law of Property Act 1881*, s 12 of the *Trustees and Executors Act 1897* (Qld) originally provided for the vesting of trust and mortgage estates in the personal representative of a sole trustee or mortgagee. However, when the office of the Public Curator was established by the *Public Curator Act 1915* (Qld), that Act amended s 12 of the *Trustees and Executors Act 1897* (Qld) to vest trust and mortgage estates in the Public Curator. The Public Curator 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).

²¹⁹ 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.

²²⁰ 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.

²²¹ At the time, 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. However, since the commencement of the *Land Transfer Act 1897*, 60 & 61 Vict, c 65, 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: ss 1(1), (5), 25.

²²² Sir Robert Megarry and HWR Wade, *The Law of Real Property* (Stevens & Sons, 5th ed, 1984) 981.

²²³ *Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 207 sch 7 (Act as passed).

²²⁴ *Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 85.

security and the debt created by a mortgage were in the nature of personal property.²²⁵

3.375 At the time that 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) now 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 deceased's executor or, if there is no executor able and willing to act, in the Public Trustee.²²⁶

3.376 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.²²⁷

Discussion Paper

3.377 In the Discussion Paper, the Commission proposed that section 17 of the *Trusts Act 1973* (Qld) should be omitted.²²⁸ The Commission considered that, because a mortgage of real property operates only as a charge and, in any event, the vesting rules no longer distinguish between real and personal property, section 17 was no longer needed.²²⁹

3.378 Although section 17 would enable the Public Trustee to give a discharge of a mortgage where the sole mortgagee had died, the Commission considered that, even if section 17 were omitted, a similar power could be exercised by the Public Trustee under section 61 of the *Public Trustee Act 1978* (Qld). The Commission explained that section 61, which applies in a range of circumstances, enables the Public Trustee 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), including where the mortgagee of property:²³⁰

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; ...

225 HG Hanbury, *The Law of Mortgages* (Stevens & Sons, Sweet & Maxwell, 1938) 215. Further, as explained at n 221, the *Land Transfer Act 1897*, 60 & 61 Vict, c 65 had earlier provided for the vesting of both real and personal property in a deceased person's personal representative.

226 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.

227 *Real Property Act 1861* (Qld) s 60 (repealed). See now *Land Title Act 1994* (Qld) s 74.

228 *Trusts Discussion Paper* (2012) 105.

229 *Ibid* [5.220].

230 *Public Trustee Act 1978* (Qld) s 61(1)(b). 'Property' is defined to include 'real and personal property of every description or kind': s 6. For a further discussion of s 61, see *Trusts Discussion Paper* (2012) [5.219].

Consultation

3.379 The Commission's proposal to omit section 17 of the *Trusts Act 1973* (Qld) was supported by the Queensland Law Society, the Bar Association of Queensland, Professor Lee and a legal practitioner who practises in trusts and succession law.

3.380 The Queensland Law Society noted that, apart from the reasons given in the Discussion Paper for the omission of section 17, the provision effectively requires a grant of representation to transmit the interest of a deceased mortgagee.

3.381 The Public Trustee submitted that he 'has no difficulty' with the omission of section 17. He also advised that section 61 of the *Public Trustee Act 1978* (Qld) is frequently used in circumstances where a sole mortgagee has died and the mortgagee needs to have the mortgage released, but there has been no grant made in relation to the deceased mortgagee's estate. The Financial Services Council endorsed this view.

The Commission's preliminary view

3.382 As explained above, the rationale for the enactment of the English provision in which section 17 of the *Trusts Act 1973* (Qld) has its origins was to avoid the inconvenience that occurred when, on the death of a sole mortgagee, the deceased's interest in the legal estate (which was real property) vested in either the devisee or heir, who then 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 (which was personal property).

3.383 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. The Commission is of the view that, because section 17 of the *Trusts Act 1973* (Qld) no longer serves its original purpose, the new legislation should not include a provision to that effect.

3.384 In the absence of a provision to the effect of section 17, a deceased mortgagee's interest in the mortgaged property will vest in accordance with section 45 of the *Succession Act 1981* (Qld), like all other property to which the deceased was, immediately before his or her death, beneficially entitled. If a sole mortgagee dies and the mortgagor is unable to obtain a release of the mortgage because the deceased's estate is not being administered, the mortgagor will still be able to obtain a release of the mortgage from the Public Trustee under section 61 of the *Public Trustee Act 1978* (Qld).

DISCLAIMER OF TRUSTS ON RENUNCIATION OF PROBATE

3.385 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;²³¹ or
 - (b) after being duly cited²³² 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)

3.386 The circumstances mentioned in section 18(2), 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.

3.387 The purpose of section 18 of the *Trusts Act 1973* (Qld) is to ensure that the person who is appointed by will as both executor and trustee cannot hold the office of trustee if the person's right to the executorship of the will has ceased.

3.388 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.²³³ 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), that person is automatically substituted as the trustee of the trust contained in the will.

3.389 The trustee legislation in Victoria and Western Australia contains provisions in virtually identical terms to section 18.²³⁴ In the ACT and New South

231 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).

232 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).

233 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.

234 *Trustee Act 1958* (Vic) s 46; *Trustees Act 1962* (WA) s 12.

Wales, the trustee legislation contains similar provisions to section 18(1),²³⁵ but the provisions dealing with the substitution of the executor-trustee have a narrower application than section 18(2).²³⁶

3.390 The situations of renunciation of probate and failure to apply for a grant, which are referred to in section 18 of the *Trusts Act 1973* (Qld) and section 46 of the *Succession Act 1981* (Qld), are relevant where the person who is named as executor does not wish to assume that office. When that occurs, 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.²³⁷

3.391 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,²³⁸ the court has an inherent power, in certain limited circumstances, to pass over a named executor.²³⁹ The principle underlying the exercise of that power is that:²⁴⁰

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; ...

3.392 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).

²³⁵ *Trustee Act 1925* (ACT) s 10(1); *Trustee Act 1925* (NSW) s 10(1).

²³⁶ 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).

²³⁷ Most applications made for a grant of probate or letters of administration are for a grant in common form: see *Trusts Discussion Paper* (2012) ch 5, n 257.

²³⁸ *Evans v Tyler* (1849) 2 Rob Ecc 128, 131; 163 ER 1266, 1267 (Sir Herbert Jenner Fust).

²³⁹ *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977) 2; *Re Crane* (2005) 93 SASR 198. For a discussion of the circumstances in which executors have been passed over, see *Trusts Discussion Paper* (2012) [5.231].

²⁴⁰ *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).

Discussion Paper

3.393 In the Discussion Paper, the Commission sought submissions on whether section 18 of the *Trusts Act 1973* (Qld) should 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, it asked whether the current mechanisms for replacing the person are sufficient.²⁴¹

Consultation

3.394 The Queensland Law Society, the Public Trustee, the Financial Services Council and Professor Lee each considered that section 18 should be amended so that, if a person who is appointed both executor and trustee by will applies for a grant but is passed over, the person will be taken to have disclaimed the trust.

3.395 However, the Bar Association of Queensland considered that section 18 does not require amendment because this situation can be sufficiently dealt with by an application under section 80, as part of the proceedings in relation to the contested grant. It also noted that:

It is important to bear in mind that situations can frequently arise where the reason for passing over a person as executor (such as conflict with other executors) does not justify removal as trustee of a testamentary trust where there are several such trusts, one for each executor.

The Commission's preliminary view

3.396 As the Bar Association of Queensland has observed, there may be situations where the reasons for passing over a person as executor do not warrant the person's removal as a trustee. For this reason, the Commission considers that it is appropriate that section 18 of the *Trusts Act 1973* (Qld) does not have the automatic effect that a person who is named as the executor and trustee of a will is deemed to have disclaimed the trust merely because the person is passed over as executor. In those cases where it is appropriate for the person to be removed as both an executor and a trustee, an application can be made for the person's removal as trustee, concurrently with the probate proceedings. The new legislation should, therefore, include a provision to the effect of section 18 in its current terms.

MEANING OF 'TRUSTEE' FOR THE PROVISIONS DEALING WITH THE APPOINTMENT AND DISCHARGE OF TRUSTEES

3.397 Section 5(1) of the *Trusts Act 1973* (Qld) provides that 'trustee' includes 'a personal representative'. However, 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'.

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Trusts Discussion Paper (2012) 108.

3.398 The effect of section 12(9) is that, while a personal representative is still completing his or her executorial duties,²⁴² he or she cannot be replaced by a new personal representative under the mechanism established by section 12 for the replacement of trustees. Similarly, because the vesting of property on the death of a sole executor or administrator is a matter of succession law,²⁴³ section 16(9) provides that that section does not apply to a personal representative as such.

Discussion Paper

3.399 In the Discussion Paper, the Commission noted that section 14 of the Act, which provides for the retirement of a trustee without being replaced, does not contain a similar provision to section 12(9).²⁴⁴ The Commission suggested that the absence of such a provision would appear to be an oversight.²⁴⁵ It observed that, 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.²⁴⁶ 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.

3.400 The Commission also observed that the counterparts to section 14 in the ACT and New South Wales legislation both include a provision in the following terms:²⁴⁷

Nothing in this section shall authorise any retirement from the office of an executor or administrator.

3.401 Although the Commission considered that a 'trustee', for the purposes of section 14 of the *Trusts Act 1973* (Qld), should not include a personal representative as such, the Commission did not propose an amendment to section 14.²⁴⁸ Instead, the Commission made the more general proposal that:²⁴⁹

²⁴² 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 (Sargant 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].

²⁴³ See [3.348] above.

²⁴⁴ 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.

²⁴⁵ *Trusts Discussion Paper* (2012) [5.168].

²⁴⁶ 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).

²⁴⁷ *Trustee Act 1925* (ACT) s 8(7); *Trustee Act 1925* (NSW) s 8(7).

²⁴⁸ *Trusts Discussion Paper* (2012) [5.170].

²⁴⁹ *Ibid* 116.

- 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 Act should be omitted.

3.402 It considered that this would appropriately ensure that sections 12, 14 and 16 did not apply to personal representatives. The Commission considered that the other provisions in Part 2 of the Act either deal with matters that are addressed in other legislation in so far as they concern personal representatives (such as section 11) or, because of the nature of the provisions, do not have any relevance to personal representatives (such as sections 13 and 17).²⁵⁰

Consultation

3.403 The Commission’s proposal to exclude personal representatives from the application of the provisions in Part 2 of the *Trusts Act 1973* (Qld) was supported by the Bar Association of Queensland and a legal practitioner who practises in trusts and succession law. The Public Trustee and the Financial Services Council both considered that there were some ‘drafting benefits’ in the Commission’s proposal.

3.404 The Queensland Law Society commented that, if the Act were amended to define the different types of trusts (such as constructive and resulting trusts, inter vivos trusts, testamentary trusts and statutory trusts), ‘any provision of the Act [could] limit its application to one or the other types of trustees by simply using those terms individually or collectively eg, “personal representative and testamentary trustee and inter vivos trustee”’.

The Commission’s preliminary view

3.405 The Commission remains of the view that the provisions based on Part 2 of the *Trusts Act 1973* (Qld) should be expressed not to apply to a personal representative as such. As explained in the Discussion Paper, those provisions deal with matters that are either regulated separately for personal representatives or have no relevance for personal representatives.

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Ibid [5.260]–[5.262].

PRELIMINARY RECOMMENDATIONS

Disqualification from appointment as trustee

- 3-1 The new legislation should provide that the appointment of a minor as trustee is void unless the instrument (if any) creating the trust provides that the appointment is to take effect on the minor attaining his or her majority, whether before or after the creation of the trust.
- 3-2 The new legislation should provide that:
- (a) the appointment as trustee of a person who is an undischarged bankrupt is void; and
 - (b) the provision mentioned in paragraph (a) applies whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

Limitation on the maximum number of trustees

- 3-3 The new legislation should include a provision to the general effect of section 11 of the *Trusts Act 1973* (Qld), except that the provision based on section 11(3)(b) of the Act should confer on the court, rather than on the Minister, the power to approve more than four trustees of a private trust.

The appointment of replacement or additional trustees without recourse to the court

- 3-4 Subject to Recommendations 3-5 to 3-8 and 3-10 to 3-12, the new legislation should include provisions to the general effect of section 12 of the *Trusts Act 1973* (Qld), except that:
- (a) the provisions should be expressed in a more modern and simplified drafting style; and
 - (b) it is not necessary to include a provision to the effect of section 12(10) of the Act.

The circumstances in which a trustee may be replaced without recourse to the court

- 3-5 The provision based on section 12(1) of the *Trusts Act 1973* (Qld) should:

- (a) not provide for the replacement of a trustee in the circumstances mentioned in section 12(1)(b) or (g) of the Act;
- (b) include, as an additional circumstance in which a trustee may be replaced, that the trustee has become a bankrupt; and
- (c) include, as an additional circumstance in which a trustee may be replaced, that the trustee is a person who is disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001* (Cth) and is not given permission under section 206F or 206G of that Act to manage all corporations.

Appointment of replacement or additional trustees by appointors

3-6 The new legislation should provide that, for the purposes of the provisions based on section 12(1) and (5) of the *Trusts Act 1973* (Qld), appointors are taken to be not 'able and willing' to exercise the power to appoint replacement or additional trustees if either of the following paragraphs applies:

- (a) if:
 - (i) two or more persons (the 'appointors') have the power under a trust instrument to appoint new trustees;
 - (ii) the trust instrument:
 - (A) requires the appointors to exercise their power jointly; or
 - (B) is silent as to the manner in which the appointors are to exercise their power; and
 - (iii) the appointors are unable to agree on the appointment of a new trustee; or
- (b) if:
 - (i) more than two persons (the 'appointors') have the power under a trust instrument to appoint new trustees;
 - (ii) the trust instrument provides for the appointors to exercise their power by majority; and
 - (iii) the appointors are unable to form a majority view on the appointment of a new trustee.

Appointment of replacement trustees by the personal representative of a last surviving or continuing trustee

3-7 The new legislation should provide that, if there are two or more personal representatives of a last surviving or continuing trustee, the personal representatives are to exercise their power of appointment jointly.

Appointment of replacement trustees by an administrator or attorney for financial matters

3-8 The new legislation should provide that:

- (a) the following persons may, by writing, appoint trustees to replace a last surviving or continuing trustee who has impaired capacity for the administration of the trust:
 - (i) a person who is, for the time being, the administrator of the trustee under the *Guardianship and Administration Act 2000* (Qld) or under the corresponding law of another Australian jurisdiction;
 - (ii) a person who is, for the time being, 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);
- (b) the administrator or attorney may exercise the power regardless of the scope of his or her appointment as administrator or attorney; and
- (c) if the trustee has more than one administrator or more than one attorney for financial matters, the power to appoint replacement trustees is to be exercised jointly by the administrators or attorneys, as the case may be.

The removal of a trustee (without replacement) without recourse to the court

3-9 The new legislation should provide that:

- (a) a trustee may be removed, without being replaced, in the circumstances mentioned in section 12(1)(a), (d)–(f) and (h) of the *Trusts Act 1973* (Qld) and in Recommendation 3-5(b) and (c);
- (b) the power mentioned in paragraph (a) may be exercised by:
 - (i) the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust; or

- (ii) if there is no person as mentioned in subparagraph (b)(i) or no such person who is able and willing to act — the surviving or continuing trustee or trustees for the time being; and
- (c) the power mentioned in paragraph (a) may be exercised only if, following the trustee's removal, there will remain as trustees:
 - (i) in the case of any trust (including a trust referred to in subparagraph (ii)) — a corporation or at least two individuals; or
 - (ii) in the case of a trust for any charitable purpose or public purpose or for any purpose of recreation or other leisuretime use or occupation — a local government.

Discharge of trustee on the appointment of replacement trustees

3-10 The provision based on section 12(2)(c) of the *Trusts Act 1973* (Qld) should:

- (a) provide that a trustee is discharged from the trust if there will remain as trustees of the trust:
 - (i) in the case of any trust (including a trust referred to in subparagraph (ii)) — a corporation or at least two individuals; or
 - (ii) in the case of a trust for any charitable purpose or public purpose or for any purpose of recreation or other leisuretime use or occupation — a local government; and
- (b) provide that the requirements for discharge in paragraph (a) do not apply if:
 - (i) only one trustee was originally appointed; or
 - (ii) the trust instrument provides otherwise; and
- (c) include a positive statement to the effect that the trustee is discharged from the trust.

3-11 The provision based on section 12(2)(d) of the *Trusts Act 1973* (Qld) should provide expressly that the duties imposed by that subsection apply to:

- (a) the trustee who is replaced by the appointment of new trustees or who wishes to be discharged;
- (b) any continuing trustees; and

- (c) any new trustees.

Appointment of additional trustees without the replacement of an existing trustee

- 3-12 The provision based on section 12(5) of the *Trusts Act 1973 (Qld)* should refer to the court's approval of additional trustees, rather than an approval given by the Minister.

Retirement of trustee without a new appointment

- 3-13 The new legislation should include a provision to the general effect of section 14 of the *Trusts Act 1973 (Qld)*, except that the provision based on section 14(1) should:

- (a) apply where, after the retirement of the trustee who wishes to be discharged, there will remain as trustees:
- (i) in the case of any trust (including a trust referred to in subparagraph (ii)) — a corporation or at least two individuals; or
 - (ii) in the case of a trust for any charitable purpose or public purpose or for any purpose of recreation or other leisuretime use or occupation — a local government;
- (b) provide that, despite the requirements in paragraph (a), the provision will nevertheless apply if:
- (i) only one trustee was originally appointed; or
 - (ii) the trust instrument provides otherwise; and
- (c) include a provision to the general effect of section 8(4) of the *Trustee Act 1925 (ACT)* and of the *Trustee Act 1925 (NSW)* so that, if it is necessary for trust property to be transferred to the continuing trustees in order to vest the property in them alone, the retiring trustee is not discharged in respect of that part of the property until it is duly transferred.

Evidence as to a vacancy in a trust

- 3-14 The new legislation should include a provision to the general effect of section 13 of the *Trusts Act 1973 (Qld)*, except that the protection afforded by the provision should be extended so that it also applies to a debtor who makes a payment in good faith.

Vesting of trust property in new and continuing trustees

- 3-15 The new legislation should include a provision to the general effect of section 15 of the *Trusts Act 1973 (Qld)*, except that:

- (a) the new provision should provide that, if any other Act imposes, or authorises the imposition of, specific requirements for the transfer of property, the provision applies subject to those other requirements;
- (b) the new provision should provide that, if property does not vest until transfer or registration, the instrument of appointment or discharge nevertheless vests in the new and continuing trustees or the continuing trustees, as the case may be, the right to call for a transfer of the property; and
- (c) the provision based on section 15(3) should provide expressly that the duties imposed by that subsection apply to:
 - (i) the trustee who is replaced by the appointment of new trustees or who wishes to be discharged;
 - (ii) any continuing trustees; and
 - (iii) any new trustees.

Devolution of trust property and powers on the death of a trustee

3-16 The new legislation should include a provision to the effect of section 16 of the *Trusts Act 1973* (Qld).

Devolution of mortgage estates on the death of a sole mortgagee

3-17 The new legislation should not include a provision to the effect of section 17 of the *Trusts Act 1973* (Qld).

Disclaimer of trusts on renunciation of probate

3-18 The new legislation should include a provision to the effect of section 18 of the *Trusts Act 1973* (Qld).

Application of provisions relating to the appointment and discharge of trustees

3-19 The new legislation should provide that, for the purpose of the provisions relating to the appointment and discharge of trustees, a reference to a 'trustee' does not include a personal representative as such.

Chapter 4

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INTRODUCTION

4.1 Unless authorised by the trust instrument or by statute, trustees are ordinarily required to act personally, to have trust property vested in the names of themselves and their co-trustees, and to keep the documents relating to the trust property under their control.

4.2 This chapter examines the exceptions to these requirements that currently apply under the *Trusts Act 1973* (Qld), together with some additional exceptions that have been enacted or recommended overseas. These include the powers:

- under section 54 of the *Trusts Act 1973* (Qld) to employ agents;
- under section 11 of the *Trustee Act 2000* (UK) to authorise an ‘agent’ to exercise some of their discretions (sometimes referred to as ‘collective delegation’);
- under section 49 of the *Trusts Act 1973* (Qld) to deposit documents relating to the trust property for safe keeping;
- under sections 16 and 17 of the *Trustee Act 2000* (UK) to appoint nominees and custodians; and
- under section 56 of the *Trusts Act 1973* (Qld) to delegate all or any of the trusts, powers, authorities and discretions that are vested in the trustee.

4.3 The chapter also examines section 19 of the *Trusts Act 1973* (Qld), which makes provision for the appointment of custodian trustees (as distinct from the power to appoint custodians).

Terminology

4.4 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.¹ Many commentators also use the term in this way.² In other instances, the term ‘delegate’ is used more broadly to encompass a trustee’s power to employ an agent in matters not necessarily involving the exercise of any discretion.³

4.5 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).⁴ That section empowers

¹ 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).

² 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].

³ 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.

⁴ 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.

a trustee, in specified circumstances, to delegate the execution of all or any of the trusts, powers, authorities and discretions vested in the trustee,⁵ effectively appointing a person to stand in the shoes of the trustee for the relevant period.

THE EMPLOYMENT OF AGENTS

The general law

4.6 It is a long-standing exception to the requirement for trustees to act personally that, in certain circumstances, they may employ agents to perform an act in the administration of the trust.⁶ In *Ex parte Belchier*, Lord Hardwicke LC stated that, 'where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses'.⁷ 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 employ a broker to purchase securities for the trust and for the money for the securities to pass through the broker's hands.⁸ Lord FitzGerald described the principle in the following terms:⁹

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.

4.7 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',¹⁰ 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.

4.8 A trustee must still exercise his or her discretion in selecting an agent,¹¹ and should employ the agent to do only those acts that are within the usual scope of business of the agent.¹² A trustee is also 'under an obligation to be diligent in seeing that a duty given to an agent has been properly performed'.¹³

⁵ *Trusts Act 1973* (Qld) s 56 is considered at [4.196] ff below.

⁶ See generally JRF Lehane, 'Delegation of Trustees' Powers and Current Developments in Investment Funds Management' (1995) 7 *Bond Law Review* 36, 39–40.

⁷ (1754) *Amb* 218, 219; 27 *ER* 144, 145.

⁸ (1883) 9 *App Cas* 1, 10, 12 (Earl of Selborne LC), 22, 25 (Lord Blackburn), 29 (Lord FitzGerald).

⁹ *Ibid* 29. See also *Learoyd v Whiteley* (1887) 12 *App Cas* 727, 734 (Lord Watson).

¹⁰ (1883) 9 *App Cas* 1, 19 (Lord Blackburn).

¹¹ *Re Weall* (1889) 42 *Ch D* 674, 677–8 (Kekewich J).

¹² *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).

¹³ *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).

4.9 The employment of an agent does not involve a ‘surrender or delegation’ of the trustee’s discretionary powers:¹⁴

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.

Statutory power to employ and pay an agent: section 54(1)

Scope of the statutory power

4.10 The main provision giving trustees the power to employ and pay an agent is section 54(1) of the *Trusts Act 1973* (Qld), which provides:

54 Power to employ agents

- (1) A trustee may, instead of acting personally, employ and pay an agent, whether a solicitor, accountant, financial institution,¹⁵ trustee corporation, financial services licensee,¹⁶ regulated principal¹⁷ 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. (notes added)

4.11 Section 54(1) provides that a trustee may employ and pay an agent, including of the various kinds mentioned in that provision, 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 receipt and payment of money and for the keeping and audit of trust accounts.¹⁸ The subsection also provides that the trustee is not responsible for the default of any such agent employed in ‘good faith and without negligence’.¹⁹

¹⁴ JRF Lehane, ‘Delegation of Trustees’ Powers and Current Developments in Investment Funds Management’ (1995) 7 *Bond Law Review* 36, 40.

¹⁵ *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* (Cwlth), section 5’.

¹⁶ *Trusts Act 1973* (Qld) s 54(6) defines ‘financial services licensee’ to mean ‘a financial services licensee, defined under the Corporations Act, section 761A, whose licence covers dealing in, or providing advice about, securities’.

¹⁷ *Trusts Act 1973* (Qld) s 54(6) defines ‘regulated principal’ to mean ‘a regulated principal defined under the Corporations Act, section 1430, and dealing in, or providing advice about, securities as authorised by the Corporations Act, part 10.2, division 1, subdivision D’.

¹⁸ See also the discussion of ss 43 (Power of trustee to give receipts) and 52 (Audit) of the *Trusts Act 1973* (Qld) in Chapter 9.

¹⁹ The liability of a trustee for the default of an agent is considered in Chapter 11.

4.12 The trustee legislation of the ACT, New South Wales, Victoria, Western Australia and New Zealand contains a provision in similar terms.²⁰ 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.

4.13 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.²¹

4.14 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.²²

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.

4.15 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'.²³

4.16 It has been questioned whether the Australian provisions that are based on the former section 23(1) of the English *Trustee Act 1925* empower a trustee to employ 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.²⁴

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 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).

²⁰ *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).

²¹ *In the Estate of Purton* (1935) 53 WN (NSW) 148, 149 (Nicholas J). As to the general law, see [4.6] ff above.

²² [1931] 1 Ch 572, 581.

²³ [1930] 1 Ch 38, 45.

²⁴ JRF Lehane, 'Delegation of Trustees' Powers and Current Developments in Investment Funds Management' (1995) 7 *Bond Law Review* 36, 43.

4.17 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.²⁵

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)

4.18 Ford and Lee suggest, however, 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'.²⁶ In their view:²⁷

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.

4.19 In England, section 23(1) of the *Trustee Act 1925* has been repealed and replaced by a new scheme in the *Trustee Act 2000* (UK) for the appointment of 'agents' to exercise a wide range of powers.²⁸ Section 12 of that Act 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).²⁹ Further, the trustees may not authorise two or more persons to exercise the same function unless they are to exercise the function jointly.³⁰

Discussion Paper

4.20 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to include a provision to the general effect of section 54(1) or whether there is a need to clarify the administrative functions for which an agent may be appointed.³¹

Consultation

4.21 The Queensland Law Society, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law each expressed the

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Ibid.

26

HAI Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2009) [61.5440]. See, however, their comment at [4.55] below in relation to the limits of the fund manager's role.

27

Ibid.

28

See [4.57] ff below.

29

Trustee Act 2000 (UK) c 29, s 12(1), (3).

30

Trustee Act 2000 (UK) c 29, s 12(2).

31

Trusts Discussion Paper (2012) 350.

view that the legislation should continue to include a provision to the effect of section 54(1) of the *Trusts Act 1973* (Qld). Professor Lee considered that section 54(1) is 'clear enough'.

4.22 The Public Trustee commented that, because a trustee's power to employ an agent is subject to the trustee's duty of care and prudence, the statutory power to employ an agent is subject to the limitation of necessity. The Public Trustee further noted that he would have 'no objection to the limitation being placed on the power that the appointment of agents might occur where it is necessary or in accordance with ordinary prudent commercial practice'.

4.23 The Bar Association of Queensland submitted that, 'in light of the conflicting authority set out, the opportunity to clarify the position in Queensland should be taken'. It considered that the inclusion of a provision to the effect of section 53(5) of the *Trustee Act 1925* (NSW) might be appropriate.

4.24 The Registrar of Titles commented that the legislation should clarify the relationship between sections 54 and 56 of the Act, noting that, in dealing with the titles registry, some trustees who are not specifically authorised under the trust deed to delegate their powers appear to be using section 54 to justify the delegation of their powers in situations where section 56 does not apply.

The Commission's preliminary view

4.25 The Commission is of the view that the new legislation should include a provision to the effect of section 54(1) of the *Trusts Act 1973* (Qld).

4.26 In deciding whether to employ an agent, a trustee will need to comply with the statutory duty of care that is recommended in Chapter 6. However, the Commission does not recommend the inclusion of an additional provision to the effect of section 53(5) of the *Trustee Act 1925* (NSW). Although the purpose of that provision is to emphasise that a trustee must act with prudence in deciding whether to employ an agent, the Commission is concerned that the inclusion of a specific provision in those terms could be thought to narrow the scope of the current power to employ an agent.

4.27 The new legislation should, however, include provisions to the effect of section 12(1) and (3) of the *Trustee Act 2000* (UK) and provide that trustees may authorise one or more of their number to act as their agent, but may not authorise a beneficiary to act as an agent (even if the beneficiary is also a trustee).

Appointment of agent or attorney to exercise discretions, trusts and powers in relation to property outside the jurisdiction: section 54(2)

4.28 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. 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 for the purpose of 'executing or exercising any discretion, trust or power vested in the trustee' in relation to such property. It

also 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.

4.29 The provision is said to be declaratory of the general law.³² 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.³³

4.30 A similar provision to section 54(2) is included in the trustee legislation of Victoria, Western Australia and New Zealand.³⁴

4.31 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 implemented a new, broader scheme for the delegation of trustee functions.³⁵

4.32 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'.³⁶ However, on further consideration, the Law Commission concluded that section 23(2) was unnecessary in view of modern communication methods. It considered that it would be 'anomalous to give trustees different powers merely because of the geographical location of the property concerned'.³⁷ 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'.³⁸

Discussion Paper

4.33 In the Discussion Paper, the Commission suggested that, with modern communication methods, it is arguable that, in the absence of a provision to the effect of the new delegation power found in the *Trustee Act 2000* (UK), the power conferred by section 54(1) of the *Trusts Act 1973* (Qld) would be sufficient to enable the employment of an agent outside Queensland, who could give effect to the trustee's decisions, without needing the additional authority to exercise the

³² 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.

³³ 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'.

³⁴ *Trustee Act 1958* (Vic) s 28(2); *Trustees Act 1962* (WA) s 53(2); *Trustee Act 1956* (NZ) s 29(2).

³⁵ See [4.57] ff below.

³⁶ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [4.12].

³⁷ *Ibid* [4.13].

³⁸ *Ibid*.

discretions, trusts and powers of the trustee.³⁹ The Commission therefore sought submissions on whether section 54(2) of the *Trusts Act 1973* (Qld) should be retained or omitted.⁴⁰

Consultation

4.34 The Queensland Law Society, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law submitted that section 54(2) of the *Trusts Act 1973* (Qld) should be omitted. Both the Queensland Law Society and the Public Trustee considered that the general power to appoint agents given by section 54(1) is sufficient.

4.35 However, the Bar Association of Queensland submitted that section 54(2) should be retained. In its view, although ‘the need to differentiate between Queensland as a “country” foreign from other States ... is gone’, the powers conferred by section 54(2) ‘would not be inutile ... in respect of property outside Australia’.

The Commission’s preliminary view

4.36 The Commission considers that the extent to which a trustee may delegate his or her discretions and powers should not depend on the location of the trust property. Although the power of delegation conferred by section 54(2) may once have been necessary, such a wide power can no longer be justified given the ease with which trustees can communicate with interstate or overseas agents. Accordingly, the Commission is of the view that the new legislation should not include a provision to the effect of section 54(2) of the *Trusts Act 1973* (Qld).

Power to appoint a solicitor or financial institution to receive money payable to the trustee: section 54(3)–(4)

4.37 Section 54(3) of the *Trusts Act 1973* (Qld) empowers a trustee to appoint a solicitor or a financial institution⁴¹ to receive, and give a discharge for, certain money receivable by, or payable to, the trustee.

4.38 Section 54(3)(a) enables a trustee to appoint a solicitor as the trustee’s agent to receive, and give a discharge for, any money, valuable consideration or property receivable by the trustee, by permitting the solicitor to have and produce an instrument endorsed with a receipt signed by the person entitled to give the receipt. Similarly, section 54(3)(b) enables a trustee to appoint 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, by permitting the financial institution or solicitor to have and produce the policy of insurance with a receipt signed by the trustee.

4.39 The effect of section 54(4) is that the appointment of an agent under section 54(3) does not of itself constitute a breach of trust. However, the provision

³⁹ *Trusts Discussion Paper* (2012) [9.47].

⁴⁰ *Ibid* 352.

⁴¹ See n 15 above for the meaning of ‘financial institution’.

does not protect a trustee who permits money or trust property to remain under the control of the solicitor or banker for longer than is reasonably necessary.⁴² This is consistent with the liability of a trustee under the general law.⁴³

4.40 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.⁴⁴

Historical background

4.41 Section 54(3)–(4) of the *Trusts Act 1973* (Qld) has its origins in section 2 of the English *Trustee Act 1888*. That provision was ultimately replaced by section 23(3) of the *Trustee Act 1925*, which has since been repealed by the *Trustee Act 2000* (UK).⁴⁵

4.42 The original provision in the *Trustee Act 1888* was enacted in response to the decision of the English Court of Appeal in *Re Bellamy and Metropolitan Board of Works*.⁴⁶ At the time, there was no general statutory power for trustees to employ agents, as is now found in section 54(1) of the *Trusts Act 1973* (Qld). The first provision to confer such a power was section 23(1) of the English *Trustee Act 1925*, which later formed the basis for section 54(1) of the Queensland Act.

4.43 *Re Bellamy and Metropolitan Board of Works* concerned the effect of section 56 of the English *Conveyancing and Law of Property Act 1881*, which provided that, where a solicitor produces a deed that has in the body of it, or endorsed thereon, a receipt for money or other consideration, the executed deed or signed receipt is sufficient authority to the person liable to pay the money for paying the money or giving the consideration to the solicitor, without the solicitor producing any separate or other authority from the person who executed the deed or signed the receipt endorsed on the deed. A provision in similar terms to section 56 is still found in section 66(1) of the *Property Law Act 1974* (Qld).

4.44 In *Re Bellamy and Metropolitan Board of Works*, the Court of Appeal considered that the purpose of section 56 was to obviate the need for the solicitor to produce a separate authority from the vendor to receive the money or consideration.⁴⁷ However, it held that the section did not enlarge the power of a trustee to appoint a solicitor to receive purchase money.⁴⁸

⁴² See *Robinson v Harkin* [1896] 2 Ch 415; *Wyman v Paterson* [1900] AC 271; *Re Sheppard* [1911] 1 Ch 50.

⁴³ See *Wood v Weightman* (1872) LR 13 Eq 434, 436 (Lord Romilly MR).

⁴⁴ *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’.

⁴⁵ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 23, sch 4 pt II.

⁴⁶ See FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 76.

⁴⁷ (1883) 24 Ch D 387, 399 (Cotton LJ).

⁴⁸ *Ibid* 403 (Bowen LJ). See also at 400 (Cotton LJ).

I do not say, and I do not think it can be said, that this section does not apply to the case of trustees. It appears to me that it applies to the case of any trustee who would be right in authorizing his solicitor to receive the purchase-money upon a written direction. All that seems to me to be clear is, that it does not enlarge the power of trustees as to the employment of a solicitor, but leaves it exactly where it was before.

4.45 As to the power of a trustee to appoint a solicitor to receive purchase money, Bowen LJ held that there was 'no invariable rule',⁴⁹ but must depend on the circumstances of each case.⁵⁰

I can conceive many cases in which it would be reasonable that he should employ a solicitor to receive the purchase-money, but still a solicitor, to use the language of a Judge in a well-known case, is not employed to receive the purchase-money except in the case of moral necessity. It must depend upon the circumstances of each case whether he was properly so employed or not ...

4.46 As a result, the Court of Appeal held that the purchasers were entitled to require that the trustees either attend the settlement to receive the settlement proceeds or give the purchasers a written direction to pay the purchase money into a bank account in the name of all the trustee-vendors.

Discussion Paper

4.47 In the Discussion Paper, the Commission observed that the provisions that section 54(3) of the *Trusts Act 1973* (Qld) replaced⁵¹ were enacted well before trustees had the general power to employ agents (including for the receipt of money) that is now conferred by section 54(1) of the Act.⁵²

4.48 The Commission sought submissions on whether, in view of the general power to employ agents conferred by section 54(1), it is necessary to retain any part of section 54(3).⁵³

Consultation

4.49 The Queensland Law Society, the Bar Association of Queensland, Professor Lee and a legal practitioner who practises in trusts and succession law submitted that section 54(3) is no longer necessary. Professor Lee stated that section 54(1) is sufficient and that section 54(3)–(4) 'merely add complexity'.

4.50 However, the Public Trustee considered that there is possibly a need to retain a modified form of section 54(3), 'at least to the extent that the agent appointed may have the custody of ... a receipt already signed by the trustee'.

49 Ibid 403.

50 Ibid 404. Cotton LJ (at 400) held that there 'may be circumstances which would justify and render it necessary for trustees to grant power to somebody else to receive purchase-money for them, but as a general rule I think it may be safely laid down that it is their duty not to authorize or delegate to an agent or solicitor the power to receive the money'.

51 *Trustees and Executors Act 1897* (Qld) s 16(1)–(2).

52 *Trusts Discussion Paper* (2012) [9.55].

53 Ibid 355.

The Commission's preliminary view

4.51 As explained earlier, the original English provision in which section 54(3) has its origins was enacted at a time when the courts considered that trustee-vendors would not ordinarily be authorised to employ solicitors to receive settlement moneys and when trusts legislation did not confer a power on trustees to employ agents. However, it is now customary for solicitors to be retained to attend settlements and to receive settlement moneys, and trustees have a general power under section 54(1) of the Act to employ agents for various purposes (including for the receipt of money), which will be preserved by the new legislation. In view of those matters, the Commission considers that section 54(3) is no longer needed, and that the new legislation should not include a provision to that effect. Consequently, it is not necessary for the new legislation to include provisions to the effect of section 54(4)–(5).

WHETHER THE ACT SHOULD ENABLE TRUSTEES TO APPOINT A THIRD PARTY TO EXERCISE SOME OF THEIR DISCRETIONS

4.52 Under the general law, trustees are ordinarily required to act personally.⁵⁴ As a result, unless they are authorised to do so,⁵⁵ trustees may not delegate the exercise of their duties or powers,⁵⁶ not even to a co-trustee.⁵⁷ Accordingly, while they may take advice from experts, they cannot delegate the exercise of their discretions:⁵⁸

[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.

4.53 Except in the limited circumstances in which section 56 of the *Trusts Act 1973* (Qld) applies,⁵⁹ the Act does not make provision for a trustee to appoint a third party to exercise some of the trustee's discretions.

4.54 This part of the chapter considers whether the new legislation should make provision for a trustee to appoint a third party for that purpose 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 trustee's investment powers, which has been the main issue driving this debate

⁵⁴ *Turner v Corney* (1841) 5 Beav 515, 517; 49 ER 677, 678 (Lord Langdale MR).

⁵⁵ See *Pilkington v Inland Revenue Commissioners* [1964] AC 612, 634 (Viscount Radcliffe).

⁵⁶ *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).

⁵⁷ *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596 (Kay J).

⁵⁸ *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).

⁵⁹ *Trusts Act 1973* (Qld) s 56 is considered at [4.196] ff below.

in those overseas jurisdictions where legislation has been enacted or recommended to this effect.

4.55 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.⁶⁰ However, Ford and Lee have observed that:⁶¹

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.

4.56 As explained below, in a number of overseas jurisdictions, legislation has been enacted or recommended to give trustees broader powers to authorise a person to exercise certain of the trustees' decision-making functions (particularly in relation to the making of investments).

Overseas jurisdictions

England

4.57 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).⁶² 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 an agent (or of any substitute appointed by the agent).

4.58 These provisions implemented the recommendations of the Law Commission of England and Wales.⁶³ The Law Commission was generally of the view that:⁶⁴

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.

⁶⁰ See, eg, *Jones v AMP Perpetual Trustee Company NZ Ltd* [1994] 1 NZLR 690, 705 (Thomas J).

⁶¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 16 January 2012) [9.12450].

⁶² *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 23, sch 4 pt II.

⁶³ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) pt IV.

⁶⁴ *Ibid* [4.6]. See also Alberta Law Reform Institute, *Trustee Investment Powers*, Report No 80 (2000) [219].

General power to authorise an agent to exercise ‘delegable functions’

4.59 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’.

4.60 ‘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*.⁶⁵

- (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.

4.61 ‘Delegable functions’, for a charitable trust, are defined in positive terms: They are.⁶⁶

- (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 trade⁶⁷ 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)

Terms on which agents may be appointed

4.62 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.⁶⁸

- permit the agent to appoint a substitute;
- restrict the liability of the agent or his substitute to the trustees or any beneficiary; and

⁶⁵ *Trustee Act 2000* (UK) c 29, s 11(2).

⁶⁶ *Trustee Act 2000* (UK) c 29, s 11(3). The Law Commission 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’: Law Commission of England and Wales, *Trustees’ Powers and Duties*, Report No 260 (1999) [4.40].

⁶⁷ See *Trustee Act 2000* (UK) c 29, s 11(4).

⁶⁸ *Trustee Act 2000* (UK) c 29, s 14(2)–(3).

- permit the agent to act in circumstances capable of giving rise to a conflict of interest.

4.63 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. It noted, for example, that the standard terms and conditions for fund managers commonly make provision for subdelegation and limit the manager’s liability.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’,⁷⁰ but acknowledged that it was also necessary for practical reasons.⁷¹

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.

Specific requirements in relation to the delegation of ‘asset management functions’

4.64 Section 15 of the *Trustee Act 2000* (UK) imposes special restrictions on the appointment of a person to exercise the trustees’ ‘asset management functions’, which are defined as their functions relating to:⁷²

- the investment of assets subject to the trust,
- the acquisition of property which is to be subject to the trust, and
- managing property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property.

4.65 Section 15(1) provides that 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’. The Law Commission considered that:⁷³

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)

4.66 Section 15(2)–(4) further requires trustees who wish to delegate their asset management functions to prepare a written policy statement to give guidance

⁶⁹ Law Commission of England and Wales, *Trustees’ Powers and Duties*, Report No 260 (1999) [4.26].

⁷⁰ *Ibid* [4.28].

⁷¹ *Ibid* [4.27].

⁷² *Trustee Act 2000* (UK) c 29, s 15(5). Section 15 is set out in *Trusts Discussion Paper* (2012) [9.71].

⁷³ Law Commission of England and Wales, *Trustees’ Powers and Duties*, Report No 260 (1999) [4.18].

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

4.67 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'⁷⁴ that they have and, if they consider that there is a need, they must exercise the power.

4.68 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

4.69 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:⁷⁵

- 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

4.70 The provisions of the *Trustee Act 2000* (UK) that deal with the authorisation of agents to exercise the delegable functions of trustees, as well as the provisions that deal with the review of those arrangements, apply to all trusts whether created before or after the commencement of those provisions.⁷⁶ However,

⁷⁴ *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.

⁷⁵ *Trustee Act 2000* (UK) c 29, s 2, sch 1 para 3. Section 1(1) of that Act is set out at [6.63] below.

⁷⁶ *Trustee Act 2000* (UK) c 29, s 27.

the provisions apply 'subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation'.⁷⁷ The Law Commission of England and Wales considered that existing trusts would benefit most from these reforms:⁷⁸

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.

Ireland

4.71 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).⁷⁹ However, it considered that the scope of the non-delegable function in relation to the distribution of trust assets⁸⁰ 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'.⁸¹

4.72 The Law Reform Commission of Ireland agreed with the approach adopted in the *Trustee Act 2000* (UK), which allows co-trustees, but not beneficiaries, to be appointed as agents.⁸² 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.⁸³

New Zealand proposals

4.73 The Law Commission of New Zealand has made the preliminary proposal that new legislation should authorise trustees to appoint agents to carry out 'administrative functions', but not 'trustee functions'. The provision would define a 'trustee function' as:⁸⁴

- (i) a function related to a decision regarding the distribution, use, possession, or other beneficial enjoyment of trust property;
- (ii) a power to decide whether any fees should be paid or other payment should be made out of income or capital;

⁷⁷ *Trustee Act 2000* (UK) c 29, s 26.

⁷⁸ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [4.35].

⁷⁹ See Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008), Draft *Trustee Bill 2008*, cl 15.

⁸⁰ See *Trustee Act 2000* (UK) c 29, s 11(2) at [4.60] above.

⁸¹ 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).

⁸² *Ibid* [6.21].

⁸³ *Ibid* [6.29].

⁸⁴ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 83 (Proposal P15(a)).

- (iii) a power to decide whether payments received should be appropriated to income or capital;
- (iv) a power to appoint a person to be, or to remove, a trustee of the trust;
- (v) a power of appointment (including a power to appoint a person to be, or to remove, a beneficiary);
- (vi) a power to appoint or change the distribution date of trust funds;
- (vii) a power to resetttle the trust, or to amend, revoke, or revoke and replace terms or provisions of a trust deed;
- (viii) a right conferred by this Act to apply to the court;
- (ix) the power to authorise another person to perform any of the functions of the trustees or trustee.

4.74 However, it proposed that new legislation should authorise trustees to appoint investment managers and give them authority to make decisions about investments.⁸⁵ This would be a default position, which could be modified or excluded by the trust deed.⁸⁶

4.75 The appointment of investment managers would be subject to certain legislative safeguards. Trustees would be required to act honestly and in good faith and to exercise reasonable care when appointing an investment manager, and to review the investment manager's performance periodically.⁸⁷

4.76 The Law Commission of New Zealand also proposed that new legislation should require trustees to create a written policy statement that gives guidance as to how investment functions are to be exercised by an investment manager, setting out the general investment objectives, and should also require investment managers to agree to comply with the policy statement.⁸⁸ It stated that:⁸⁹

This would be an effective way of requiring the trustees to think carefully about the purpose of the trust and requiring investment strategies consistent with such purpose, rather than completely washing their hands of the investment role when an investment manager is used. It would be a practical way of emphasising the trustee's ultimate role of accounting for trust property for the benefit of the beneficiaries. We do not envisage that this would be a detailed policy, but more a basic statement of the general approach to risk and to the types of returns that are desirable. The statement would allow trustees to ensure the investment strategy takes into account the interests and needs of the beneficiaries, including potentially the individual beneficiaries' needs, depending on the number and nature of the beneficiaries of the trust.

85 Ibid 104 (Proposal P20(1)).

86 Ibid [5.56].

87 Ibid 104 (Proposal P20(2)(a)).

88 Ibid (Proposal P20(2)(b)).

89 Ibid [5.63].

4.77 The Law Commission of New Zealand did not consider it ‘appropriate to prescribe in legislation the classes of organisation or people to whom investment decision-making powers can be delegated’. It considered that the ‘duty to act prudently should be sufficient’ and that ‘the investment world changes frequently so any list of approved organisations would quickly become outdated’.⁹⁰

Canada

4.78 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.⁹¹ Under this 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.⁹²

4.79 In its review of the law of trusts, the British Columbia Law Institute considered that expanded powers of delegation should be given to trustees, especially in relation to investment.⁹³ Its recommended provision would confer a broad power to appoint agents, but would prohibit the delegation of a trustee’s distributive or dispositive powers.⁹⁴

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.

...

4.80 The British Columbia Law Institute explained that, in its view, the relevant distinction is between dispositive and other powers, rather than between administrative powers and powers that involve the exercise of a discretion:⁹⁵

⁹⁰ Ibid [5.62].

⁹¹ *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).

⁹² *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).

⁹³ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 33.

⁹⁴ Ibid, Proposed *Trustee Act*, cl 7.

⁹⁵ Ibid 33.

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.

4.81 The recommended provision has not yet been enacted in British Columbia, but has been adopted in Saskatchewan.⁹⁶

Scotland

4.82 The Scottish Law Commission 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'.⁹⁷ It was critical of the draft provision recommended by the British Columbia Law Institute. In its view, clause 7(2) of the Proposed *Trustee Act* 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'.⁹⁸

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.

4.83 The Scottish Law Commission 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. It considered that trustees 'should have to decide the basic strategy for carrying out the trust and whether to retain or dispose of substantial assets'.⁹⁹

4.84 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.¹⁰⁰

4.85 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'.¹⁰¹ It noted that, at present, it considered

⁹⁶ *Trustee Act 2009*, SS 2009, c T-23.01, s 11.

⁹⁷ Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) [3.10].

⁹⁸ *Ibid* [3.12].

⁹⁹ *Ibid* [3.13].

¹⁰⁰ *Ibid* [3.14].

¹⁰¹ *Ibid*.

that 'it would be very difficult to frame rules applicable to all trusts that provided clearer guidance than the existing common law'.¹⁰²

Discussion Paper

4.86 In the Discussion Paper, the Commission sought submissions on the threshold issue of whether there is a need for the legislation to be amended to allow trustees to delegate the exercise of certain of their powers to a third party.¹⁰³ It also sought submissions on the further issues that would arise if such a power were conferred on trustees, namely:¹⁰⁴

- whether the Act should provide a general power for trustees to delegate their powers to another person (subject to specified exceptions) or whether the Act should make provision only for the delegation of trustees' powers of investment;
- whether or not particular provisions of the *Trustee Act 2000* (UK) should be included in the Act, such as the provisions:
 - enabling trustees to authorise a person to act on particular terms; and
 - 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; and
- what safeguards should be included in the Act.

4.87 The Commission also sought submissions on whether, if the legislation were amended to give trustees the power to appoint another person to exercise certain of the trustees' powers, that power should apply subject to a contrary intention in the trust instrument, or whether or not a contrary intention is expressed in the trust instrument.¹⁰⁵

Consultation

Appointment of another person to exercise the trustees' discretions

4.88 Two respondents were of the view that there is no need for an amendment to allow trustees to delegate the exercise of certain of their powers. The Queensland Law Society did not consider that such an amendment was needed, 'given the powers trustees already have to appoint agents and attorneys'. A legal practitioner who practises in trusts and succession law expressed a similar view, noting that trustees are entrusted to that role by the settlor or testator.

102 Ibid.

103 *Trusts Discussion Paper* (2012) 366.

104 Ibid 366–7.

105 Ibid 422.

4.89 Professor Lee was also generally of the view that the legislation should not be amended to allow trustees to delegate the exercise of certain of their powers. However, he considered that it might be useful to allow trustees to employ fund managers who should be permitted to buy and sell, and that the legislation could provide that trustees 'may employ agents to invest trust assets in accordance with the provisions of Part 3 of the Act'.

4.90 The Bar Association of Queensland considered that there should be 'clarification of the types of powers that a trustee may delegate and may not delegate', and that the 'distinction drawn in other jurisdictions between dispositive powers and administrative or management powers should be maintained'. It did not favour a general power for trustees to delegate the exercise of their powers, but expressed some support for a more limited power to delegate:

The general rule of no delegation should be maintained, with specific exceptions for management type powers ...

4.91 The Bar Association of Queensland commented that the relaxation in relation to conflict of interest provisions, as has occurred under the English legislation, would require 'considerable thought'. In its view, the legislation should not allow trustees to appoint a delegate on such terms unless the trustee has the fully-informed consent of all the beneficiaries or the appointment is specifically authorised by the trust instrument.

4.92 In relation to safeguards, the Bar Association of Queensland expressed the view that:

A delegate must account to the trustee to allow the trustee to account to the beneficiaries. So the trustee retains at all times the duty to oversee the delegation within the limits of prudence.

4.93 The Public Trustee considered that the legislation should be amended to allow for a greater delegation of a trustee's discretions because:

Trusteeships are increasingly a specialised task and in particular the obligation to invest, including in accordance with the modern portfolio investment techniques, do require a rebalancing of the trustee's traditional proscription in respect of delegations.

4.94 The Public Trustee generally favoured the adoption of provisions to the effect of sections 11, 14 and 15 of the *Trustee Act 2000* (UK), including the prohibition in section 12 on authorising a beneficiary to exercise any function as agent. In relation to liability, the Public Trustee expressed the view that 'such greater power should be accompanied by a limitation on liability for the acts of a delegate'. He favoured the adoption of the provisions in section 22 of the *Trustee Act 2000* (UK) requiring the trustee, among other things, to keep those arrangements under review.

The effect of a contrary intention in the trust instrument

4.95 This issue was addressed by the Queensland Law Society, the Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law. All of these respondents

were of the view that, if introduced, the power to authorise a person to exercise certain of the trustee's powers should apply subject to a contrary intention in the trust instrument.

4.96 The Queensland Law Society commented that 'the trust instrument should be able to limit this power as it creates significant exceptions to the usual duty to act personally'.

4.97 The Bar Association of Queensland considered that 'if the settlor has expressly applied its mind to a particular issue, there is no reason for a trustee to be empowered to act contrary to the settlor's intentions'. Similarly, Professor Lee commented that the provision 'should be subject to any contrary intention in the trust instrument because the creator of the trust may wish the trust property to be managed by the trustees and by no-one else'.

4.98 The Public Trustee observed that this approach would be consistent with the position adopted in England.

The Commission's preliminary view

4.99 As a general proposition, the Commission considers that trustees should exercise their powers and discretions personally unless authorised by the trust instrument to do otherwise.

4.100 The Commission acknowledges, however, that, for many trusts, the management of their investments can require considerable expertise, and that it may be in the interests of the beneficiaries for the trustees to be able to authorise a person to exercise their powers of investment. To that extent, the new legislation should make provision for trustees to delegate their powers and discretions. It should also require that the authorisation of a person for this purpose is made or evidenced in writing.¹⁰⁶

4.101 The Commission does not favour the approach adopted in some overseas jurisdictions where trustees are given a very broad power to delegate, which is then made subject to a large number of exceptions. The Commission's recommended approach avoids the need to identify each power that should *not* be capable of being delegated, as well as the potential for uncertainty in relation to the scope of specified exceptions.

4.102 In exercising this power, trustees will be required to comply with the statutory duty of care that is recommended in Chapter 6 (as well as any other relevant duties to which they are subject). At this stage, however, the Commission does not make any recommendation about additional duties to which they should be subject in exercising this power.

4.103 In the Commission's view, the new legislation should not include a provision to the effect of section 14 of the *Trustee Act 2000* (UK), which authorises trustees to delegate on terms that: permit the delegate to appoint a substitute; restrict the liability of the delegate or substitute to the trustees or beneficiaries; or

¹⁰⁶

This is consistent with the requirement in s 15(1) of the *Trustee Act 2000* (UK) c 29.

permit the delegate to act in circumstances that give rise to a conflict of interest. While a settlor might choose to authorise a trustee to delegate on these terms, the Commission does not consider that such a wide power is appropriate for inclusion as a 'default' power that would apply to all trustees.

The effect of a contrary intention in the trust instrument

4.104 The Commission's recommendation that the new legislation should enable trustees to authorise a person to exercise their powers of investment creates a significant exception to the usual duty to act personally.

4.105 The Commission is therefore of the view that the recommended power should be subject to the expression of a contrary intention in the instrument (if any) creating the trust. This will allow a settlor to require a trustee to act personally in exercising these powers, and is consistent with the approach adopted in the English legislation.¹⁰⁷

NOMINEES, CUSTODIANS AND THE DEPOSIT OF DOCUMENTS FOR SAFE CUSTODY

Background

4.106 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':¹⁰⁸

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.

4.107 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, that, once there was no further need to refer to the deeds, 'then they could be put into a safe place'.¹⁰⁹

4.108 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.¹¹⁰ Further, where the trust documents are not

¹⁰⁷ *Trustee Act 2000* (UK) c 29, s 26(b).

¹⁰⁸ *Field v Field* [1894] 1 Ch 425, 429 (Kekewich J).

¹⁰⁹ *Ibid* 430.

¹¹⁰ *Cottam v Eastern Counties Railway Co* (1860) 1 J & H 243, 247; 70 ER 737, 739 (Wood V-C). 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.

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.¹¹¹

4.109 The duty of trustees in relation to trust documents was considered by the High Court in *Austin v Austin*.¹¹² In that case, 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 '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'.¹¹³ The High Court held that the trustee was not guilty of any breach of trust, and referred to the practice of leaving trust documents in the custody of trustees' solicitors.¹¹⁴

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 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.

Deposit of documents for safe custody

4.110 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 institution 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.

¹¹¹ *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'.

¹¹² (1906) 3 CLR 516.

¹¹³ *Ibid* 525 (Griffith CJ, Barton and O'Connor JJ), citing *Speight v Gaunt* (1883) 9 App Cas 1, 19 (Lord Blackburn).

¹¹⁴ *Ibid* 526.

4.111 Similar provision is made in the ACT, New South Wales, Victoria, Western Australia and New Zealand.¹¹⁵

4.112 Section 49 of the *Trusts Act 1973* (Qld) was based on the former section 21 of the English *Trustee Act 1925*. In recommending a provision to that effect in its 1971 Report, the Commission commented:¹¹⁶

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 ...

Nominees and custodians

4.113 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),¹¹⁷ which instead makes provision for trustees to appoint 'nominees' and 'custodians' in relation to trust assets.¹¹⁸ These changes implemented recommendations made by the Law Commission of England and Wales, which considered that the power then conferred by section 21 of the *Trustee Act 1925* was 'very limited', noting that:¹¹⁹

- (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. (emphasis in original)

4.114 The last of these criticisms does not apply to section 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.

4.115 The Explanatory Notes to the *Trustee Act 2000* (UK) outlined the limitations in the current law that the new provisions were intended to overcome:¹²⁰

¹¹⁵ *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'.

¹¹⁶ *Trusts and Settled Land Report* (1971) 41.

¹¹⁷ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 21, sch 4 pt II.

¹¹⁸ *Trustee Act 2000* (UK) c 29, ss 16–17.

¹¹⁹ Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [7.6].

¹²⁰ Explanatory Notes, *Trustee Act 2000* (UK) [68].

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 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.

4.116 The Explanatory Notes further described how the ability to appoint nominees and custodians would facilitate modern investment management:¹²¹

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.

4.117 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’.

4.118 Section 17 of that Act 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’.

4.119 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.¹²²

4.120 A person may not be appointed as a nominee or custodian under the *Trustee Act 2000* (UK) unless the person:¹²³

- 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;¹²⁴ or

121 Ibid.

122 *Trustee Act 2000* (UK) c 29, ss 16(3), 17(4).

123 *Trustee Act 2000* (UK) c 29, s 19(1)–(2).

124 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).

- is a body corporate recognised under section 9 of the *Administration of Justice Act 1985* (UK) (essentially, an incorporated legal practice).

4.121 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 or, in some cases, the same safeguards as apply to the appointment of an ‘agent’ under section 11 of the *Trustee Act 2000* (UK) to exercise all or any of the delegable functions of the trustees. Briefly, the Act provides that trustees:

- must not, unless it is reasonably necessary for them to do so, appoint a person to act as a nominee or custodian on terms that: 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;¹²⁵
- must keep under review the arrangements under which the nominee or custodian is appointed;¹²⁶ and
- 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 22.¹²⁷

4.122 As explained later in this chapter, 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.

Discussion Paper

Deposit of documents for safe custody

4.123 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to include a provision to the general effect of section 49 and, if so, whether there should be any change to the types of entities with which trust documents may be deposited for safe custody.¹²⁸

¹²⁵ *Trustee Act 2000* (UK) c 29, s 20.

¹²⁶ *Trustee Act 2000* (UK) c 29, s 22. See [4.67] above for a discussion of this same requirement in relation to an agent who has been appointed to exercise the trustees’ delegable functions.

¹²⁷ *Trustee Act 2000* (UK) c 29, s 2, sch 1 para 3. See [4.69] above for a discussion of these same requirements in relation to an agent who has been appointed to exercise the trustees’ delegable functions.

¹²⁸ *Trusts Discussion Paper* (2012) 415.

Nominees and custodians

4.124 In the Discussion Paper, the Commission also sought submissions on several issues in relation to the appointment of nominees and custodians, namely:¹²⁹

- whether there is a need for trustees to have additional powers to appoint nominees and custodians;
- if so, whether there are particular provisions of the *Trustee Act 2000* (UK) that should or should not be included in the legislation, for example, the provisions relating to the terms on which nominees and custodians may be appointed; and
- whether particular safeguards should be included in the legislation.

Consultation

Deposit of documents for safe custody

4.125 The Queensland Law Society and Professor Lee each submitted that the *Trusts Act 1973* (Qld) should continue to include a provision to the general effect of section 49. The Queensland Law Society considered that the provision operated as a guide to trustees as to where they should deposit documents relating to the trust and trust property. Professor Lee commented that section 49 is 'brief and to the point' and that there is 'no harm in retaining it'.

4.126 However, the Bar Association of Queensland did not support the retention of a provision to the effect of section 49. In its view, section 49 (and section 19, which provides for the appointment of custodian trustees) should be replaced with:

a regime modelled on [the provisions of the *Trustee Act 2000* (UK)] that allow a trustee to appoint (a) nominees in whom trust property may be vested and (b) persons to take possession of trust property for its safe custody.

4.127 A legal practitioner who practises in trusts and succession law also submitted that the legislation should not continue to include a provision to the effect of section 49.

Nominees and custodians

4.128 The Bar Association of Queensland, the Public Trustee and Professor Lee each submitted that there is a need for trustees to have additional powers to appoint nominees and custodians.

4.129 The Bar Association of Queensland commented that:

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Ibid 415–16.

the commercial need for both agents in whom trust property can be vested and persons to keep trust property safe appears to have increased rather than decreased and so more flexibility is desirable, as well as increased safeguards for beneficiaries.

4.130 The Public Trustee also considered that the need to appoint nominees and custodians 'is particularly relevant to investment management'. He observed that, while the constituent trust deeds will ordinarily provide the types of powers required, it would nevertheless be appropriate to make statutory provision for the appointment of nominees and custodians by adopting provisions to the effect of sections 16 and 17 of the *Trustee Act 2000* (UK).

4.131 The Bar Association of Queensland also favoured the adoption of the provisions of the *Trustee Act 2000* (UK) dealing with nominees and custodians, including the various safeguards included in that Act.

4.132 Professor Lee was also attracted to the English provisions, and commented that the adoption of those provisions would have the benefit of being able to use the English case law that has developed in relation to them. However, he considered that the provisions are 'rather long-winded and labyrinthine', and expressed a preference for something simpler, but not different in substance. Expanding on his earlier suggestion in relation to the exercise of trustees' investment powers,¹³⁰ he suggested that trustees should be able to employ agents, including custodians and nominees, to invest trust assets in accordance with Part 3 of the *Trusts Act 1973* (Qld). He considered that the restraints in Part 3 would be worthless if they did not also apply to agents, nominees and custodians.

4.133 However, the Queensland Law Society and a legal practitioner who practises in trusts and succession law each submitted that there is no need for trustees to have additional powers to appoint nominees or custodians of trust property.

The Commission's preliminary view

Deposit of documents for safe custody

4.134 The Commission is of the view that the new legislation should include a provision to the general effect of section 49 of the *Trusts Act 1973* (Qld). This will ensure that there is continued certainty about the power of trustees to deposit documents relating to the trust, or to the trust property, for safe custody.

Nominees and custodians

4.135 Where a settlor considers it appropriate for the trustees to be able to appoint nominees who are vested with title to the trust property, or custodians to undertake the safe custody of trust property, the trust instrument can authorise the trustees to make the relevant appointments. At this stage of the review, however, the Commission does not consider that there is a strong case for legislative reform to enable trustees to appoint nominees and custodians as a matter of course.

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See [4.89] above.

CUSTODIAN TRUSTEES

Introduction

4.136 Section 19 of the *Trusts Act 1973* (Qld) makes provision for any corporation that could be appointed to be a trustee of a trust to be appointed as a 'custodian trustee'. Similar provision is made in some of the other Australian jurisdictions, in New Zealand, and in England.¹³¹

4.137 Where a corporation is appointed as custodian trustee, the trust property is vested in the corporation as if it were the sole trustee.¹³² 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 remaining 'managing' trustees.¹³³ To that end, the custodian trustee must 'execute all such documents and perform all such acts as the managing trustees in writing direct'.¹³⁴

4.138 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'.¹³⁵ For example, the power of a trustee to appoint new trustees is exercisable by the managing trustees alone.¹³⁶

4.139 The custodian trustee is not liable for acting on a direction given by the managing trustees, nor for any act or default on the part of the managing trustees.¹³⁷ However, if the custodian trustee 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', it may seek directions from the court.¹³⁸

4.140 In *Re Brooke Bond & Co Ltd's Trust Deed*, Cross J explained the nature of a custodian trustee's role:¹³⁹

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

¹³¹ *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; *Te Ture Whenua Maori Act 1993* (NZ) ss 222(4), 225; *Public Trustee Act 1906*, 6 Edw 7, c 55, s 4.

¹³² *Trusts Act 1973* (Qld) s 19(2)(a).

¹³³ *Trusts Act 1973* (Qld) s 19(2)(c).

¹³⁴ *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).

¹³⁵ *Trusts Act 1973* (Qld) s 19(2)(b).

¹³⁶ *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.

¹³⁷ *Trusts Act 1973* (Qld) s 19(2)(e), (f).

¹³⁸ *Trusts Act 1973* (Qld) s 19(2)(e).

¹³⁹ [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).

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.

4.141 Although a custodian trustee exercises a 'lesser' function which is differentiated from the functions of an ordinary trustee,¹⁴⁰ 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.¹⁴¹

4.142 The concept of a custodian trustee under section 19 of the Act differs from other concepts that involve a third party in holding or dealing with trust property. Although it has been likened to the use of an ongoing bare trustee,¹⁴² custodian trusteeship differs from a bare trust:¹⁴³

the custodian trustee is not (like a bare trustee) bound to give effect, for example by voting [as the registered shareholder of a company], in all cases (not involving criminal liability) to the wishes or directions of the managing trustees. Thus he is not so bound if the directed exercise involves a breach of trust. The distinction (between a custodian and bare trustee) is, for practical purposes, perhaps a fine one; but it is a real one.

Whether the legislation should continue to provide for the appointment of custodian trustees

4.143 Section 19 of the Act permits, but does not require, the use of corporate custodian trustees. The appointment of a custodian trustee effectively creates two different types of trustees of the same property with different duties and powers — one corporate trustee in whom title to the property is vested and who is thereby responsible for dealing with the property, but only as directed; and the managing trustees who retain the management of the trust property and the exercise of the powers and discretions exercisable by the trustees under the trust.

4.144 It has been explained that '[t]his mechanism allows for a separation between legal ownership, management, and beneficial interest'.¹⁴⁴

4.145 When discussing the Trustee Bill 1956 (NZ), the Attorney-General commented on the expected use of custodian trustees:¹⁴⁵

140 *Forster v Williams Deacon's Bank Ltd* [1935] Ch 359, 367 (Lord Hanworth MR), 372 (Clauson J).

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

142 NC Kelly, C Kelly and G Kelly, *Garrow and Kelly Law of Trusts and Trustees* (LexisNexis, 6th ed, 2005) 445, cited in Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [7.2].

143 *Inland Revenue Commissioners v Silverts LD* [1951] Ch 521, 526 (Evershed MR).

144 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [7.2].

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.

4.146 One of the primary advantages 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, whilst management of the trust remains with the individual trustees.¹⁴⁶

4.147 The other main advantage of custodian trusteeship is in 'ensuring the security of the trust fund against possible breaches of trust',¹⁴⁷ for example, by:

- reducing the risk of misappropriation by the trustees of the trust property, since title is not held by the managing trustees;¹⁴⁸ and
- providing 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.¹⁴⁹

4.148 It is difficult to know the extent to which custodian trustees are used in Australia. In England, where only certain types of corporations can be appointed,¹⁵⁰ 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.¹⁵¹ More recently, the Law Commission of New Zealand has observed that custodian trusteeship is 'widely used in Māori land trusts, and trusts with overseas assets or an overseas managing trustee'.¹⁵² In that jurisdiction, as in Queensland, any corporation can be appointed as a custodian trustee.

¹⁴⁵ New Zealand, *Parliamentary Debates*, House of Representatives, 11 October 1956, 2383–4 (J Marshall, Attorney-General). See also SG Maurice, 'The Office of Custodian Trustee' (1960) 24 *The Conveyancer and Property Lawyer* 196, 199, 203–4 in which it is suggested that custodian trusteeship is likely to be 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.

¹⁴⁶ 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]; *Trusts and Settled Land Report* (1971) 17.

¹⁴⁷ Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [7.10].

¹⁴⁸ *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].

¹⁴⁹ SG Maurice, 'The Office of Custodian Trustee' (1960) 24 *The Conveyancer and Property Lawyer* 196, 199, 204. See *Trusts Act 1973* (Qld) s 19(2)(e).

¹⁵⁰ See [4.160] below.

¹⁵¹ Law Reform Committee (UK), *Twenty-Third Report: The Powers and Duties of Trustees*, Cmnd 8733 (1982) 40.

¹⁵² Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [7.2].

Other jurisdictions

4.149 As noted above, provisions allowing the appointment of custodian trustees are made in four other Australian jurisdictions, as well as in New Zealand and England.¹⁵³

4.150 In England, although separate provision has been made for the appointment of ‘nominees’ and ‘custodians’, it has not replaced the statutory power to appoint custodian trustees, which continues to operate. On the contrary, the provisions in relation to the appointment of nominees and custodian do not apply to any trust that already has a custodian trustee.¹⁵⁴

4.151 In its recent Issues Paper, the Law Commission of New Zealand has proposed that the legislation should continue to include a provision for the appointment of custodian trustees.¹⁵⁵ It noted that custodian trusteeship is ‘a convenient and flexible mechanism’, and that all of the submissions it received on this issue considered that it should be retained.¹⁵⁶ In its view, the new legislation should not alter the role of custodian trusteeship but should clarify that it is an ‘essentially administrative’ role.¹⁵⁷

Discussion Paper

4.152 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to make provision for custodian trustees, or whether section 19 of the Act should be omitted.¹⁵⁸

Consultation

4.153 The Public Trustee expressed the view that the provisions of section 19 of the Act have some utility and should be retained. He observed that, although custodian trustees are more commonly found in managed investment schemes, there are also other circumstances in which custodian trusteeship arises.

4.154 On the other hand, the Bar Association of Queensland submitted that section 19 should be omitted, preferring the introduction of provisions for the use of ‘nominees’:

The concepts of nominee or custodian ... provide what is needed. Assets may be held in nominee names, where appropriate. Where a portfolio of investments is placed with a financial institution for investment management, an investment management agreement is typically signed and the investments are registered in the name of the asset manager’s corporate nominee.

¹⁵³ See n 131 above.

¹⁵⁴ *Trustee Act 2000* (UK) c 29, ss 16(3), 17(4).

¹⁵⁵ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 137–8 (Proposal P29).

¹⁵⁶ *Ibid* [7.8], [7.13].

¹⁵⁷ *Ibid* [7.14].

¹⁵⁸ *Trusts Discussion Paper* (2012) 112.

4.155 The Financial Services Council also expressed the view that section 19 should be omitted. It considered that ‘custodian trustees no longer fulfil any useful role’.

4.156 Professor Lee submitted that the concept of custodian trusteeship should be brought ‘within the embrace of agency’. In his view, the Act should allow for the appointment of another person in whom title to the trust assets is vested and who is given the power to sell and manage those assets as the trustees’ agent.

4.157 The Queensland Law Society stated that it did not have a particular view on this issue.

The Commission’s preliminary view

4.158 In the Commission’s view, the new legislation should include a provision to the general effect of section 19 of the *Trusts Act 1973* (Qld) allowing for the appointment of custodian trustees. Because a custodian trustee appointed under the provision will still be a trustee, rather than merely an agent of the managing trustees, the appointment provides a simple mechanism for the holding of trust property over time by another party without losing the duties that are imposed on a trustee to act in the beneficiaries’ best interests. The Commission considers that, although the provision is likely to have less utility in circumstances where the trust property is already vested in a corporate trustee, it nevertheless provides a convenient mechanism for other trusts to establish a separation of legal ownership and management of the property where such a separation is desired.

Who may be appointed as a custodian trustee

4.159 Section 19(1) of the *Trusts Act 1973* (Qld) provides that ‘any corporation’ may be appointed as a custodian trustee of a trust. The position is the same in Western Australia and New Zealand.¹⁵⁹

4.160 In contrast, in some of the other jurisdictions, the appointment of a custodian trustee is limited to:

- the Public Trustee (in South Australia);¹⁶⁰
- the Public Trustee or a trustee company (in Tasmania);¹⁶¹
- State Trustees or an approved corporation (in Victoria);¹⁶² and
- the Public Trustee, a banking or insurance company, or another approved corporation (in England).¹⁶³

¹⁵⁹ *Trustees Act 1962* (WA) s 15(1); *Trustee Act 1956* (NZ) s 50(1).

¹⁶⁰ *Public Trustee Act 1995* (SA) s 17(1).

¹⁶¹ *Public Trustee Act 1930* (Tas) s 23; *Trustee Companies Act 1953* (Tas) s 18B(c).

¹⁶² *Trustee Act 1958* (Vic) s 71(2)–(3).

¹⁶³ *Public Trustee Act 1906*, 6 Edw 7, c 55, s 4(1), (3).

4.161 On the other hand, the Law Commission of New Zealand has proposed that the legislation should provide that one or more natural persons or bodies corporate may be appointed as a custodian trustee (or joint custodian trustees).¹⁶⁴ It observed that this would be consistent with the provision in the *Māori Land Act 1993* (NZ) for the appointment of ‘any individual or body’ as a custodian trustee of a Maori land trust.¹⁶⁵ It acknowledged that ‘there are some significant arguments against this approach’, including that the rationale of custodian trusteeship is, in part, ‘to allow the assets to be held by an entity that will provide consistency through time in a way that a natural person could not’. It also observed that the appointment of a natural person as custodian trustee could be provided for in the trust instrument. Nevertheless, it considered that ‘it is desirable to allow greater flexibility’ in the statutory default provision.¹⁶⁶

Discussion Paper

4.162 In the Discussion Paper, the Commission sought submissions on whether section 19(1) of the *Trusts Act 1973* (Qld) should continue to provide that ‘any corporation’ may be appointed to be custodian trustee of a trust.¹⁶⁷

Consultation

4.163 Four respondents addressed this issue — namely, the Queensland Law Society, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law. None of these respondents considered that, if section 19 of the Act is retained, it should limit the corporations that may be appointed to be custodian trustee.

4.164 The Queensland Law Society noted that, although it might provide greater protection, restricting the appointment of custodian trustees to licensed trustee companies ‘would probably see the use of the section reduced to a minimum of cases because of the additional expense’.

4.165 Professor Lee similarly observed that the appointment of a trustee company might be seen as too expensive. He also noted that the Public Trustee might not wish to assume the duties of custodian trusteeship, and that a ‘corporation created by the settlor can take account of specific family interests and ensure close cooperation between the custodians, adult beneficiaries and other trustees’.

4.166 The Public Trustee submitted that ‘it is no doubt desirable’ to have a ‘professional fiduciary’, such as the Public Trustee or a trustee company, accept the role of custodian trustee, but that he did not hold a strong view that the Act should limit the range of custodian trustees.

¹⁶⁴ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 138 (Proposal P29(j)).

¹⁶⁵ *Ibid* [7.21], referring to *Te Ture Whenua Maori Act 1993* (NZ) ss 222(4), 225.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Trusts Discussion Paper* (2012) 113.

4.167 The Discussion Paper did not raise, and the submissions did not comment on, whether an individual should be able to be appointed as a custodian trustee, as has been proposed by the Law Commission of New Zealand.

The Commission's preliminary view

4.168 The Commission is of the view that the provision in the new legislation based on section 19 of the Act should provide that 'any corporation' may be appointed to be custodian trustee of a trust.

4.169 In the Commission's view, one of the principal purposes of the provision is to ensure continuity of legal title to the trust property by vesting the property in a corporate entity. The Commission does not consider it necessary or desirable to restrict the types of corporations that may be appointed as custodian trustee, as is the case in some other jurisdictions, since that would reduce the flexibility and availability of the mechanism.

4.170 Nor does the Commission consider that the provision should be extended, as has been proposed in New Zealand, to allow 'one or more natural persons' to be appointed as a custodian trustee. The appointment of an individual as custodian trustee would involve the risk of the individual dying or otherwise becoming incapable and needing to be replaced, which would defeat the principal purpose of having a custodian trustee. It would also be inconsistent with the Commission's approach to the appointment of trustees in Chapter 3, which is intended to avoid the situation where there is a sole individual trustee.

4.171 Unlike New Zealand, the relevant legislation in Queensland does not make specific provision for the appointment, whether corporate or individual, of 'custodian trustees' of Aboriginal or Torres Strait Islander land trusts, and the Commission does not consider that the limitation in appointing a corporation (rather than an individual) as custodian trustee would unfairly affect Aboriginal or Torres Strait Islander land trusts in Queensland.¹⁶⁸

Circumstances in which a custodian trustee may be appointed

4.172 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,¹⁶⁹ by an order of the

¹⁶⁸

Aboriginal Land Act 1991 (Qld) s 267 provides that the *Trusts Act 1973* (Qld) 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 of the Act. Part 21 of the Act deals with the jurisdiction of the court to deal with land trusts, and provides, in s 268, that a land trust may exercise all the powers of a trustee under the *Trusts Act 1973* (Qld), subject to any other provision of the *Aboriginal Land Act 1991* (Qld). Similar provisions are included in the *Torres Strait Islander Land Act 1991* (Qld) pt 15, except that there is no provision equivalent to s 268 giving land trusts the powers of trustees under the *Trusts Act 1973* (Qld).

¹⁶⁹

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.

court,¹⁷⁰ or under section 12 of the Act by a person with the power to appoint a new trustee.

4.173 The equivalent provisions in some of the other jurisdictions set out those circumstances expressly.¹⁷¹ For example, section 71(3) of the *Trustee Act 1958* (Vic) provides that a custodian trustee may be appointed by the trust instrument, any person having power to appoint new trustees, or the court.

4.174 The Law Commission of New Zealand has also proposed that the legislation should provide that the appointment of a custodian trustee must be in writing.¹⁷² In Queensland, the appointment of new trustees under section 12 of the *Trusts Act 1973* (Qld) must be in writing.¹⁷³

4.175 At present, there is some uncertainty whether a custodian trustee could be appointed as an additional trustee if there are already four or more trustees of the trust. Section 11 of the Act provides that, although a private trust must not have more than four trustees,¹⁷⁴ a custodian trustee is not to be counted as a trustee for that purpose.¹⁷⁵ However, section 12(5) of the Act, under which additional trustees may be appointed, provides that an additional trustee may be appointed if 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. Despite section 11, this suggests that a custodian trustee could not be appointed as an additional trustee if the trust already had four or more trustees.¹⁷⁶

Discussion Paper

4.176 In the Discussion Paper, the Commission sought submissions on whether section 19(1) of the Act should clarify who may appoint a custodian trustee and in what circumstances.¹⁷⁷

¹⁷⁰ 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).

¹⁷¹ *Public Trustee Act 1995* (SA) s 17(1); *Public Trustee Act 1930* (Tas) s 23; *Trustee Act 1958* (Vic) s 71(3).

¹⁷² Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 137 (Proposal P29(a)).

¹⁷³ *Trusts Act 1973* (Qld) s 12(1), (5).

¹⁷⁴ *Trusts Act 1973* (Qld) s 11(1)–(2). See also s 12(2)(a), (5).

¹⁷⁵ *Trusts Act 1973* (Qld) s 11(4).

¹⁷⁶ *Trusts Act 1973* (Qld) s 12(5) does not refer to s 11 of the Act. In contrast, s 12(2)(a) of the Act, which provides for the appointment of *replacement* trustees, provides that the appointment of a replacement trustee under s 12(1) is 'subject to the restriction imposed by this Act on the number of trustees'. This implied reference to s 11 of the Act would seem to encompass the provision in s 11(4) to the effect that a custodian trustee will not be counted in calculating the number of trustees when a replacement trustee is appointed.

¹⁷⁷ *Trusts Discussion Paper* (2012) 114.

Consultation

4.177 Two of the respondents who addressed this issue suggested that the Act should clarify who has power to appoint a custodian trustee and in what circumstances. Professor Lee suggested that, in addition to the settlor, only the trustees of the trust for the time being should be capable of appointing a third party in whom title to the trust property is vested 'because they are entirely responsible for the management of the trust and should decide at the time and for the purpose whether the appointment of a custodian is desirable'. A legal practitioner who practises in trusts and succession law commented that the Act should clarify whether the power to appoint a custodian trustee is capable of being delegated.

4.178 On the other hand, the Queensland Law Society did not consider that there is any great need for section 19(1) to clarify who may appoint a custodian trustee and in what circumstances. Similarly, the Public Trustee submitted that he had not seen any difficulties with this issue in practice.

The Commission's preliminary view

4.179 In the Commission's view, the provision in the new legislation based on section 19 of the Act should clarify who may appoint a custodian trustee. The appointment of a custodian trustee differs from the usual appointment of new trustees in that, in the first instance, it will effect a significant change to the way in which the trust is structured. In the Commission's view, such an appointment should therefore be capable of being made only by the trust instrument, a person nominated in the trust instrument for the purpose of appointing trustees, the trustees for the time being of the trust, or the court.

4.180 The Commission also considers that the new legislation should clarify that, whenever a custodian trustee is to be appointed, the custodian trustee is not to be counted as a 'trustee' for the purpose of the usual requirement that there must not be more than four trustees of a private trust.¹⁷⁸ This would ensure that a custodian trustee may be appointed in addition to the existing trustees even if there are already four (or more) existing trustees.

Property for which a custodian trustee may be appointed

4.181 Section 19(2)(a) of the *Trusts Act 1973* (Qld) 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, and in New Zealand, are in similar terms.¹⁷⁹ However, it is not clear whether a custodian trustee may be appointed for a specific part, rather than for all, of the trust property.

¹⁷⁸ At present, see *Trusts Act 1973* (Qld) s 11.

¹⁷⁹ *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); *Trustee Act 1956* (NZ) s 50(2)(a).

4.182 The Law Commission of New Zealand has proposed that the legislation should expressly provide that a custodian trustee may be appointed over part of the trust property, 'such as, the share portfolio only'.¹⁸⁰ In its view, this 'would clarify the current law and is consistent with the purpose of custodian trusteeship'.¹⁸¹

Discussion Paper

4.183 In the Discussion Paper, the Commission sought submissions on whether section 19 of the *Trusts Act 1973* (Qld) should clarify whether a custodian trustee may be appointed for the whole or a specific part of the trust property.¹⁸²

Consultation

4.184 Most of the respondents that addressed this issue generally agreed that the Act should clarify that a custodian trustee may be appointed for the whole or a specific part of the trust property.

4.185 As outlined above, Professor Lee suggested that the Act should include a provision, in lieu of section 19, to enable 'the trust property or any part of it' to be vested in a third party to act as the trustees' agent for the management of that property.

4.186 The Queensland Law Society suggested that this question be considered alongside section 12(2)(b) of the Act, which provides for the appointment of a separate set of trustees for any part of the trust property held on trusts distinct from those relating to any other part.

4.187 On the other hand, the Public Trustee considered it unnecessary to amend the provision to clarify whether a custodian trustee may be appointed for the whole or a specific part of the property. In the Public Trustee's view, this is a matter to be determined by the trust instrument or, in limited circumstances, by the court.

The Commission's preliminary view

4.188 In the Commission's view, the provision in the new legislation based on section 19 of the Act should clarify that all, or part, of the trust property may be vested in a custodian trustee. The Commission considers that this would be appropriate to accommodate those circumstances in which the use of a custodian trustee, to maintain continuity of legal title, is desirable for a specific part of the trust property only.

Directions of the managing trustees

4.189 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

¹⁸⁰ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 138 (Proposal P29(i)).

¹⁸¹ *Ibid* [7.20].

¹⁸² *Trusts Discussion Paper* (2012) 115.

acting on those directions. Under section 19(2)(d) of the *Trusts Act 1973* (Qld), 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.

4.190 Similar provision, allowing the managing trustees to direct the custodian trustee by majority, is made in Western Australia and New Zealand.¹⁸³

4.191 The Law Commission of New Zealand did not specifically address this issue in its recent Issues Paper, although it proposed the inclusion of a general statutory default duty for trustees to act unanimously.¹⁸⁴

Discussion Paper

4.192 In the Discussion Paper, the Commission sought submissions on whether section 19(2) of the *Trusts Act 1973* (Qld) should continue to provide that directions to the custodian trustee may be given by a majority of the managing trustees.¹⁸⁵ The Commission explained that the current provision contrasts with the usual rule that, for private trusts, the decisions of trustees are to be made unanimously, rather than by majority, and stated that the appointment of two or more trustees who must act unanimously provides ‘a safeguard against wanton or capricious exercises of trustee discretion’.¹⁸⁶

Consultation

4.193 Professor Lee and a legal practitioner who practises in trusts and succession law each expressed a preference for unanimous decision-making. Professor Lee observed:

A decision to appoint a custodian trustee is a very serious matter and may involve sensitive issues of management. The unanimity rule ensures that the trustees settle any doubts or differences before they act. A trustee whose opinion has been overruled by other trustees under a majority dispensation may refuse to vest trust property in a custodian leading to problems.

4.194 In contrast, the Queensland Law Society submitted that section 19(2) of the Act should continue to enable directions to a custodian trustee to be given by a majority of the managing trustees. Similarly, the Public Trustee submitted that he had not seen any difficulty with this provision in practice and that there is therefore no particular reason for an amendment.

¹⁸³ *Trustees Act 1962* (WA) s 15(2)(d); *Trustee Act 1956* (NZ) s 50(2)(d). 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: *Public Trustee Act 1930* (Tas) s 24(e).

¹⁸⁴ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 46 (Proposal P7(g)).

¹⁸⁵ *Trusts Discussion Paper* (2012) 115.

¹⁸⁶ *Ibid* [5.258], quoting GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.65]. The duty of trustees to act jointly is considered in Chapter 6.

The Commission's preliminary view

4.195 In Chapter 6, the Commission has recommended the continuation of the long-standing rule that co-trustees must act jointly unless either they are authorised by the trust instrument to act by majority or they are trustees of a charitable trust. In the Commission's view, there is no compelling reason why the position should be different with respect to managing trustees when giving directions to a custodian trustee. The Commission therefore considers that a provision to the effect of section 19(2)(d) of the Act should not be included in the new legislation.

POWER TO DELEGATE TRUSTS

4.196 Trusteeship is an office of personal confidence.¹⁸⁷ 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.¹⁸⁸ The prohibition on delegation is an aspect of the duty to act personally.

4.197 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.¹⁸⁹ 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.¹⁹⁰ Section 25 of the English Act now enables trustees to delegate in any circumstances, but only for a maximum period of 12 months.

4.198 In Queensland, the statutory power to delegate is conferred by section 56 of the *Trusts Act 1973* (Qld).

4.199 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, by reason of physical infirmity, temporarily incapable of performing all duties as a trustee.¹⁹¹ By referring to 'all or any' of the trustee's powers, authorities and discretions, a trustee can select the particular matters that are to be delegated. Where the period of delegation is quite short, a trustee might, for example, wish to delegate the power to manage the trust property, but to exclude the power or discretion to make distributions to the beneficiaries.

¹⁸⁷ *Trusts and Settled Land Report* (1971) 44.

¹⁸⁸ *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).

¹⁸⁹ *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.

¹⁹⁰ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25 (Act as passed).

¹⁹¹ 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 the Public Trustee or a trustee company: see *Trusts Act 1973* (Qld) ss 5(1) (definition of 'trustee corporation'), 56(1).

4.200 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.¹⁹²

4.201 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.¹⁹³

4.202 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.

4.203 Similar provision for delegation by an individual trustee is made in the trustee legislation of the Australian jurisdictions and New Zealand to delegate the execution of their trusts, powers, authorities and discretions.¹⁹⁴

Circumstances in which a trustee may delegate

4.204 The circumstances in which a trustee may delegate the execution of a trust are generally fairly narrow. This reflects the fact that the office of trustee is ordinarily one that should be exercised personally.

4.205 In Queensland, a trustee may delegate the execution of his or her trusts if he or she:¹⁹⁵

- is out of the State or is about to depart from the State; or
- is, or may be about to become, by reason of 'physical infirmity', temporarily incapable of performing all duties as a trustee.

4.206 The legislation in Western Australia also makes provision for delegation in these circumstances.¹⁹⁶

4.207 In the ACT, New South Wales, the Northern Territory, Tasmania and Victoria, delegation is limited to the situation where the trustee is absent from, or

¹⁹² 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).

¹⁹³ *Trusts Act 1973* (Qld) s 56(5).

¹⁹⁴ *Trustee Act 1925* (ACT) s 64; *Trustee Act 1925* (NSW) s 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.

¹⁹⁵ *Trusts Act 1973* (Qld) s 56(1).

¹⁹⁶ *Trustees Act 1962* (WA) s 54(1). In addition, the power to delegate also applies if the trustee is a member of Her Majesty's forces.

about to leave, the jurisdiction and does not extend to physical infirmity.¹⁹⁷

4.208 In South Australia, however, the power to delegate is not limited to any particular circumstances.¹⁹⁸ As mentioned earlier, that 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’,¹⁹⁹ although the English *Trustee Act 1925* does not limit delegation to where the trustee is ‘unable to attend to the trust affairs’.

4.209 The power to delegate was considered by the Law Commission of New Zealand in a recent Issues Paper. That Commission 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’:²⁰⁰

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.

4.210 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.²⁰¹ Because the Law Commission of New Zealand also recommended that the delegation should not usually last for more than 12 months, its proposal would operate in fairly limited circumstances and would not, for example, enable the delegate of a trustee with mental incapacity to act as a delegate on a long-term basis.

4.211 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’.²⁰²

¹⁹⁷ *Trustee Act 1925* (ACT) s 64(1); *Trustee Act 1925* (NSW) s 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).

¹⁹⁸ *Trustee Act 1936* (SA) s 17(3)(b). See *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(2)(b).

¹⁹⁹ Law Commission of England and Wales, *Trustees’ Powers and Duties*, Consultation Paper No 146 (1997) [3.35].

²⁰⁰ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [4.38].

²⁰¹ *Ibid.*

²⁰² Law Commission of England and Wales, *The Law of Trusts: Delegation by Individual Trustees*, Report No 220 (1994) [2.15].

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'.²⁰³

4.212 However, for reasons that do not apply in Queensland, 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.²⁰⁴ In 1999, the *Trustee Delegation Act 1999* (UK) was enacted to provide a different mechanism to address the problem that had prompted that amendment,²⁰⁵ 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.²⁰⁶ 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.²⁰⁷

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)

Discussion Paper

4.213 In the Discussion Paper, the Commission sought submissions on whether section 56 of the *Trusts Act 1973* (Qld) should 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.²⁰⁸

4.214 The Commission noted that the power to delegate that is conferred by section 56 currently applies whether or not a contrary intention is expressed in the instrument (if any) creating the trust, in contrast to the position in the other Australian jurisdictions where the power to delegate can be excluded by the trust

203 Ibid.

204 See *Trusts Discussion Paper* (2012) ch 9, nn 184–185 for a discussion of the background to this amendment.

205 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.

206 *Trustee Delegation Act 1999* (UK) c 15, ss 4, 12, sch (Act as passed).

207 See Law Commission of England and Wales, *The Law of Trusts: Delegation by Individual Trustees*, Report No 220 (1994) [3.8].

208 *Trusts Discussion Paper* (2012) 379.

instrument.²⁰⁹ The Commission commented that, if the power continued to be an invariable one, that might be a factor in deciding the extent to which the power to delegate should be widened or otherwise changed.²¹⁰

Consultation

4.215 The Queensland Law Society and a legal practitioner who practises in trusts and succession law submitted that temporary impaired incapacity should not be included in section 56 as an additional circumstance in which a trustee may delegate the execution of a trust. The Queensland Law Society agreed with the view expressed by the Law Commission of England and Wales that delegation in these circumstances is undesirable, since the incapable trustee will not be able to supervise the delegate.

4.216 However, the Bar Association of Queensland was in favour of permitting a trustee to delegate the execution of a trust where he or she may be about to become temporarily incapable, by reason of impaired capacity, of performing his or her duties. In its view, the key word was 'temporarily'. It suggested that:

the circumstance that a trustee is to have a procedure and expects to require a few months to become well would be within the additional circumstance. In those circumstances the trustee's ability to return to oversee the actions of the replacement exists.

4.217 The Public Trustee also considered that there is merit in amending section 56 in this way, but commented that 'delegation should only apply where the capacity is temporary (or at least until it is clarified as to whether the incapacity is permanent)'. However, the Public Trustee submitted that the position in relation to contrary intention should be reversed, so that the power to delegate is subject to the terms of the trust instrument.

4.218 Professor Lee favoured the introduction of a provision allowing a trustee to appoint a 'substitute trustee' where the trustees have scheduled a date for a meeting and the trustee is unable, *for any reason*, to attend the meeting.

The Commission's preliminary view

4.219 Section 56(1) of the *Trusts Act 1973* (Qld) currently authorises a trustee, by power of attorney, to delegate the execution of a trust in two situations: where the trustee is out of, or is about to leave, the State and where the trustee is, or may be about to become, temporarily incapable of acting as a trustee by reason of physical infirmity. It is not unusual, however, for temporary physical infirmity to be accompanied by a temporary impaired decision-making capacity, for example, where a person is heavily medicated following surgery. In that situation, the occurrence of impaired decision-making capacity has the effect of revoking the

²⁰⁹ *Trusts Act 1973* (Qld) s 31(1). Cf *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.

²¹⁰ *Trusts Discussion Paper* (2012) [9.134].

general power of attorney by which the delegation has been made,²¹¹ thus ending the authority of the delegate.

4.220 The Commission is, therefore, of the view that the new legislation should widen the circumstances in which delegation is permitted, so as to provide for delegation in circumstances where a trustee is temporarily incapable of acting as a trustee by reason of impaired decision-making capacity. Because of the Commission's recommendation below to limit the duration of delegation generally to 12 months, it is not necessary to define what is 'temporary' for the purposes of the provision, as the delegate's authority will automatically end after 12 months. This approach is consistent with the Commission's view that, if a trustee is unable to act for more than 12 months, it is more appropriate for the trustee to be replaced than to have the trustee's delegate exercising the trustee's powers on a long-term basis.

Duration of delegation

4.221 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.²¹² 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 Tasmania, Western Australia or New Zealand.²¹³

4.222 In contrast, the legislation in a number of other Australian jurisdictions prescribes 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.²¹⁴ In the Northern Territory, the delegation may not exceed 12 months from the date of the power of attorney²¹⁵ and, in South Australia, the power of attorney expires 12 months from the date on which it came into operation.²¹⁶

4.223 A maximum period of 12 months also applies in England, where a delegation under section 25 of the *Trustee Act 1925*:²¹⁷

- (a) commences as provided by the instrument creating the power or, if the instrument makes no provision as to the commencement of the delegation, with the date of the execution of the instrument by the donor; and
- (b) continues for a period of twelve months or any shorter period provided by the instrument creating the power.

²¹¹ *Powers of Attorney Act 1998* (Qld) s 18(1).

²¹² *Trusts Act 1973* (Qld) s 56(5).

²¹³ *Trustee Act 1898* (Tas) s 25AA; *Trustees Act 1962* (WA) s 54; *Trustee Act 1956* (NZ) s 31.

²¹⁴ *Trustee Act 1925* (ACT) s 64(5); *Trustee Act 1925* (NSW) s 64(4).

²¹⁵ *Trustee Act* (NT) sch 3 (*Trustee Act 1907* s 3(1)).

²¹⁶ *Trustee Act 1936* (SA) s 17(3).

²¹⁷ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(2).

4.224 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 the delegation by a further 12 months.²¹⁸ It considered that the imposition of such a restriction reflected the fact that the delegation of a trust is a temporary measure.²¹⁹

4.225 It has been suggested that a limit on the effective duration of the delegation is an important safeguard, and that, where 'a greatly extended period is contemplated, it may be preferable for the trustee to resign rather than engage in a full delegation'.²²⁰

Discussion Paper

4.226 In the Discussion Paper, the Commission noted that, if the period of delegation is to be restricted, a further issue is the date from which the relevant period should run. The Commission considered that 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, the Commission acknowledged that it would provide greater utility for the period to run from when the power of attorney comes into operation under section 56(5).²²¹ In the latter case, however, the exact date on which the trustee becomes incapable of performing all of his or her duties as a trustee is unlikely to be a matter that can be identified with any certainty.²²²

4.227 The Commission sought submissions on whether section 56 of the *Trusts Act 1973* (Qld) should be amended to impose a 12 month (or some other) limitation on the duration of the delegation and, if so, whether that period should run from:²²³

- the date of execution of the power of attorney; or
- the date when the power of attorney comes into operation under section 56(5).

Consultation

4.228 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law were all of the view that there should be a 12 month limitation on the duration of the delegation.

218 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 85 (Proposal P16(b)).

219 Ibid [4.39].

220 British Columbia Law Institute, *Statutory Powers of Delegation by Trustees*, Report No 11 (2000) 14.

221 See [4.221] above.

222 *Trusts Discussion Paper* (2012) [9.147].

223 Ibid 380.

4.229 The Queensland Law Society, the Public Trustee and the legal practitioner submitted that the period should run from the date when the power of attorney comes into operation under section 56(5). In contrast, the Bar Association of Queensland considered that ‘a fixed period commencing from the certain date of execution is desirable’.

4.230 Professor Lee suggested that the duration of the delegation should be for a single trust meeting.

The Commission’s preliminary view

4.231 The statutory power to delegate is a significant exception to a trustee’s duty to act personally. Currently, delegation under section 56 of the *Trusts Act 1973* (Qld) may be made for an indefinite period, effectively abrogating the duty to act personally. In the Commission’s view, delegation should be regarded as a temporary measure and should, therefore, be limited to a maximum period of 12 months.

4.232 In determining the date from which the delegation runs, it is important to balance certainty as to the commencement of the delegation with providing reasonably utility in the legislation for an event that may happen in the future. The Commission therefore favours a provision to the effect of section 25(2) of the English *Trustee Act 1925*, and recommends that the period of delegation should commence:

- as provided by the instrument by which the delegation is made; or
- if the instrument makes no provision as to the commencement of the delegation — on the date on which the instrument is executed.

Liability of trustee for acts and defaults of delegate

4.233 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.²²⁴ This is also the position in England.²²⁵ It has 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’.²²⁶

4.234 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.²²⁷

²²⁴ *Trusts Act 1973* (Qld) s 56(3). See also *Trustee Act 1925* (ACT) s 64(8); *Trustee Act 1925* (NSW) s 64(7); *Trustee Act* (NT) sch 3 (*Trustee Act 1907* s 3(3)); *Trustee Act 1898* (Tas) s 25AA(7); *Trustee Act 1958* (Vic) s 30(2).

²²⁵ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(7).

²²⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 January 2012) [9.12050].

²²⁷ *Trustees Act 1962* (WA) s 54(4); *Trustee Act 1956* (NZ) s 31(3).

4.235 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.²²⁸ 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’.²²⁹

4.236 It has been suggested that the imposition of 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:²³⁰

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.

4.237 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:²³¹

[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.

4.238 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:²³²

[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?

228 *Trusts and Settled Land Report* (1971) 44.

229 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 56.

230 British Columbia Law Institute, *Statutory Powers of Delegation by Trustees*, Report No 11 (2000) 14.

231 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [4.41].

232 WA Lee, ‘Current Issues for Trustee Legislation’ (1990) 20 *University of Western Australia Law Review* 507, 530. In Chapter 11, the Commission has recommended that the provision based on s 54(1) of the *Trusts Act 1973* (Qld) should no longer provide that a trustee is not liable for the default of an agent if the trustee employed the agent in good faith and without negligence. Instead, the Commission has recommended that a trustee’s liability for the default of an agent should be brought within the scope of the provision, based generally on s 71 of the Act, which provides that a trustee is not liable for loss occasioned by an agent unless the loss occurs through the trustee’s own default.

Discussion Paper

4.239 In the Discussion Paper, the Commission sought submissions on whether section 56(3) of the *Trusts Act 1973* (Qld) should 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, alternatively, 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.²³³

Consultation

4.240 The Queensland Law Society, the Bar Association of Queensland and a legal practitioner who practises in trusts and succession law submitted that section 56(3) of the Act should 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.

4.241 The Bar Association of Queensland commented that:

the trustee's decision to delegate is one that is not lightly to be taken and the retention of s 56(3) underscores that seriousness. In appropriate circumstances a trustee who is found to be liable for its delegate's defaults can apply to be excused. But the burden should remain on the trustee to explain why it should be relieved.

4.242 Similarly, the legal practitioner stated that 'it is the trustee who makes the decision as to the delegate and so the trustee should be responsible'. He also referred to the court's power to relieve the trustee from personal liability under section 76 of the Act.

4.243 However, Professor Lee considered that the liability imposed by section 56(3) is 'too harsh', and that the only reason he could think of for its retention 'is that it may deter recourse to the practice' of delegation. In his view, section 56(3) of the Act should be omitted. He was of the view that 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. However, as noted above, he also favoured permitting delegation only for the limited period of a single trust meeting.

4.244 The Public Trustee considered that there is some attraction in the Western Australian and New Zealand provisions, which provide that it is a defence for a trustee to show that the delegate was appointed in good faith and without negligence. As noted above, the Public Trustee considered that the Act should make specific provision for the delegation of trustees' powers of investment, and favoured the adoption of the provisions of the *Trustee Act 2000* (UK) that require the trustee, among other things, to keep those arrangements under review. The Public Trustee therefore noted that a further consideration 'might be the need for the trustee (but for circumstances where the [trust] is delegated as a result of temporary incapacity discussed above) to exercise some appropriate form of prudential oversight of the actions of delegate'.

233

Trusts Discussion Paper (2012) 382.

The Commission's preliminary view

4.245 In the Commission's view, the new legislation should 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. The statutory power to delegate is, as stated earlier, a significant exception to the duty to act personally, and one that should be exercised with great caution. The Commission is concerned that, if the liability of a trustee for the acts and defaults of a delegate were reduced, trustees might be more willing to delegate their trusts in circumstances where they would not otherwise take that step.

Notification

4.246 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:²³⁴

- each person (other than himself or herself), if any, who has power to appoint a new trustee under the instrument creating the trust; and
- each of the other trustees.

4.247 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.²³⁵ 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.²³⁶

4.248 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, notice should be given to:²³⁷

- 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.

4.249 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.²³⁸

²³⁴ *Trustee Act 1936* (SA) s 17(4); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(4).

²³⁵ *Trustee Act 1936* (SA) s 17(5); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(4).

²³⁶ *Trustee Act 1936* (SA) s 17(6); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(4).

²³⁷ British Columbia Law Institute, *Statutory Powers of Delegation by Trustees*, Report No 11 (2000) 17.

²³⁸ *Ibid* 15.

4.250 The Law Commission of New Zealand favoured the introduction of a requirement for sole trustees who are delegating 'to notify any person with the power to appoint and remove beneficiaries, or if none, all adult vested beneficiaries (where it is reasonable to do so) or a reasonably representative sample of beneficiaries'.²³⁹ It explained that:²⁴⁰

It is straightforward for a sole trustee to notify a person with the power to appoint and remove beneficiaries where there is one, but where there is not, a meaningful notification can only be to some or all of the beneficiaries. A 'reasonably representative sample of beneficiaries' has been proposed as the way of determining which beneficiaries should be informed if it is not practical and reasonable to contact all adult vested beneficiaries. This conveys the need to inform the appropriate range of beneficiaries that should know in the given circumstances that a delegation has been made.

Discussion Paper

4.251 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should 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:²⁴¹

- a person with the power to appoint and remove a trustee;
- co-trustees; or
- if there is no one under paragraph (a) or (b) who can be notified — particular beneficiaries.

Consultation

Notification of appointors and co-trustees

4.252 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law considered that a trustee who has delegated the execution of his or her trusts should be required to notify a person with the power to appoint and remove a trustee and co-trustees. The Bar Association of Queensland noted that this 'facilitates the effective continued administration of the trust'.

Notification of beneficiaries

4.253 The submissions were divided in relation to whether there should be a requirement to notify beneficiaries, or particular beneficiaries, in the case of a sole trustee where there is no appointor.

239 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 86 (Proposal P16(g)).

240 Ibid [4.43].

241 *Trusts Discussion Paper* (2012) 383–4.

4.254 The Queensland Law Society considered that a trustee should be required to notify beneficiaries 'of any delegation of the trustee's duties', while the Public Trustee commented that there was some attraction to requiring the trustee to give notice to adult beneficiaries who have vested interests or, in the case of protective trusts, to the Public Trustee or some other body.

4.255 However, the Bar Association of Queensland and a legal practitioner who practises in trusts and succession law submitted that trustees should not be required to notify beneficiaries. The Bar Association of Queensland commented that beneficiaries 'may not form a closed class and, indeed, may not be aware that they are beneficiaries'.

The Commission's preliminary view

Notification of appointors and co-trustees

4.256 In the Commission's view, the new legislation should require a trustee who has delegated his or her trusts to notify:

- any persons having the power to appoint and remove a trustee of the trust; and
- the trustee's co-trustees.

4.257 Each of these persons has a genuine interest in knowing of the delegation. Co-trustees will be required to act with the delegate and, depending on the circumstances in which the delegation is to operate, the fact that the delegation has become operative may raise questions about whether the trustee should be replaced.

Notification of beneficiaries

4.258 If a trustee is a sole trustee and there is no person who has the power to appoint and remove a trustee of the trust, the Commission considers that the new legislation should impose some requirement on a trustee who delegates the trust to notify the beneficiaries. In the absence of such a provision, the beneficiaries will not necessarily have the means to ascertain who is effectively acting as the trustee.

4.259 The Commission recognises that many delegations may be made for quite short periods, for instance, while a trustee is on holidays, and therefore considers that the requirement as to notification should not be too onerous for the trustee. On the other hand, the requirement should still be capable of providing meaningful guidance to a trustee. The Commission therefore recommends that the new legislation should provide that, if a trustee is a sole trustee and there is no person who has the power to appoint and remove a trustee of the trust, the trustee must, where practicable, notify the beneficiaries if he or she delegates the trust.

Formal requirements and the *Powers of Attorney Act 1998 (Qld)*

4.260 Section 56(1) of the *Trusts Act 1973 (Qld)* authorises a delegation to be made 'by power of attorney executed as a deed'. Similarly, the previous provision,

section 4 of the *Trustees and Executors Acts Amendment Act 1906* (Qld) authorised a delegation to be made by 'power of attorney, under seal'.

General power of attorney form

4.261 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).²⁴² The approved form for a general power of attorney does not make provision for the appointment of an attorney for particular matters but instead provides, in clause 6, for a broad conferral of power on the attorney:

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.

4.262 The approved form further provides, in clause 4, that the attorney's power 'is subject to the following terms', with a space provided for the principal to insert any limiting terms that he or she wishes to impose. A legal practitioner who practises in trusts and succession law has advised that he uses this clause to limit the power of attorney to specified trusteeships.

4.263 In contrast, the English *Trustee Act 1925* includes an approved form that is to be used for delegating a trust under section 25 of that Act. Section 25(5)–(6) of that Act provides:

(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,

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.

(6) The form referred to in subsection (5) of this section is as follows—

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].

²⁴²

A general power of attorney made under the *Powers of Attorney Act 1998* (Qld) must be in the approved form: s 11.

Requirement for power of attorney to be executed as a deed

4.264 The requirement in section 56(1) for the power of attorney to be executed as a deed (that is, as an instrument made under seal) reflects the fact that the statutory power of delegation originated long before legislation was enacted to provide for general (and enduring) powers of attorney. Section 45(2) of the *Property Law Act 1974* (Qld) provides, in relation to the formal requirements for deeds, that:

- (2) An instrument expressed—
- (a) to be an indenture or a deed; or
 - (b) to be sealed;

shall, if it is signed and attested by at least 1 witness not being a party to the instrument, be deemed to be sealed and, subject to section 47, to have been duly executed.

4.265 Although the approved form for a general power of attorney requires the principal's signature to be witnessed, the form is not expressed to be a deed or to be sealed.²⁴³

Revocation of general power of attorney if principal has impaired capacity

4.266 Earlier in this chapter, the Commission has recommended that the circumstances in which a trustee may delegate the execution of a trust should include the situation where the trustee has impaired decision-making capacity.

4.267 If 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.²⁴⁴

4.268 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),²⁴⁵ or in some other, new way that is authorised by legislation.

Discussion Paper

4.269 In the Discussion Paper, the Commission sought submissions on whether there should 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) or, alternatively, whether the approved form for a general power of attorney under the *Powers of Attorney Act 1998* (Qld) should make separate provision for a principal to appoint

²⁴³ Cf the former approved form for an enduring power of attorney made under the *Property Law Act 1974* (Qld) (Form 16A), where the attestation clause provided that the instrument was 'Signed Sealed and Delivered' by the donor.

²⁴⁴ *Powers of Attorney Act 1998* (Qld) s 18(1). In that case, the attorney would not have any further authority.

²⁴⁵ See *Powers of Attorney Act 1998* (Qld) s 32(2).

an attorney as the principal's delegate under section 56 of the *Trusts Act 1973* (Qld).²⁴⁶

4.270 The Commission also sought submissions on what provision should be made in the *Powers of Attorney Act 1998* (Qld) to accommodate the making of an enduring power of attorney, 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.²⁴⁷ The Commission noted that, while the definition of 'financial matter' in the *Powers of Attorney Act 1998* (Qld) 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 appropriate for an attorney who is exercising the delegated powers of a trustee.²⁴⁸

Consultation

Whether there should be a separate approved form for delegating a trust

4.271 The Queensland Law Society, the Bar Association of Queensland and the Public Trustee each submitted that there should 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). The Queensland Law Society considered that this would make it 'clear when the appointment is given, commences and terminates', while the Bar Association of Queensland considered that a separate approved form 'removes all ambiguity and is simple'.

4.272 As mentioned earlier, Professor Lee favoured the inclusion of a provision to replace the current section 56, allowing for the appointment of a substitute trustee to attend a meeting in place of an incapable trustee. He suggested that the trustees would be required to agree to the appointment 'in writing', but considered that 'there should be no need to insist on further formalities'.

How to accommodate a trustee's impaired capacity

4.273 The Bar Association of Queensland, the Public Trustee and Professor Lee submitted that the *Powers of Attorney Act 1998* (Qld) should not be amended to accommodate the making of an enduring power of attorney for this purpose.

4.274 The Bar Association of Queensland expressed the view that the matter 'should be dealt with separately by way of an approved form under the Trustee Act so that the personal affairs of the trustee are clearly separated from the trustee's trust affairs'.

²⁴⁶ *Trusts Discussion Paper* (2012) 385.

²⁴⁷ *Ibid* 386.

²⁴⁸ *Ibid* [9.170].

4.275 Similarly, Professor Lee stated that enduring powers of attorney, which are ‘important vehicles for the management of [the adult’s] private property should not be allowed to be confused with the management of separate trust funds’:

A power of attorney executed by a person cannot extend to property of which that person is trustee: an attorney has never been seen as a substitute trustee; and neither can the administrator of a person with ‘impaired capacity’ appointed under the *Guardianship and Administration Act 2000* (Qld). ... These important vehicles for the management of private property should not be allowed to be confused with the management of separate trust funds.

4.276 The Public Trustee commented that ‘a particular form of instrument is required’, which should endure past the temporary incapacity of the trustee.

4.277 The Queensland Law Society made the general comment that ‘perhaps there needs to be some definition of “impaired capacity” in both Acts to make it clear when it would apply’. It also noted that ‘some consideration should be made to permanent incapacity’.

The Commission’s preliminary view

4.278 In a number of respects, the requirements for the statutory delegation of a trust by an individual trustee do not align well with the provisions of the *Powers of Attorney Act 1998* (Qld) in relation to either general powers of attorney or enduring powers of attorney.

4.279 As noted above, the approved form for a general power of attorney is not expressed to be a deed or to be made under seal, and does not make provision for the delegation of a specific trust except through the imposition of ‘terms’ on the exercise of power by the attorney. Further, a general power of attorney is revoked if the principal has impaired capacity, which means that a general power of attorney will not be a suitable mechanism for a trustee who wishes to provide for the delegation of a trust in the event that he or she becomes a person with impaired capacity.

4.280 While provision could be made for delegation to be made by way of an enduring power of attorney, the Commission is of the view that the incorporation of that mechanism into the *Powers of Attorney Act 1998* (Qld) would not be consistent with the purpose of that Act. Nor would it be appropriate to subject the trustee’s delegate to the requirements of the *Powers of Attorney Act 1998* (Qld) when the delegate is not exercising power in relation to the principal’s financial matters but, rather, exercising the principal’s powers as a trustee for other beneficiaries.

4.281 In view of these matters, the Commission considers that the new legislation should make provision for an approved form to be made under the legislation, as is the case under section 25 of the English *Trustee Act 1925*.

4.282 In giving effect to this view, it will be necessary, in the draft legislation, to make provision for the circumstances in which the delegation would be revoked by factors such as the bankruptcy or impaired capacity of the delegate, which would

currently operate to revoke a delegation made by way of a general power of attorney.²⁴⁹

PRELIMINARY RECOMMENDATIONS

Power to employ agents

- 4-1 The new legislation should include provisions to the effect of section 54(1) and (6) of the *Trusts Act 1973 (Qld)*, but should not include provisions to the effect of section 54(2)–(5).
- 4-2 The new legislation should provide that trustees may authorise one or more of their number to act as their agent, but may not authorise a beneficiary to act as an agent (even if the beneficiary is also a trustee).

Authorisation of person to manage trust investments

- 4-3 The new legislation should provide that:
- (a) subject to the expression of a contrary intention in the instrument (if any) creating the trust, a trustee may authorise a person to exercise the trustee's powers of investment; and
 - (b) the authorisation of a person for this purpose must be made or evidenced in writing.

Deposit of trust documents for safe custody

- 4-4 The new legislation should include a provision to the general effect of section 49 of the *Trusts Act 1973 (Qld)*.

Custodian trustees

- 4-5 The new legislation should include a provision to the effect of section 19 of the *Trusts Act 1973 (Qld)*, except that the new provision should:
- (a) provide that a custodian trustee may be appointed by:
 - (i) the trust instrument;
 - (ii) a person nominated in the trust instrument for the purpose of appointing trustees;
 - (iii) the trustees for the time being of the trust; or
 - (iv) the court;

²⁴⁹

Powers of Attorney Act 1998 (Qld) ss 22–23.

- (b) clarify that, whenever a custodian trustee is to be appointed, the custodian trustee is not to be counted as a 'trustee' for the purpose of the usual requirement that there must not be more than four trustees of a private trust;
- (c) clarify that all, or part, of the trust property may be vested in a custodian trustee; and
- (d) not include a provision to the effect of section 19(2)(d).

Delegation by an individual trustee

4-6 The new legislation should include a provision to the general effect of section 56 of the *Trusts Act 1973* (Qld), except that the new provision should:

- (a) include the impaired decision-making capacity of a trustee as an additional circumstance in which delegation is authorised;
- (b) limit the duration of any delegation to a maximum of 12 months;
- (c) provide that the period of delegation commences:
 - (i) as provided by the instrument by which the delegation is made; or
 - (ii) if the instrument makes no provision as to the commencement of the delegation — on the date on which the instrument is executed;
- (d) require a trustee who has delegated the execution of a trust to notify:
 - (i) the trustee's co-trustees and any persons having the power to appoint and remove a trustee of the trust; or
 - (ii) if there is no person under subparagraph (i) who can be notified — the beneficiaries, if practicable to do so; and
- (e) make provision for delegation to be made by way of an approved form made under the new legislation, rather than by a power of attorney made under the *Powers of Attorney Act 1998* (Qld).

Chapter 5

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INTRODUCTION

5.1 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. Unless the trust instrument provided otherwise or the court approved another investment, trustees were limited to the authorised investments specified in the statutory list.

5.2 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 rapidly rising inflation.¹ It did not recognise modern economic theory (such as modern portfolio investment theory) or modern economic products.² Moreover, the list could lead to a false assumption that the authorised investments were safe investments,³ while effectively diverting trustees from their responsibility for determining which investments were most prudent or suitable for the particular type of trust.⁴

¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [10.030]; L Clarkson, 'Trusts & the Prudent Person Rule' (Paper presented at the Continuing Legal Education Teleconference, 20 March 2001) 2.

² T Cockburn, 'Trustee Investment Law Reform — *Trusts (Investments) Amendment Act 1999*' (2000) 20(4) *Proctor* 15, 15. 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 260/172 (1999) [2.31].

³ PM McDermott, 'Trustee Investment Law Reform' (1996) 70 *Australian Law Journal* 801, 801.

⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 8 June 1999, 2178–9 (MJ Foley, Attorney-General and Minister for Justice and Minister for the Arts).

TRUSTEES' INVESTMENT POWERS AND DUTIES: THE MAIN PROVISIONS

5.3 Since 1995, all Australian jurisdictions have progressively abolished the statutory list of authorised investments and adopted a modern legislative framework to regulate trustees' powers of investment.⁵ The new legislative framework, which is generally consistent across all Australian States and Territories, enables trustees to invest trust funds in any form of investment, subject to complying with their statutory duty of care, with the duties imposed by the various rules or principles of law or equity, and with the statutory requirement to take certain matters into account.

5.4 In Queensland, the relevant provisions are found in sections 21–24 of the *Trusts Act 1973* (Qld).⁶ Together, these provisions allow 'a portfolio, rather than an investment-by-investment approach to investing', shifting the focus from 'whether the trustees have exceeded their powers' to 'whether they have exercised their powers in accordance with the requisite standard of care'.⁷

General power to invest

5.5 Instead of the list of authorised investments that previously applied, section 21 of the *Trusts Act 1973* (Qld) 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.

Imposition of restrictions by settlor

5.6 There are a variety of reasons why a settlor might wish to restrict a 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 a trust is to further cancer research, the settlor might wish to forbid investment in tobacco companies.

⁵ *Trustee (Amendment) Act 1999* (ACT); *Trustee Amendment (Discretionary Investments) Act 1997* (NSW); *Trustee Amendment Act (No 2) 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).

⁶ *Trusts Act 1973* (Qld) ss 21–24 are found in pt 3 of the Act, which was substituted by the *Trusts (Investments) Amendment Act 1999* (Qld).

⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [10.2010].

5.7 A trustee may exercise the investment powers conferred by section 21 of the Act ‘unless expressly forbidden’ by the trust instrument. As a result, it is possible for a settlor to exclude certain forms of investment or to forbid the variation or realisation of an investment.⁸

5.8 Where statutory powers of investment are conferred ‘unless expressly forbidden’ by the trust instrument,⁹ ‘negative words’ or an ‘express veto’ are required to exclude those powers.¹⁰ It is not sufficient that the instrument directs the trust property to be invested in a certain way or, by implication, forbids certain investments.¹¹ Section 21, therefore, recognises a settlor’s autonomy to set limits on a trustee’s powers of investment, but sets a high bar for establishing those limits.

5.9 If the exclusion of a particular form of investment would be to the detriment of the beneficiaries — for example, where the trust instrument took an extremely restrictive approach to the permissible forms of investment — the trustees may apply to the court under section 94 of the *Trusts Act 1973* (Qld) for an order conferring additional powers of investment on the trustees.¹²

5.10 In the other Australian jurisdictions, the counterparts to section 21 also use the expression ‘unless expressly forbidden’ (or ‘unless expressly prohibited’).¹³ 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’.¹⁴

5.11 In its review, the Law Reform Commission of Ireland expressed the view that a settlor’s autonomy in this respect is fundamental to trust law. It therefore considered that it was preferable for a trustee to apply to the court for the conferral of a relevant power, rather than to restrict the effect of a contrary intention in the trust instrument.¹⁵

⁸ *Trusts Act 1973* (Qld) s 21 takes a different approach in relation to the effect of a settlor’s wishes from the approach generally found in the powers conferred by pt 4 of the Act. However, the difference between the two approaches is generally of no significance: see *Trusts Discussion Paper* (2012) [6.14] ff.

⁹ 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.

¹⁰ *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’.

¹¹ *Re Burke* [1908] 2 Ch 248, 250 (Neville J).

¹² As explained at [12.79] below, the circumstances in which the court may confer additional powers on a trustee extend to the situation where the trustee lacks the relevant power because the trust instrument prohibits the exercise of that power.

¹³ *Trustee Act 1925* (ACT) s 14; *Trustee Act 1925* (NSW) s 14; *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.

¹⁴ *Trustee Act 2000* (UK) c 29, s 6(1)(b).

¹⁵ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [8.22], [8.35].

Statutory duty of care (the 'prudent person' rule)

5.12 Section 22(1) of the *Trusts Act 1973* (Qld) 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. It 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.

5.13 Section 22(1)(b) requires a trustee to exercise 'the care, diligence and skill a prudent person of business would exercise in managing the affairs of other persons'. However, section 22(1)(a) imposes a different duty (with a higher standard of care) if the trustee's profession, business or employment is, or includes, 'acting as a trustee or investing money for other 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'.

5.14 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*.¹⁶

5.15 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.

5.16 Section 22(3) requires a trustee to review the performance of trust investments (individually and as a whole) at least once annually.

5.17 The *Trusts Act 1973* (Qld) makes no provision for the duties imposed by section 22 of the Act to be excluded.¹⁷ Accordingly, those duties apply whether or

¹⁶ (1886) 33 Ch D 347, 355. This decision is considered further in Chapter 6.

¹⁷ *Trusts Act 1973* (Qld) s 4(4) applies to the powers conferred by the Act, but not to the duties imposed by the Act.

not a contrary intention is expressed in the trust instrument.¹⁸

Preservation of rules or principles of law or equity

5.18 The duties imposed by section 22 of the *Trusts Act 1973* (Qld) are not the only duties that apply to trustees 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.¹⁹

5.19 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 interests²⁰ 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;²¹ and
 - (c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries; and
 - (d) a duty to obtain advice.²²
- (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.

¹⁸ 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).

¹⁹ 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; PF Hanrahan, 'The Responsible Entity as Trustee' in I Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 227, 245–8.

²⁰ 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).

²¹ See *Learoyd v Whiteley* (1887) 12 App Cas 727, 733 (Lord Watson).

²² 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 [6.30] ff below.

- (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)

5.20 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 caution²³ 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.²⁴

5.21 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.²⁵

5.22 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

5.23 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'. The list is not exhaustive, and 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.

5.24 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.²⁶

5.25 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 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.

²³ See *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 516–17 (Finn J), discussed at [6.51] ff below.

²⁴ See, eg, the discussion at [5.180] ff below of the particular rules that applied to trustees when lending on the security of real property.

²⁵ 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.

²⁶ 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).

Discussion Paper

5.26 In the Discussion Paper, the Commission sought submissions on whether, subject to the issues raised in that Paper in relation to ‘total return investment’, sections 21–24 of the *Trusts Act 1973* (Qld) provide sufficient flexibility and safeguards for an effective power of investment.²⁷

Consultation

5.27 This issue was addressed by the Queensland Law Society, the Bar Association of Queensland, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law. All of these respondents considered that sections 21–24 of the *Trusts Act 1973* (Qld) provide sufficient flexibility and safeguards for an effective power of investment. The Bar Association of Queensland commented that the sections ‘seem to be working well and provide both flexibility and safeguards’.

5.28 Professor Lee observed that the provision in section 21 of the Act for the trust instrument to forbid investment in a particular form of investment is commonplace in trusts legislation, and suggested that the continuation of that part of the provision would not be regretted. He suggested, however, that, if there was a concern that section 21 would enable a settlor to impose severe restrictions on a trustee’s powers of investment, the relevant words could be omitted from section 21 and section 24 could be amended to require a trustee to have regard to ‘any directions or prohibitions with respect to the investment of trust funds expressed in the instrument creating the trust’.

The Commission’s preliminary view

5.29 By allowing a portfolio approach to investing, sections 21–24 of the *Trusts Act 1973* (Qld) provide an effective framework for trustees’ powers of investment. In particular, the statutory duty of care imposed by section 22 and the requirement for trustees to have regard to the matters mentioned in section 24 provide effective safeguards for the exercise of trustees’ powers of investment. The Commission is therefore of the view that, subject to the following matter, the new legislation should include provisions to the effect of sections 21–24 of the *Trusts Act 1973* (Qld).

5.30 In Chapter 6, the Commission has recommended that the new legislation should include a general statutory duty of care that will apply to trustees when performing their duties and exercising their powers. That duty is to be based on the language of section 22, except that the duty to exercise the higher standard of care referred to in section 22(1)(a) will also apply to trustees who have special knowledge or experience or who hold themselves out as having such knowledge or experience.

5.31 In preparing the draft legislation, it is possible that section 22 of the current Act might be subsumed by the new statutory duty of care. If, however, a provision to the general effect of section 22 is retained as a separate provision, that provision

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should, for consistency with the recommended general statutory duty of care, also impose a higher standard of care on trustees who have special knowledge or experience or who hold themselves out as having such knowledge or experience.

POWERS IN RELATION TO SECURITIES

5.32 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.

5.33 Section 25 of the *Trusts Act 1973* (Qld) applies where a trustee holds shares in a corporation. 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.

5.34 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:

- exercise the right and apply capital money subject to the trust in payment of the consideration; or
- assign the benefit of the right, or the title to the right, to any person (including a beneficiary under the trust) for the best consideration that can be reasonably obtained; or
- renounce the right.

5.35 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) provides that the trustee may hold the new securities 'for any period for which the trustee could properly have retained the original securities'.²⁸

5.36 Before Part 3 of the Act was substituted 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 the powers conferred by those provisions are essential.²⁹

5.37 The Law Commission of New Zealand, which has recently proposed a power similar to the 'general property power' recommended in this Interim Report, has proposed that its counterpart to section 25 of the *Trusts Act 1973* (Qld) should

²⁸ See also the related discussion of s 29 of the *Trusts Act 1973* (Qld) at [5.145] ff below.

²⁹ *Trusts and Settled Land Report* (1971) 27.

be repealed on the basis that it is one of a number of provisions that are 'either historic or unnecessary'.³⁰

The current effect of a contrary intention in the trust instrument

5.38 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'.³¹

5.39 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'.³² That approach was consistent with the view expressed in the Commission's 1971 Report that the powers conferred by those provisions 'are essential'.³³

5.40 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'.

Discussion Paper

Whether the legislation should include a provision to the effect of section 25

5.41 In the Discussion Paper, the Commission observed that provisions to the effect of section 25(1)–(3) would not, strictly, be necessary, if the Act was amended, as proposed in that Paper, to provide that trustees have, in relation to the trust property, all the powers of an absolute owner (the 'general property power'). It suggested, however, that the detailed content of section 25 might assist trustees to understand the full ambit of the general property power.³⁴

5.42 The Commission noted that 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. It considered, however, that 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.³⁵

5.43 The Commission sought submissions on whether the powers conferred by section 25(1)–(3) of the *Trusts Act 1973* (Qld) should continue to be the subject of a

³⁰ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 90 (Proposal P17(3)(f)), [5.7], referring to *Trustee Act 1956* (NZ) s 13K.

³¹ *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.

³² *Trusts Act 1973* (Qld) s 20(3) (Act as passed).

³³ *Trusts and Settled Land Report* (1971) 27.

³⁴ *Trusts Discussion Paper* (2012) [6.81].

³⁵ *Ibid* [6.82]. In this respect, the Commission referred (at [6.83]) to s 4(1) of the *Trusts (Scotland) Act 1921* (Scot), which lists the specific powers of trustees. The Commission observed that s 4(1)(o) is not substantially shorter than s 25(1) of the Queensland Act.

stand-alone provision in the Act. Alternatively, it asked whether, 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 powers conferred by section 25(1)–(3) should either be omitted or stated briefly in a provision that lists examples of specific powers conferred by the general property power.³⁶

The effect of a contrary intention in the trust instrument

5.44 In the Discussion Paper, the Commission suggested 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). In its view, while it is possible for a trustee to apply to the court for an order conferring on the trustee a power that he or she lacks,³⁷ 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.³⁸ For that reason, the Commission proposed 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.³⁹

Consultation

Whether the legislation should include a provision to the effect of section 25

5.45 The Queensland Law Society, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law considered that section 25(1)–(3) of the *Trusts Act 1973* (Qld) should continue to be the subject of a stand-alone provision, even if the Act is amended to confer on trustees a general property power. The Public Trustee and the legal practitioner commented that the detailed content of section 25 would assist trustees to understand the full ambit of their powers. The Financial Services Council endorsed the Public Trustee's view, and commented that it would be reluctant to see section 25 omitted.

5.46 However, the Bar Association of Queensland considered that, if the Act is amended to include the general property power, there would be no reason to retain section 25(1)–(3). In its view, the powers conferred by those provisions could be stated in a provision giving examples of the powers conferred by the general property power.

5.47 Professor Lee expressed a similar view, suggesting that the provision could be abbreviated as follows:

³⁶ *Trusts Discussion Paper* (2012) 145.

³⁷ *Trusts Act 1973* (Qld) s 94.

³⁸ *Trusts Discussion Paper* (2012) [6.87].

³⁹ *Ibid* 146.

If the securities of a corporation are subject to a trust the trustee has in relation to the management of those securities all the powers of an absolute beneficial owner of such securities.

The effect of a contrary intention in the trust instrument

5.48 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee of Queensland, Professor Lee and a legal practitioner who practises in trusts and succession law considered that, whether section 25 was retained or replaced with a shorter provision, the section should apply whether or not a contrary intention is expressed in the trust instrument. The Public Trustee observed that the 'circumstances in which section 25 applies are circumstances beyond the control of the trustee and are a function of the management or law applying to the corporation in which the securities are held'.

5.49 However, the Financial Services Council expressed the view that section 25 should apply 'unless a contrary intention is expressed in the trust instrument', as opposed to 'whether or not'. It considered that:

The provisions appear at present to be universally desirable. Nonetheless, it is impossible to foresee every situation, and in our view it is better to retain the flexibility provided by the principle of settlor autonomy.

The Commission's preliminary view

Whether the legislation should include a provision to the effect of section 25

5.50 In light of the general property power recommended in Chapter 7 of this Interim Report, the Commission's view is that it is not necessary for the new legislation to include detailed provisions in the terms of section 25(1)–(3) of the *Trusts Act 1973* (Qld).

5.51 However, to assist trustees to understand the scope of their powers, the new legislation should state the powers currently conferred by section 25(1)–(3) more briefly as examples of the powers conferred by the general property power. In the Commission's view, it is sufficient for that statement of powers to provide that, if securities of a corporation are subject to a trust, the trustee has in relation to the management of those securities all the powers of an absolute owner of the securities.

The effect of a contrary intention in the trust instrument

5.52 The Commission remains of the view that it could prejudice the management of a trust if the trustee did not have the powers that are currently the subject of section 25(1)–(3) of the *Trusts Act 1973* (Qld). Accordingly, the new legislation should adopt a different approach from the current Act and, instead, should provide that the provision recommended above applies whether or not a contrary intention is expressed in the trust instrument.

Omission of section 25(4)–(7)

5.53 In the Commission's view, it is not necessary for the new legislation to provide that a trustee, in accepting or subscribing for securities in exercise of the power currently conferred by section 25(1)–(3) of the *Trusts Act 1973* (Qld), is exercising a power of investment. In so providing, section 25(4) ensures that the trustee is subject to the duty of care imposed by section 22 of the Act. However, in Chapter 6, the Commission has recommended that trustees should also be subject to a general duty of care in terms that are generally consistent with section 22 of the current Act. Nor is it necessary for the new legislation to include provisions to the effect of section 25(6)–(7).

5.54 The Commission is also of the view that it is not necessary for the new legislation to include a provision to the effect of section 25(5) of the *Trusts Act 1973* (Qld). That section provides that, if a trustee accepts or subscribes for securities under that section, the trustee may hold the new securities 'for any period for which the trustee could properly have retained the original securities'. Section 25(5) served a particular purpose at a time when trustees could invest in shares only if they were authorised to do so by the trust instrument. Under the general law, if trustees were authorised by the trust instrument to retain, or to invest in, shares in a specific company or in specific classes of shares in a company, and there was a reconstruction of the company resulting in the allotment of new shares (being of a different kind) or even of shares in a new company, the trustees were not always permitted to retain the new shares. If 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 shares.⁴⁰ However, if 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.⁴¹

5.55 Now, however, section 21 empowers a trustee, unless expressly forbidden by the trust instrument, to invest in any form of investment. As the Commission has earlier in this chapter recommended that the new legislation should include a provision to that effect, there will ordinarily be no issue in relation to a trustee's power to retain securities accepted or subscribed for in exercise of a right attaching to existing securities.

5.56 The only situation in which the issue of the trustee's power to retain the new securities would arise is where the trust instrument expressly forbids the trustee from investing in a particular form of investment and the new securities are in a form of investment that is expressly forbidden. Where that occurred, the trustee would not, in the absence of a provision to the effect of section 25(5) be permitted to retain the new securities, but would be required, as under the general law, to sell them. However, this result is consistent with the effect given by section 21 of the current Act to an express prohibition of a particular form of investment.

⁴⁰ *Re Smith* [1902] Ch 667, 672–3 (Buckley J). See also *Perpetual Trustee Co Ltd v Noyes* (1925) SR (NSW) 226.

⁴¹ *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.

POWER AS TO CALLS ON SHARES

5.57 Under the general law, if shares form part of the capital of a trust, any calls on shares will also be payable out of the capital.⁴²

5.58 The *Trusts Act 1973* (Qld) contains two separate provisions that empower trustees to apply certain trust money in the payment of calls on shares: section 27, which was inserted by the *Trusts (Investments) Amendment Act 1999* (Qld), and section 33(1)(c), which has been included in the Act since it was passed.

5.59 Section 27 provides that a trustee may ‘apply capital money’ in payment of calls on shares subject to the same trust.

5.60 Section 33(1)(c) 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; ...

5.61 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’.⁴³ It therefore gives effect to a settlor’s wishes about matters that affect the ultimate entitlements of the beneficiaries under the trust. Section 33(1)(c) and (g), on the other hand, is contained in Part 4 of the Act and, therefore, applies ‘whether or not a contrary intention is expressed in the instrument (if any) creating the trust’.⁴⁴

⁴² *Rowley v Unwin* (1855) 2 K & J 138; 69 ER 726; *Todd v Moorhouse* (1874) LR 19 Eq 69.

⁴³ *Trusts Act 1973* (Qld) s 4(4).

⁴⁴ *Trusts Act 1973* (Qld) s 31(1).

5.62 The other Australian jurisdictions all have a provision in similar terms to section 27.⁴⁵

5.63 In England, the equivalent provision was repealed by the *Trustee Act 2000* (UK).⁴⁶ The Law Commission of New Zealand has recently proposed that its counterpart to section 27 should be repealed on the basis that it is one of a number of provisions that are 'either historic or unnecessary'.⁴⁷

Discussion Paper

5.64 In the Discussion Paper, the Commission suggested that, 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. It observed, however, that under section 27 the power is confined to the application of capital.⁴⁸

5.65 The Commission stated that, as the payment of a call on shares is a payment made in relation to a capital asset, it preferred the approach taken by section 27 of the *Trusts Act 1973* (Qld).⁴⁹ It therefore proposed that, in light of the power conferred by section 27 of the Act, section 33(1)(c) of the Act should be omitted.⁵⁰

Consultation

5.66 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee, the Financial Services Council and Professor Lee each agreed with the Commission's proposal that, in light of the power conferred by section 27 of the Act, section 33(1)(c) should be omitted. The Queensland Law Society commented:

As the two provisions have the potential to be contradictory and as payment of calls on shares appeals more to reason as capital expenditure than income expenditure, we favour retaining s 27 and omitting s 33(1)(c).

5.67 However, a legal practitioner who practises in trusts and succession law considered that the statement in the Discussion Paper that the payment of a call on shares is a payment made 'in relation to a capital asset' presents too narrow a view. Although he acknowledged that generally, and particularly for older people, a share portfolio is a capital portfolio, he stated that 'it is still common to find trading portfolios where the shares are treated as trading stock'.

⁴⁵ *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.

⁴⁶ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 11(2), repealed by *Trustee Act 2000* (UK) c 29, s 40(3), sch 4 pt II.

⁴⁷ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 90 (Proposal P17(3)(f)), [5.7], referring to *Trustee Act 1956* (NZ) s 13L.

⁴⁸ *Trusts Discussion Paper* (2012) [6.95].

⁴⁹ *Ibid.*

⁵⁰ *Ibid* 148.

The Commission's preliminary view

5.68 The Commission considers that there is value in retaining a provision that deals with the application of trust money to pay calls on shares, although it is obviously desirable that the issue should be the subject of a single provision, rather than two, potentially conflicting provisions, as is presently the case.

5.69 In Chapter 8, the Commission has recommended that the new legislation should contain a provision to the effect of section 33(1)(g) of the *Trusts Act 1973* (Qld), except that:

- the power of recoupment conferred by the new provision should also allow for expenditure that is made out of income to be recouped from capital, if it would be equitable to do so in all the circumstances; and
- unlike section 33(1)(g), the new provision should be capable of being excluded or modified by the trust instrument.

5.70 In view of those recommendations, the Commission now considers that the more flexible approach would be to retain a provision to the effect of section 33(1)(c), rather than section 27. This would enable income or capital to be applied initially to pay a call on shares, with the trustee being able to apportion the payment as he or she considers equitable. Where, because of a lack of liquidity in relation to capital, income was initially applied to pay a call on shares, the new provision based on section 33(1)(g) would allow the trustee to recoup the capital from subsequent income.

POWER TO PURCHASE DWELLING HOUSE AS RESIDENCE FOR BENEFICIARY

5.71 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.⁵¹ 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.

⁵¹

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'.

5.72 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'.⁵²

5.73 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.⁵³

5.74 Provisions of this kind 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.⁵⁴ It has also been observed that section 28 can relieve trustees of the duty to diversify investments.⁵⁵

The current effect of a contrary intention in the trust instrument

5.75 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'.⁵⁶

5.76 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.

5.77 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.⁵⁷

5.78 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. Unlike section 28 of the current Act, the former section 22 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.⁵⁸ 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

52 *Trusts Act 1973* (Qld) s 28(3).

53 *Trusts Act 1973* (Qld) s 28(4).

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

55 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [10.8060].

56 *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', the specified provisions do not include s 28.

57 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.

58 See *Trusts Act 1973* (Qld) s 20(1) (Act as passed).

to apply despite the terms of the trust instrument. Instead, former section 22(4) simply provided that the trustee had the power 'notwithstanding any trust for conversion contained in the instrument creating the trust'.⁵⁹

5.79 As explained elsewhere in this Interim Report, 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.⁶⁰ 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.

5.80 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.

Discussion Paper

5.81 In the Discussion Paper, the Commission expressed the view that it is undesirable that section 28(1) and (2) take different approaches to the effect of a contrary intention in the trust instrument. It noted that, 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. The Commission referred to the competing arguments that may be made in relation to which approach should be adopted. While the recognition of a settlor's autonomy favours making the provision subject to a contrary intention that is expressed in the trust instrument, it could also be argued that, because the provision is a beneficial one for beneficiaries, it should apply whether or not a contrary intention is expressed in the trust instrument.⁶¹

5.82 The Commission sought submissions on whether the powers conferred by section 28(1)–(2) of the *Trusts Act 1973* (Qld) should apply:⁶²

- subject to a contrary intention in the trust instrument; or
- whether or not a contrary intention is expressed in the trust instrument.

⁵⁹ *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.

⁶⁰ See [2.6] above, [8.6] ff below.

⁶¹ *Trusts Discussion Paper* (2012) [6.111].

⁶² *Ibid* 151.

Consultation

5.83 A legal practitioner who practises in trusts and succession law considered that the powers conferred by section 28(1)–(2) of the *Trusts Act 1973* (Qld) should apply subject to a contrary intention in the trust instrument. In his view, 'it is the settlor's trust and, within limits, the settlor should be allowed to state the rules under which the trust runs'. The Financial Services Council was also of that view.

5.84 On the other hand, although the Bar Association of Queensland generally favoured an approach that recognised settlor autonomy, it considered that section 28(1)–(2) should apply whether or not a contrary intention is expressed in the trust instrument. The Public Trustee and Professor Lee expressed a similar view. Professor Lee commented:

A residence prohibition or worse still a residence insistence could seriously affect a desired life style for the resident, who might wish to reside elsewhere than in the family home or a retirement village.

5.85 The Queensland Law Society did not address the issue of the conflicting approaches to contrary intention found in section 28, but raised an issue about how the provision applies in relation to 'elderly beneficiaries':

In 'early old age', it might be adequate for such a beneficiary to move from one dwelling house to another. In 'middle old age', a movement to an independent living retirement village may be appropriate and it may be possible to procure an arrangement with participation in capital growth. However, in 'later old age', higher care (hostel or nursing home) becomes necessary.

The latter, through the mechanism of accommodation bonds is probably a wasting asset, but whatever label is appropriate, the capital input is less than the capital retrieved on death of the elderly beneficiary. This can work an injustice to the beneficiaries in remainder (assuming that the circumstances arise in the case of a life interest) where as the same capital depletion would not be so certain to occur in the case of a substitution of a new dwelling for the original dwelling, or the substitution of an interest in a retirement village (with capital growth participation) for any dwelling.

5.86 It suggested that a 'partial resolution might be to extend the operation of s 28 to those types of retirement village arrangements which include the capacity to participate in capital growth'.

5.87 The Bar Association of Queensland also suggested that consideration should be given to 'including in the definition of "dwelling house" a unit in a retirement village or nursing home, to otherwise accommodate the needs of an ageing society'.

The Commission's preliminary view

The effect of a contrary intention

5.88 Section 28 of the *Trusts Act 1973* (Qld) serves an important function in overcoming the narrow interpretation of 'investment', which previously had the effect that the purchase of a residence for the use and enjoyment of a beneficiary

did not constitute an investment because it did not generate income.⁶³ For this reason, the new legislation should include a provision to the general effect of section 28.

5.89 The more difficult issue is what effect should be given to an expression in the trust instrument that purports to exclude the powers conferred by section 28(1)–(2). On balance, the Commission considers that the interests of beneficiaries who may benefit from the exercise of these powers outweigh the interests of settlors in being able to exclude the exercise of these powers. In coming to this view, the Commission notes that section 28(3) provides that a dwelling house that is purchased, retained or otherwise secured for use by a beneficiary under section 28(1) or (2) may be made available to the beneficiary ‘on the conditions consistent with the trust and the extent of the beneficiary’s interest that the trustee considers appropriate’.

Modernisation of the provision

5.90 In relation to the issue raised by the Queensland Law Society and the Bar Association of Queensland, the Commission considers that the new provision based on section 28 should be expressed in more modern language, and should avoid the current reference to a ‘dwelling house’. In addition, the provision should clarify that it enables a trustee, in appropriate circumstances, to purchase an interest in a retirement village.

POWER TO CONVERT A BUSINESS INTO A COMPANY

5.91 It has been observed that, ‘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’.⁶⁴

5.92 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.

5.93 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.⁶⁵

⁶³ See [5.74] above.

⁶⁴ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2045].

⁶⁵ *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.

5.94 Section 58 avoids the need for recourse to the court. However, it applies subject to the provisions of the trust instrument⁶⁶ and so can be overridden by the settlor.

5.95 Section 58 was modelled on provisions in Western Australia and New Zealand, which also apply subject to a contrary intention in the trust instrument.⁶⁷ None of the other Australian jurisdictions makes express provision for these powers.

Discussion Paper

5.96 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to include a provision to the effect of section 58.⁶⁸

Consultation

5.97 The Queensland Law Society, the Public Trustee and a legal practitioner who practises in trusts and succession law each expressed the view that the *Trusts Act 1973* (Qld) should continue to include a provision to the effect of section 58. The Public Trustee noted that, whilst in his experience the provision is rarely engaged, 'the capacity to convert a business into a proprietary limited company in particular may upon a trustee's legal and accounting advice be desirable'.

5.98 The Bar Association of Queensland commented that there 'appears no longer to be any need for section 58', but that 'its retention is not detrimental'.

5.99 In contrast, Professor Lee submitted that the legislation should not continue to include a provision to the effect of section 58. He considered that trustees would have this power 'under their broad general powers of investment and would not need the additional guidance of this section'.

The Commission's preliminary view

5.100 Section 58 of the *Trusts Act 1973* (Qld) confers two powers on trustees. The first is the power to convert any business into a company limited by shares. The second is the power to sell or transfer the business to a company in consideration of shares in that company or of debentures, debenture stock or bonds of that company.

5.101 The first of these powers will be conferred by the general property power that the Commission has recommended in Chapter 7, while the second of these powers is already provided for by section 21 of the Act, which was introduced by the *Trusts (Investments) Amendment Act 1999* (Qld).

⁶⁶ *Trusts Act 1973* (Qld) ss 31(1), 58(1).

⁶⁷ See *Trustees Act 1962* (WA) ss 5(2), (3)(a), 56; *Trustee Act 1956* (NZ) ss 2(4), (5)(a), 33.

⁶⁸ *Trusts Discussion Paper* (2012) 417.

5.102 In light of the powers that trustees already have under section 21 of the Act and the additional powers that will be conferred on the introduction of the recommended general property power, the Commission is of the view that the specific powers conferred by section 58 of the *Trusts Act 1973* (Qld) are no longer needed, and that the new legislation should not include a provision to the effect of section 58.

TOTAL RETURN INVESTMENT

5.103 Trusts law distinguishes between capital and income.⁶⁹

‘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.

5.104 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.⁷⁰ His Honour further observed that such ‘conflicts are, however, commonplace 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’.⁷¹

5.105 The general investment power in Part 3 of the *Trusts Act 1973* (Qld) enables trustees to apply the modern portfolio theory of investment.⁷² 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’.⁷³

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 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.

69 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 26 April 2012) [11.000].

70 [1986] 1 Qd R 372, 379.

71 Ibid.

72 See n 2 above.

73 Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [3.4].

5.106 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'⁷⁴ — developed in response to these concerns. 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

5.107 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'.⁷⁵ This enables trustees to make investment choices without having regard to whether the expected receipts will constitute income or capital.⁷⁶

5.108 The Law Commission of England and Wales has observed that '[t]here 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.⁷⁷

Percentage trusts

5.109 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'.⁷⁸ It is said, therefore, that the percentage trust 'enables the income beneficiary to share in the inflationary growth of capital assets', and that it 'promotes better investment performance of the trust funds, while at the same time maintaining the life tenant's income over a period of years at a constant level'.⁷⁹

5.110 However, the percentage trust may not be suitable in all cases. For example, it has been noted that it would not be suitable if a trust consisted of only a handful of investments or a single asset, or if a trust's assets were difficult to value or were not 'readily marketable'.⁸⁰ It has also been noted that it may not be suitable for 'discretionary trusts that give trustees a discretion whether to make distributions

⁷⁴ Ibid [1.17].

⁷⁵ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Consultation Paper No 175 (2004) [5.39].

⁷⁶ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [5.16].

⁷⁷ Ibid [3.27]–[3.28].

⁷⁸ Ibid [3.17].

⁷⁹ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 301.

⁸⁰ See *Trusts Discussion Paper* (2012) [6.45]–[6.46], citing Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 301; Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [3.22].

and, if so, how much', or for 'a trust the primary purpose of which is to allow for capital accumulation and distribution later on'.⁸¹

Legislation and proposals for reform in overseas jurisdictions

5.111 Provisions in relation to total return investment have been enacted or recommended in a number of overseas jurisdictions.

England

5.112 The Law Commission of England and Wales was generally in favour of facilitating total return investment for private trusts by means of a statutory power of allocation. Although it had initially suggested that the power should be available on an 'opt-out' basis, it ultimately concluded that the power should be available only on an 'opt-in' basis, that is, where it is directed by the trust instrument.⁸²

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.

5.113 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,⁸³ which it considered was likely to be the more successful model for total return investment.⁸⁴ It 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'.⁸⁵ In its view, the percentage trust, 'while probably more alien at present to HMRC due to its unfamiliarity, is less inimical'⁸⁶ because it 'incorporates the elements of objectivity and predictability that would be important to HMRC'.⁸⁷

5.114 Ultimately, however, because of the adverse tax consequences, the Law Commission did not make any recommendations for the implementation of total return investment for private trusts:⁸⁸

81 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.

82 Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [5.15].

83 Ibid [5.23].

84 Ibid [5.101].

85 Ibid.

86 Ibid.

87 Ibid [5.102].

88 Ibid [5.72]. See also [5.98].

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.

5.115 It did not consider it appropriate 'to make recommendations for reform which cannot be implemented without adverse tax consequences — either for the Exchequer or for trusts and their trustees and beneficiaries'.⁸⁹

5.116 However, the Law Commission made recommendations to enable charitable trusts with a permanent endowment to invest on a total return basis,⁹⁰ observing 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.⁹¹ In its view, however, although 'the concept of total return investment is relatively straightforward, the mechanics of operating it are not'. The Law Commission therefore considered it 'appropriate, and indeed necessary, that the Charity Commission design and provide support for a detailed total return investment scheme for charity trustees'⁹² and, on that basis, 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'.⁹³ The *Trusts (Capital and Income) Act 2013* (UK), which commenced in part on 6 April 2013,⁹⁴ inserts new sections 104A and 104B into the *Charities Act 2011* (UK) to give effect to the Law Commission's recommendations.

American Uniform Principal and Interest Act

5.117 In the United States, most states have adopted the Uniform Principal and Interest Act 1997 (the 'UPIA'). 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).⁹⁵

5.118 Section 104(a) of the UPIA empowers a trustee 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

89 Ibid [5.10].

90 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].

91 Ibid [8.1].

92 Ibid [8.70].

93 Ibid [8.72].

94 *Trusts (Capital and Income) Act 2013 (Commencement No 1) Order 2013* (UK) SI 2013/676, art 3.

95 Unif Principal and Income Act §§ 103–104 (amended 2000). These provisions are set out in *Trusts Discussion Paper* (2012) [6.48].

the UPIA provides guidance about how the power of adjustment under section 104 should be exercised:⁹⁶

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.

5.119 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 trust⁹⁷ or would have adverse tax consequences.⁹⁸ 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.⁹⁹ In those circumstances, an adjustment may be made by another trustee if that trustee is not also a beneficiary and would not similarly be benefited.¹⁰⁰

5.120 Furthermore, section 104(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'.¹⁰¹

Ontario, British Columbia and Manitoba

5.121 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).¹⁰² 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'.¹⁰³ However, the power would apply 'only where the creator of the trust

96 Unif Principal and Income Act (amended 2000), Comment 13.

97 Ibid 16.

98 Unif Principal and Income Act § 104(c)(5)–(6), (8) (amended 2000), Comment 16.

99 Unif Principal and Income Act § 104(c)(7)–(8) (amended 2000).

100 Unif Principal and Income Act § 104(d) (amended 2000).

101 Ibid, Comment 16.

102 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 298.

103 Ibid 299. See also vol 2, Draft Bill: An Act to revise the *Trustee Act*, cl 41.

so provides in the trust instrument by the use of the words “on discretionary allocation trust”¹⁰⁴.

5.122 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’.¹⁰⁵ 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’.¹⁰⁶

5.123 The Manitoba Law Reform Commission and the British Columbia Law Institute both followed the Ontario Law Reform Commission in recommending the introduction of a limited facultative provision allowing settlors to adopt a percentage trust model.¹⁰⁷

5.124 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.¹⁰⁸ 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.¹⁰⁹

5.125 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*.¹¹⁰ For example, the British Columbia Law Institute commented:¹¹¹

[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

104 Ibid.

105 Ibid 303.

106 Ibid.

107 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.

108 British Columbia Law Institute, *Total Return Investing by Trustees*, Report No 16 (2001) 14–15, Rec 6(1).

109 See British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 54–8, Proposed *Trustee Act*, cll 36–37, which are set out in *Trusts Discussion Paper* (2012) [6.66].

110 *Income Tax Act*, RSC 1985, c 1.

111 British Columbia Law Institute, *Total Return Investing by Trustees*, Report No 16 (2001) 9. See also *Trusts Discussion Paper* (2012) [6.67]–[6.68], citing Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 302; Manitoba Law Reform Commission, *Trustee Investments: The Modern Portfolio Theory*, Report No 101 (1999) 32.

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.

5.126 However, the British Columbia Law Institute noted that similar obstacles do not apply to charitable trusts, and therefore made recommendations to facilitate total return investment for charitable trusts.¹¹²

5.127 None of the recommended provisions have been implemented.

New Zealand

5.128 The Law Commission of New Zealand considered three options for facilitating total return investment. In addition to the percentage trust and discretionary allocation trust models, it considered a 'permissive approach', which would allow trustees to determine what is capital and income for the purposes of distribution.¹¹³

5.129 Of the three options, the Law Commission of New Zealand favoured the permissive approach, as it 'relies on the important duties trustees have to beneficiaries instead of specifying any particular allocation mechanism'.¹¹⁴ It further explained that this approach 'allows trustees guided by their duties to adopt the most suitable mechanism to determine how much of the total fund should be distributed to income beneficiaries'.¹¹⁵ The Law Commission of New Zealand therefore made the preliminary proposal that:¹¹⁶

The default provisions should give trustees a power to determine what is capital and income for the purposes of distribution to allow them to invest trust assets without regard to whether the return is of an income or capital nature. Trustees would be required to act reasonably and in the best interests of the beneficiaries overall. Where there are defined classes of beneficiaries trustees should ensure a reasonable level of income is made available for the income beneficiaries. In such cases trustees would have to adopt a suitable mechanism to determine how much of the total should be distributed to the income beneficiaries.

Discussion Paper

5.130 In the Discussion Paper, the Commission commented that legislation to facilitate total return investment has the potential to maximise the return on trust investments. However, the Commission also considered that it would entail an

112 British Columbia Law Institute, *Total Return Investing by Trustees*, Report No 16 (2001) 9, Rec 1(a).

113 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [5.17], [5.19].

114 *Ibid* [5.19].

115 *Ibid*.

116 *Ibid* 95 (Proposal P18).

increased level of complexity for trustees and, for the percentage trust model, the cost of having the trust assets valued on a regular basis.¹¹⁷

5.131 However, the Commission noted that 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, would not of itself change the original classification of the receipt, in particular, for taxation purposes.¹¹⁸

5.132 The Commission therefore sought submissions on whether the concept of total return investment should be further investigated and, if so, whether there is support for either the percentage trust or discretionary allocation trust models and whether the particular model should apply only where it is expressly directed by the trust instrument.¹¹⁹

Consultation

5.133 The Queensland Law Society, the Public Trustee and the Financial Services Council considered that the concept of total return investment should be further investigated. The Queensland Law Society considered, however, that even without specific provisions, a trust instrument could presently be drafted to enable trustees to invest on a total return basis.

5.134 The Public Trustee expressed a preference for the discretionary allocation trust model, and suggested that, as an 'initial first step', it might be beneficial to provide for it where the trust instrument has directed that investments be made on that basis. The Financial Services Council considered that 'the concept of total return investment is important to enable trustees to manage the assets of the trust in the most beneficial way for all beneficiaries'.

5.135 However, a legal practitioner who practises in trusts and succession law submitted that the legislation should not make provision for investment on a total return basis. He considered that the matter should be left to the settlor to draft if he or she so desires, not to trusts legislation, and noted that legislative provisions facilitating total return investment would not of themselves change the classification of receipts for taxation purposes.

5.136 Professor Lee observed that:

While it is true that there is tension, as far as the selection of investments is concerned, between beneficiaries of capital and beneficiaries of income, so that a duty rests on the trustees to achieve a fair balance between them I would doubt whether it is suitable for legislation to attempt to prescribe a specific means in an attempt to achieve a fair balance.

5.137 He considered that the Act 'should make it clear that trustees have a duty to ensure a fair balance as between capital and income beneficiaries'. To that end,

117 *Trusts Discussion Paper* (2012) [6.72].

118 *Ibid* [6.73].

119 *Ibid* 142.

he suggested that a discretionary power to allocate receipts (and expenses) between the income and capital beneficiaries should be conferred on trustees, but expressed in general terms. He doubted, however, whether trustees would use this power often because of 'unpredictable taxation consequences both for the trust fund and for income recipients'.

5.138 The Bar Association of Queensland did not express a view on this issue, but commented that these matters 'would be more appropriately commented on by trustee companies, accountants and tax advisers'.

The Commission's preliminary view

5.139 If settlors wish to make provision for trustees to invest on a total return basis, they can, under the present law, confer that power by the trust instrument, and do not need specific legislative authority to do so. However, a power to invest on a total return basis does not, of itself, alter the original classification of the receipts for taxation purposes, and an important consideration for settlors in deciding whether to confer such a power would be the taxation implications, for both the trustees and the beneficiaries, of treating income as capital (or vice versa).

5.140 Given that investment on a total return basis has the potential for adverse taxation consequences, the Commission is of the view that it is more appropriate that the conferral of the power to invest on that basis should remain the province of the trust instrument, rather than being a statutory power conferred by legislation on all trustees. Although a statutory power to invest on a total return basis could be made subject to a contrary intention in the trust instrument, many settlors might not turn their minds to whether the power should be excluded, with the result that the legislation would confer a significant power that may not be appropriate to the circumstances of all trusts.

5.141 Even if total return investment could be restricted to charitable trusts, as is the case in England, the Commission considers that trustees would require considerable assistance and oversight in the exercise of this power. In England, that assistance and oversight is to be provided by the Charity Commission, which has the statutory power to make regulations about the investment of endowment funds on a total return basis. Although the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) has recently established the Commissioner of the Australian Charities and Not-for-profits Commission, that office is a new one and its powers do not extend to the specific regulatory powers that the English Charity Commission has in relation to total return investment.

5.142 In view of these matters, the Commission does not, at this stage, recommend that the new legislation should make provision for trustees to invest on a total return basis.

PROTECTION FROM LIABILITY: BACKGROUND

5.143 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.¹²⁰

5.144 All of the provisions in Part 3 were inserted by the *Trusts (Investments) Amendment Act 1999* (Qld). However, some of those provisions (including sections 29, 30 and 30A) were carried over from the Act, as passed, with only minor changes to update the drafting style. These provisions have their origins in much earlier English legislation, which was enacted at a time when trustees had quite restricted powers of investment.

PROTECTION OF TRUSTEES WHO RETAIN CERTAIN INVESTMENTS

5.145 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:¹²¹

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.

5.146 Similar provisions to section 29 are included in the trustee legislation of the other Australian jurisdictions and New Zealand.¹²²

5.147 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),¹²³ which implemented a number of reforms recommended by the Law Commission of England and Wales, principally in relation to trustees' investment powers.¹²⁴ 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.¹²⁵

¹²⁰ *Trusts Act 1973* (Qld) ss 29–30C apply 'despite anything contained in the instrument creating the trust': s 20.

¹²¹ See *Trusts Discussion Paper* (2012) [6.115]–[6.120] for a discussion of the difficulties introduced when s 29 of the *Trusts Act 1973* (Qld) replaced the former s 26 of the Act as passed.

¹²² *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).

¹²³ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 18, sch 4 pt II.

¹²⁴ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999).

¹²⁵ See [5.200] below.

Extent of protection

5.148 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:¹²⁶

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.

5.149 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'.¹²⁷

Background

5.150 Commentators on the original English provision observed that:¹²⁸

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.

5.151 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'.¹²⁹

5.152 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

5.153 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.

¹²⁶ *Wright v Ginn* [1995] Pens LR 33, [4].

¹²⁷ AE Randall, *A Selection of Leading Cases in Equity with Notes* (Stevens & Sons, 1912) 198.

¹²⁸ FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 176.

¹²⁹ *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'.

5.154 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.¹³⁰ Section 29 would not relieve the trustees of the duty to call in the loan.¹³¹

5.155 As explained earlier, a similar situation arose where trustees were authorised by the trust instrument 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.¹³² 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.¹³³ Section 29 would not relieve the trustees of the duty under the general law to convert the shares.¹³⁴

Investment no longer a proper investment

5.156 Trustees are now subject to the duty, imposed by section 22(3) of the Act, to review the performance of 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(1).

5.157 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.¹³⁵ However:¹³⁶

There is no rule of law which 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.

5.158 In *Re Chapman*, 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:¹³⁷

¹³⁰ *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).

¹³¹ See FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 177.

¹³² See [5.54] above.

¹³³ See n 41 above.

¹³⁴ See FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 177.

¹³⁵ *Re Medland* (1889) 41 Ch D 476, 481 (North J).

¹³⁶ *Re Chapman* [1896] 2 Ch 763, 776 (Lindley LJ).

¹³⁷ *Ibid* 773–4.

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.

5.159 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'.¹³⁸ Further, the Court held that foreclosure 'would have cost money, and would have benefited no one',¹³⁹ and there was no evidence that 'it would have been a prudent or judicious step to try and sell'.¹⁴⁰ Lindley LJ stated that a 'want of ordinary prudence on the part of the trustees' would need to be proved to make them liable.¹⁴¹

5.160 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

5.161 Ford and Lee have commented that section 29 'covers the case where ... investments formerly authorised are no longer so, as where investments in overseas securities cease to be authorised'.¹⁴² This was also the Commission's justification for recommending in its 1971 Report that the Act should include a provision to the effect of section 29.¹⁴³

Discussion Paper

5.162 In the Discussion Paper, the Commission observed 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 trust investments. The Commission considered that this raised the issue of whether section 29 still serves a purpose, or whether it should be omitted.¹⁴⁴

138 Ibid 775 (Lindley LJ).

139 Ibid.

140 Ibid 776.

141 Ibid.

142 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Lawbook, 2nd ed, 1990) [1027].

143 *Trusts and Settled Land Report* (1971) 26.

144 *Trusts Discussion Paper* (2012) [6.139].

5.163 In addition, the Commission observed that, in Queensland, 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. 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 trust investments at least once a year. Trustees are also required to comply with the duty of care imposed by section 22. The Commission considered that these changes raised 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.¹⁴⁵

5.164 The Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to include a provision to the effect of section 29 or, alternatively, whether section 29 should be omitted.¹⁴⁶

Consultation

5.165 Professor Lee and a legal practitioner who practises in trusts and succession law were both of the view that section 29 should be omitted.

5.166 However, the Bar Association of Queensland, the Public Trustee and the Financial Services Council each considered that the provision should be retained. In the Public Trustee's view:

There is at least a period of time where the provision affords protection subject to the trustee making a decision to realise an investment that is otherwise not authorised where section 29 can be of benefit.

5.167 The Queensland Law Society stated that it did not have a strong view on the issue.

The Commission's preliminary view

5.168 As explained above, the protection afforded by section 29 of the *Trusts Act 1973* (Qld) is extremely limited, given that it is confined to liability arising solely from the retention of particular investments. The section does not, for example, relieve a trustee of the duty to sell an investment that has ceased to be authorised if the trustee would otherwise be subject to such a duty under the general law. Nor does it relieve a trustee of the duty to take steps to enforce a non-performing mortgage, if that would be the prudent course.

5.169 Given that trustees now have extremely wide powers of investment and are subject, under section 22(3), to a duty to review the performance of trust investments on an annual basis, the Commission considers that section 29 no

145 Ibid [6.123].

146 Ibid 156.

longer serves a useful purpose. The Commission is therefore of the view that the new legislation should not include a provision to the effect of section 29.

LOANS AND INVESTMENTS BY TRUSTEES NOT BREACHES OF TRUST IN PARTICULAR CIRCUMSTANCES

5.170 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.

5.171 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:

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;¹⁴⁷ 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)

¹⁴⁷

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.

5.172 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.¹⁴⁸ 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.

5.173 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.¹⁴⁹

5.174 Similar provisions are included in the trustee legislation of the other Australian jurisdictions and New Zealand,¹⁵⁰ although the Law Commission of New Zealand has recently proposed that its counterpart to section 30(1) should be repealed.¹⁵¹

5.175 These provisions have their origins in section 4(1) of the English *Trustee Act 1888*, which was replaced, with minor changes, by section 8(1) of the *Trustee Act 1893*. That provision was in turn re-enacted as section 8(1) of the *Trustee Act 1925*, which has since been repealed.¹⁵²

Conditions for protection

5.176 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.¹⁵³

5.177 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 mortgagee of

¹⁴⁸ 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.

¹⁴⁹ 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 [5.182] ff below.

¹⁵⁰ *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; *Trustee Act 1956* (NZ) s 13N(1). However, only the Northern Territory, 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.

¹⁵¹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 90 (Proposal P17(3)(f)), referring to *Trustee Act 1956* (NZ) s 13N.

¹⁵² See [5.200] below.

¹⁵³ 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).

the property.¹⁵⁴ This does not mean that a trustee who relies on a valuation obtained by the mortgagor automatically commits a breach of trust, as there may be circumstances that would justify the trustee in doing so.¹⁵⁵ It simply means that, in the circumstances of a particular loan, the trustee is not entitled to the protection of section 30(1)(a).

5.178 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. The insurer must be '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'. There are not currently any insurers prescribed by regulation for this provision. This part of the provision was not found in the former section 27 of the Act, as passed, but was introduced by the *Trusts (Investments) Amendment Act 1999* (Qld).

Limits of protection

5.179 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 make¹⁵⁶ or is inherently improvident or hazardous.¹⁵⁷

Background

5.180 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 upon them'.¹⁵⁸ It has been described as a 'relieving section', and not a section that imposes further obligations on trustees.¹⁵⁹ 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'.¹⁶⁰

5.181 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.

¹⁵⁴ *Re Walker* (1890) 59 LJ Ch 386; *Shaw v Cates* [1909] 1 Ch 389, 403 (Parker J); *Palmer v Emerson* [1911] 1 Ch 758, 765 (Eve J).

¹⁵⁵ See *Palmer v Emerson* [1911] 1 Ch 758, 770 (Eve J).

¹⁵⁶ See *Re Dive* [1909] 1 Ch 328, 341–2 (Warrington J).

¹⁵⁷ See *Blyth v Fladgate* [1891] 1 Ch 337, 353–4 (Stirling J).

¹⁵⁸ *Re Solomon* [1912] 1 Ch 261, 271 (Warrington J).

¹⁵⁹ *Palmer v Emerson* [1911] 1 Ch 758, 769 (Eve J).

¹⁶⁰ FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 43.

Lending margins

5.182 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. 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.

5.183 In *Learoyd v Whiteley*, Lord Watson referred to the guidance provided to trustees by the lending margins applied by the Courts of Equity:¹⁶¹

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)

5.184 The rules in relation to lending margins have been described as 'a restraint on speculative or careless dealings with trust property'.¹⁶² 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'.¹⁶³

5.185 By the early twentieth century, however, the rules were 'not so stringent as not to admit of exceptions based upon special circumstances'.¹⁶⁴ 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 upon the trustee'.¹⁶⁵ 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, for

¹⁶¹

(1887) 12 App Cas 727, 733–4. 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), 735–6 (Lord Watson), 737 (Lord FitzGerald). As a result, the trustees were liable for the loss occasioned by their breach.

¹⁶²

Yeo v Rotton (1865) SCR (NSW) Eq 110, 111 (Hargrave J).

¹⁶³

Re Salmon (1889) 42 Ch D 351, 369–70 (Fry LJ).

¹⁶⁴

Shaw v Cates [1909] 1 Ch 389, 397 (Parker J).

¹⁶⁵

Ibid.

instance, whether the premises and the business were ‘inseparable’ or whether the property was ‘adaptable for various sorts of business’ (although still on the basis that those circumstances might justify a loan of up to two-thirds of the value of the property).¹⁶⁶

5.186 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 effect 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,¹⁶⁷ 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’.¹⁶⁸

Requirement for trustees to exercise their own judgment about the amount to lend

5.187 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’,¹⁶⁹ but, having been advised as to value, the trustees ‘could not delegate it to a third party (even an expert) to determine, what amount they could prudently advance on the security in question’.¹⁷⁰ The effect of section 4(1), and the later provisions in similar terms, was that a trustee was ‘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’ in order to obtain the statutory protection.¹⁷¹

5.188 Thus, it has been 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.¹⁷²

Requirements as to valuation

5.189 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.¹⁷³

166 *Palmer v Emerson* [1911] 1 Ch 758, 766 (Eve J).

167 See *Shaw v Cates* [1909] 1 Ch 389, 396–7 (Parker J).

168 *Trustee Act 1888*, 51 & 52 Vict, c 59, s 4(1).

169 *Shaw v Cates* [1909] 1 Ch 389, 396 (Parker J).

170 *Ibid.*

171 *Ibid* 398.

172 PH Pettit, *Equity and the Law of Trusts* (Butterworths, 8th ed, 1997) 401; JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1826].

173 *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).

5.190 Trustees have been held to have taken insufficient precautions where they relied on a valuation prepared by a valuer employed by the mortgagor.¹⁷⁴ 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).

5.191 At a time when it was common for valuations to be carried out by surveyors, trustees had also been held to be at fault in obtaining the valuation of a surveyor who was not from the locality in which the mortgaged property was situated.¹⁷⁵

5.192 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

5.193 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'.¹⁷⁶ 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 an expert having local knowledge is properly instructed to value the property, and to the lending margins applied by the courts.¹⁷⁷

5.194 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).

5.195 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.¹⁷⁸ Some specific rules and

¹⁷⁴ *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).

¹⁷⁵ *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.

¹⁷⁶ PH Pettit, *Equity and the Law of Trusts* (Butterworths, 8th ed, 1997) 401.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Trusts Act 1973* (Qld) s 23 is set out at [5.19] above.

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*.

5.196 Of those older rules, only the lending margins previously applied in England by the Courts of Equity have received judicial consideration by Australian courts.

5.197 An early decision 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.¹⁷⁹ However, by the late 1890s, as in England, the one-half margin was applied less stringently.¹⁸⁰ In particular, 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'.¹⁸¹ In coming to that view, his Honour referred to the differences between the conditions prevailing in England and New South Wales, and rejected the premise underlying the lending margins that agricultural land is a safer security than land on which a business is conducted.¹⁸²

5.198 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.¹⁸³ 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.¹⁸⁴

5.199 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.

179 *Yeo v Rotton* (1865) SCR (NSW) Eq 110, 111–12 (Hargrave J).

180 See *Hutchings v Snowden* (1897) 23 VLR 118, 127–8 (a'Beckett J); *Smith v Hassall* (1899) 20 LR (NSW) Eq 165, 171–2 (AH Simpson CJ in Eq).

181 (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'.

182 *Ibid* 171–2.

183 *Learoyd v Whitely* (1887) 12 App Cas 727, 733–4 (Lord Watson).

184 See the cases cited at n 175 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'.

Whether a provision to the general effect of section 30(1) should be retained

5.200 In England, section 8(1) of the *Trustee Act 1925* was repealed by the *Trustee Act 2000* (UK).¹⁸⁵ The repeal of that section implemented a 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.¹⁸⁶ 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:¹⁸⁷

The new wide power of investment 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 by the new statutory duty of care ...

5.201 Similarly, in Ontario, the current *Trustee Act* no longer includes an equivalent provision.¹⁸⁸

5.202 The British Columbia Law Institute has also recommended the repeal of the equivalent provision in that province.¹⁸⁹ In its view, the provision did not serve any purpose once the list of authorised trustee investments was abolished.¹⁹⁰

Whether section 30(1) is redundant

5.203 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.

5.204 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.¹⁹¹ If the property on which a loan is secured ultimately proves to be insufficient and the trustee has 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.

¹⁸⁵ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 18, sch 4 pt II.

¹⁸⁶ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [2.27].

¹⁸⁷ *Ibid* [2.27], n 50.

¹⁸⁸ The provision contained in the previous Act, *Trustee Act*, RSO 1980, c 512, 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).

¹⁸⁹ *Trustee Act*, RSBC 1996, c 464, s 92(1).

¹⁹⁰ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 110, n 23. This recommendation has not been implemented.

¹⁹¹ As noted at [5.13] 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).

5.205 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,¹⁹² 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 23.¹⁹³

5.206 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)

5.207 In Chapter 7, the Commission has recommended 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, the retention of section 30(1) would not be inconsistent with the introduction of the general property power.

5.208 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.

5.209 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.

Whether the current conditions for protection should be retained

5.210 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

¹⁹² See [6.46] ff below.

¹⁹³ See [5.193] ff above.

valuer's report. The similar provisions in the other Australian jurisdictions also include a two-thirds limit.¹⁹⁴

5.211 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.¹⁹⁵

5.212 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

5.213 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.

5.214 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.

5.215 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 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.¹⁹⁶

5.216 The Law Reform Commission of Western Australia, in its 1984 Report on Trusts and 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, for example, to facilitate the investment of small sums by trustees on mortgage in the housing market, while other respondents had opposed any change to that limit, which they saw as a safeguard.¹⁹⁷ That Commission ultimately recommended

¹⁹⁴ *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).

¹⁹⁵ See *Trustee Act 1956* (NZ) s 13N(1)(b), which is set out at [5.217] below.

¹⁹⁶ See [5.186] above.

¹⁹⁷ 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].

against any change to that limit, preferring to retain a cautious approach to the protection conferred by the provision:¹⁹⁸

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.

Other approaches

5.217 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:¹⁹⁹

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 ...

5.218 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.

5.219 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).

5.220 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,²⁰⁰ the Queensland provision arguably operates as a greater safeguard of the beneficiaries' interests.

Discussion Paper

5.221 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to include a provision to the general effect of section 30(1) or whether it is 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.²⁰¹

198 Ibid [5.4].

199 *Trustee Act 1956* (NZ) s 13N(1)(b).

200 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'.

201 *Trusts Discussion Paper* (2012) 167.

5.222 The Commission also sought submissions on whether, if the *Trusts Act 1973* (Qld) continues to include a provision to the general effect of section 30(1), that section should:²⁰²

- 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
- replace the reference to 'two-thirds' with a different proportion of the value of the property stated in the valuer's report; or
- 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.

Consultation

5.223 This issue was addressed by the Queensland Law Society, the Bar Association of Queensland, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law. All of these respondents considered that section 30(1) should be retained, and that it should 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.

5.224 Two of these respondents noted that the provision gives useful guidance to trustees. The Bar Association of Queensland considered that the 'two-thirds' rule provides certainty for trustees. The Financial Services Council was of the same view, and commented that section 30(1) 'provides a lot more comfort' to trustees than reliance on section 76.

5.225 The Queensland Law Society expressed the view that 'any movement away from a fixed two thirds places too much emphasis on the quality of the valuer's report'.

5.226 The Public Trustee also preferred the Queensland approach to the more flexible approach found in the equivalent New Zealand provision:

Whilst a provision such as that which operates in New Zealand ... provides a greater degree of flexibility for a trustee, a valuer's role and task may not lend itself to making prudent decisions — or providing advice in respect of that which is in the interest of beneficiaries.

5.227 However, a legal practitioner who practises in trusts and succession law queried whether section 30(1)(b) should be omitted. That section 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 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'. That respondent considered that 'the two-thirds value is the insurance'

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Ibid 169.

and that the premium for individual mortgagee insurance was likely to be prohibitive.

The Commission's preliminary view

5.228 The Commission acknowledges that section 30(1) of the *Trusts Act 1973* (Qld) adopts a somewhat arbitrary approach by protecting trustees who lend not more than two-thirds of the value of the mortgaged property. However, in doing so, the section provides a practical incentive for trustees not to lend more than that proportion of the mortgaged property. It therefore has the capacity to operate as a 'brake' on speculative lending, while not preventing trustees from lending a greater proportion of the value of the property where it is prudent to do so.

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

5.230 For these reasons, the Commission considers that the new legislation should include a provision to the effect of section 30(1) of the *Trusts Act 1973* (Qld), including the two-thirds ratio that currently appears in the section.

LIMITATION OF LIABILITY FOR LOSS ON IMPROPER INVESTMENTS

5.231 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:

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.

5.232 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'.²⁰³ 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

²⁰³

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

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).

5.233 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:²⁰⁴

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.

5.234 In order to obtain the protection of section 30A, a trustee must 'establish the propriety of the investment independently of value'.²⁰⁵ 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,²⁰⁶ or that was of 'such a kind that it ought never to have been made at all for any amount large or small'.²⁰⁷

5.235 Provisions in similar terms are found in the trustee legislation of the other Australian jurisdictions and New Zealand.²⁰⁸

5.236 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),²⁰⁹ 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.²¹⁰

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

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

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

207 *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 improvident'.

208 *Trustee Act 1925* (ACT) s 19; *Trustee Act 1925* (NSW) s 19; *Trustee Act* (NT) s 10D; *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.

209 *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 18, sch 4 pt II.

210 See [5.200] above.

5.237 Similarly, the Law Commission of New Zealand has recently proposed that its counterpart to section 30A of the Queensland Act should be repealed on the basis that it is one of a number of provisions that are 'either historic or unnecessary'.²¹¹

Discussion Paper

5.238 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to include a provision to the effect of section 30A.²¹²

Consultation

5.239 The Queensland Law Society, the Bar Association of Queensland, Professor Lee and a legal practitioner who practises in trusts and succession law submitted that the legislation should continue to include a provision to the effect of section 30A of the *Trusts Act 1973* (Qld), while the Public Trustee and the Financial Services Council advised that they did not press for any amendment of that section.

The Commission's preliminary view

5.240 The Commission considers that, even though the *Trusts Act 1973* (Qld) has adopted a modern framework for trustees' investment powers, section 30A of the *Trusts Act 1973* (Qld) still serves a useful purpose. Where a trustee has lent an excessive amount on the security of a mortgage, it clarifies that the trustee is liable for the difference between the amount advanced and the amount that might properly have been advanced, with interest. In doing so, section 30A avoids the causation argument that might otherwise arise as to the proper basis for assessing the trustee's liability. The Commission is therefore of the view that the new legislation should include a provision to the effect of section 30A.

PROTECTION FOR DISPENSING WITH INVESTIGATION OF LESSEE'S TITLE

5.241 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:

- (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, either completely or in part, with the production or investigation of the lessee's title when making the loan.

5.242 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

²¹¹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 90 (Proposal P17(3)(f)), [5.7], referring to *Trustee Act 1956* (NZ) s 13O.

²¹² *Trusts Discussion Paper* (2012) 171.

referred to the production or investigation of the *lessor's*, rather than the *lessee's*, title.²¹³

Background

5.243 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,²¹⁴ title to old system land was established by 'the obtaining and presentation of evidence of the chain of instruments and events constituting the title'.²¹⁵ Proof of title to old system land could be quite onerous.²¹⁶

5.244 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'.²¹⁷

5.245 Section 27(2) was modelled on similar provisions in England, Victoria, Western Australia and New Zealand (all of which referred to the *lessor's* title).²¹⁸

5.246 These provisions had their origins in section 4(2) of the English *Trustee Act 1888*. 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.²¹⁹ 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, English conveyancing legislation provided that, in contracts to grant or assign certain leaseholds, the intended lessee or assignee was not entitled to call for the relevant title of the owner-lessee.²²⁰ 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'.²²¹ Section 4(2) 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.

213 The Explanatory Notes to the Trusts (Investments) Amendment Bill 1999 (Qld) do not refer to this change in the wording between the former s 27(2) and the current s 30(2) of the *Trusts Act 1973* (Qld).

214 *Land Title Act 1994* (Qld) ss 27, 184.

215 BA Helmore, *The Law of Real Property in New South Wales* (Law Book, 2nd ed, 1966) 32.

216 Ibid, quoted in *Trusts Discussion Paper* (2012) [6.202].

217 *Trusts and Settled Land Report* (1971) 26.

218 Ibid 27. See *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 8(2) (Act as passed); *Trustee Act 1958* (Vic) s 8(2) (Act as passed); *Trustees Act 1962* (WA) s 22(2) (Act as passed); *Trustee Act 1956* (NZ) s 10(2) (Act as passed), now s 13N(2).

219 AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 42.

220 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. See also s 3(1) of the latter Act. 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).

221 AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 42.

5.247 However, as the Commission observed in its 1971 Report,²²² the obligation to require production of the lessor's title was not absolutely removed by the provision, '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'.²²³

Whether section 30(2) should be retained

5.248 In Victoria and Western Australia, the counterparts to section 30(2) were repealed in 1996 and 1997, respectively, when the trustee legislation was amended to include the new 'prudent person' investment provisions.²²⁴

5.249 The provisions in the Northern Territory, South Australia and Tasmania were reinserted (and renumbered) when the new investment provisions were enacted in those jurisdictions in 1996, 1995 and 1998, respectively.²²⁵ As part of those amendments, the Tasmanian provision changed from referring to 'lessor's title' to 'lessee's title'.

5.250 In England, the equivalent provision — section 8(2) of the *Trustee Act 1925* (which referred to the 'lessor's' title) — was repealed by the *Trustee Act 2000* (UK), implementing a recommendation of the Law Commission of England and Wales. The Law Commission considered the provision to be unnecessary in view of its proposed new investment provisions.²²⁶

5.251 Similarly, the Law Commission of New Zealand has recently proposed that its counterpart to section 30(2) of the Queensland Act should be repealed on the basis that it is one of a number of provisions that are 'either historic or unnecessary'.²²⁷

5.252 Given that there is no longer any old system land in Queensland,²²⁸ 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 the original English provision 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.²²⁹

²²² *Trusts and Settled Land Report* (1971) 27.

²²³ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 43.

²²⁴ *Trustee and Trustee Companies (Amendment) Act 1995* (Vic) s 4; *Trustees Amendment Act 1997* (WA) s 6.

²²⁵ *Trustee Act* (NT) s 10C(2); *Trustee Act 1936* (SA) s 13A(2); *Trustee Act 1898* (Tas) s 12B(2).

²²⁶ See [5.200] above.

²²⁷ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 90 (Proposal P17(3)(f)), [5.7], referring to *Trustee Act 1956* (NZ) s 13N.

²²⁸ See [7.100] below.

²²⁹ See [5.246] above.

Discussion Paper

5.253 In the Discussion Paper, the Commission suggested that, 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.²³⁰

5.254 The Commission expressed the preliminary view that section 30(2) of the *Trusts Act 1973* (Qld) is no longer needed and proposed that the provision should be omitted.²³¹

Consultation

5.255 The Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law were all of the view that section 30(2) of the *Trusts Act 1973* (Qld) should be omitted. The Queensland Law Society noted that 'an investment by Queensland trustees on leases of old system land in other jurisdictions is almost certainly rare'.

5.256 The Bar Association of Queensland stated that it does not hold a view on the Commission's proposal to omit section 30(2).

The Commission's preliminary view

5.257 Section 30(2) of the *Trusts Act 1973* (Qld) was relevant when trustees lent on the security of a lease of old system land. However, given the rarity of old system land and the breadth of trustees' general powers of investment, the Commission considers that the provision is no longer needed. Accordingly, the new legislation should not include a provision to the effect of section 30(2) of the *Trusts Act 1973* (Qld).

PRELIMINARY RECOMMENDATIONS

General investment powers and duties

5-1 Subject to Recommendation 5-2, the new legislation should include provisions to the general effect of sections 21–24 of the *Trusts Act 1973* (Qld).

²³⁰ *Trusts Discussion Paper* (2012) [6.210].

²³¹ *Ibid* [6.211], 174.

5-2 For consistency with the general statutory duty of care that is recommended in Chapter 6, the provision based on section 22 of the *Trusts Act 1973* (Qld), if retained as a separate provision (and not subsumed by the general statutory duty of care), should also impose a higher standard of care on trustees who have special knowledge or experience or who hold themselves out as having such knowledge or experience.

Powers in relation to securities

5-3 The new legislation should:

- (a) not include a stand-alone provision to the effect of section 25 of the *Trusts Act 1973* (Qld), but should instead state the powers currently conferred by section 25(1)–(3) more briefly as examples of the powers conferred by the general property power; and
- (b) provide that the powers mentioned in paragraph (a) may be exercised whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

Power as to calls on shares

5-4 The new legislation should not include a provision to the effect of section 27 of the *Trusts Act 1973* (Qld), but should instead include a provision to the effect of section 33(1)(c) of the Act.

Power to purchase, or retain, accommodation for a beneficiary

5-5 The new legislation should include a provision to the general effect of section 28 of the *Trusts Act 1973* (Qld), except that:

- (a) the provisions based on section 28(1)–(2) should apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust;
- (b) the provision should be expressed in more modern language, and should avoid the current reference to a ‘dwelling house’; and
- (c) the provision should clarify that it enables a trustee, in appropriate circumstances, to purchase an interest in a retirement village.

Power to convert a business into a company

5-6 The new legislation should not include a provision to the effect of section 58 of the *Trusts Act 1973* (Qld).

Power to retain investments

- 5-7** The new legislation should not include a provision to the effect of section 29 of the *Trusts Act 1973* (Qld).

Loans and investments not breaches of trust in particular circumstances

- 5-8** The new legislation should include a provision to the effect of section 30(1) of the *Trusts Act 1973* (Qld), including the two-thirds ratio that currently appears in that section.

Limitation of liability for loss on improper investments

- 5-9** The new legislation should include a provision to the effect of section 30A of the *Trusts Act 1973* (Qld).

Protection for dispensing with investigation of lessee's title

- 5-10** The new legislation should not include a provision to the effect of section 30(2) of the *Trusts Act 1973* (Qld).

Chapter 6

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INTRODUCTION

The nature of trustees' duties

6.1 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

6.2 Some duties are coupled with a power, in which case the trustee is obliged to perform the duty, but usually has a discretion as to when and how to perform it.³

Sources of duties

6.3 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.

6.4 The *Trusts Act 1973* (Qld) does not contain a general statement of the duties of trustees. In contrast, the *Succession Act 1981* (Qld) includes a brief statement of the key duties of personal representatives in section 52(1) of that Act, although that statement is by no means exhaustive. The content of a personal representative's duties, including, in particular, the main duty 'to administer the estate according to law', is still found in the case law.

6.5 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.⁴

Scope of this chapter

6.6 This chapter gives an overview of trustees' duties under the general law, as well as under certain Commonwealth legislation that applies to particular trustees, and examines the statutory provisions and proposals for the reform of trustees' duties that have been enacted or made in other jurisdictions.

6.7 It also includes the Commission's preliminary recommendations about the duties which, at this stage of the review, should be included in the new legislation.

¹ A person who does not wish to accept an appointment as trustee can 'disclaim' the office: see *Trusts Discussion Paper* (2012) [3.16].

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]. 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.

⁴ *Ibid* [1617]. See also JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625.

THE GENERAL LAW

6.8 As explained below, trustees are subject to many duties, which can be classified in different ways. It has been suggested, for example, that all of their duties can be reduced to two main kinds: loyalty and prudence.⁵ This part of the chapter gives a brief overview of the duties to which trustees are subject, before considering which duties might be most suitable for inclusion in the new legislation.

Fiduciary duties

6.9 Trustees are fiduciaries and, therefore, subject to the same duties as other fiduciaries. As such, trustees are subject to the 'proscriptive fiduciary duties'⁶ — 'not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict'.⁷ 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'.⁸

6.10 These duties may be seen as arising from the fundamental duty of fiduciaries to 'give undivided loyalty to the persons whom they serve'.⁹

Specific trustee duties

6.11 In addition to the duties that apply to trustees by virtue of being fiduciaries, trustees are subject to many other duties that are specific to their office as trustee.

Duty to become acquainted with the terms of the trust

6.12 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'.¹⁰

Duty to get in the trust property

6.13 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'.¹¹ They must keep documents relating to trust property under their own control and in a safe place.¹²

⁵ See [6.39]–[6.40] below.

⁶ *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ). See generally 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, 233–4.

⁷ *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ).

⁸ *Jones v AMP Perpetual Trustee Company NZ Ltd* [1994] 1 NZLR 690, 711 (Thomas J).

⁹ *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].

¹⁰ 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).

¹¹ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1702].

Duty to adhere to, and carry out, the terms of the trust

6.14 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’.¹³ 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’.¹⁴

6.15 This duty is, however, subject to a number of exceptions, and a trustee is not bound to carry out the terms of the trust if: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,¹⁶ 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

6.16 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.¹⁷ 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’.¹⁸

6.17 The duty to keep proper accounts, and the corresponding entitlement of beneficiaries (and of potential beneficiaries under discretionary trusts), are considered in greater detail later in this chapter.

12 *Field v Field* [1893] 1 Ch 425, 429 (Kekewich J).

13 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 498 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

14 JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1704].

15 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].

16 See, eg, *Trusts Act 1973* (Qld) s 31(1).

17 *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).

18 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.35].

Duty to act personally

6.18 Trustees are ordinarily required to act personally in administering the trust.¹⁹ This duty has a number of manifestations.

6.19 Unless they are authorised to do so,²⁰ trustees may not delegate the exercise of their duties or powers,²¹ not even to a co-trustee.²² 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.²³

6.20 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,²⁴ whether by the settlor, the beneficiaries or a third party.²⁵

6.21 Further, trustees must not fetter their discretion.²⁶ 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'.²⁷ The strict application of that principle has precluded the grant of an option to purchase, or renew a lease of, trust property.²⁸ 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'.²⁹

6.22 The obligation for co-trustees to act jointly, which is considered later in this chapter, is a further aspect of the duty of trustees to act personally.

19 *Turner v Comey* (1841) 5 Beav 515, 517; 49 ER 677, 678 (Lord Langdale MR).

20 See *Pilkington v Inland Revenue Commissioners* [1964] AC 612, 634 (Viscount Radcliffe). See also s 56 of the *Trusts Act 1973* (Qld), discussed in Chapter 4, which permits a trustee, in specified circumstances, to delegate the trusts, powers, authorities and discretions vested in the trustee.

21 *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).

22 *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596 (Kay J).

23 *Learoyd v Whiteley* (1887) 12 App Cas 727, 731 (Lord Halsbury LC).

24 *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.

25 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.40].

26 *Re King* (1904) 29 VLR 793, 796 (Holroyd J).

27 *Osborne v Amalgamated Society of Railway Servants* [1909] 1 Ch 163, 187 (Fletcher Moulton LJ).

28 *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.

29 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.40].

Duty to act impartially

6.23 As a general rule, ‘trustees are bound to hold an even hand among their beneficiaries, and not favour one as against another’.³⁰

6.24 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’.³¹ 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.³²

6.25 However, the duty to act impartially does not apply to the trustees of discretionary trusts in deciding which beneficiaries to benefit.³³

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.

6.26 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’, except so far as it is inconsistent with the *Trusts Act 1973* (Qld) or another Act or with the trust instrument.³⁴

Duty to invest (or to make the trust property productive)

6.27 Trustees have a duty to invest, even in the absence of a direction to that effect in the trust instrument.³⁵ 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).³⁶

³⁰ *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).

³¹ 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].

³² *Re Christmas’ Settlement Trusts* [1986] 1 Qd R 372, 379 (McPherson J).

³³ *Edge v Pensions Ombudsman* [1998] Ch 512, 533 (Scott V-C), affd [2000] Ch 602.

³⁴ *Trusts Act 1973* (Qld) s 23(1), (2)(c). 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: *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).

³⁵ *Adamson v Reid* (1880) 6 VLR 164, 167 (Molesworth J). See also *Byrnes v Kendle* (2011) 243 CLR 253, 277 (Gummow and Hayne JJ).

³⁶ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.175].

Duty to pay the correct beneficiaries

6.28 Trustees are under a duty to pay the correct beneficiaries.³⁷ This duty could be considered as another aspect of the duty to carry out, or perform, the trust.

6.29 As a response to the strictness of this duty, section 67 of the *Trusts Act 1973* (Qld) 'lighten[s] the heavy burden which was thrown on trustees'³⁸ by giving trustees relief from liability in respect of the claims of beneficiaries, creditors and other persons where trust property has been distributed after publishing a notice of intended distribution.

Duty to seek advice

6.30 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.³⁹ In *Cowan v Scargill*, Megarry V-C observed that:⁴⁰

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.

6.31 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', except so far as it is inconsistent with the *Trusts Act 1973* (Qld) or another Act or with the trust instrument.⁴¹ 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.⁴²

³⁷ *Barratt v Wyatt* (1862) 30 Beav 441, 444; 54 ER 960, 961 (Romilly MR); *Hilliard v Fulford* (1876) 4 Ch D 389.

³⁸ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1735].

³⁹ *Cowan v Scargill* [1985] 1 Ch 270, 289 (Megarry V-C). In some situations, a trustee should also seek judicial advice and directions from the court: see the discussion of *Trusts Act 1973* (Qld) ss 96–97 in Chapter 12.

⁴⁰ [1985] 1 Ch 270, 289. See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [10.2030].

⁴¹ *Trusts Act 1973* (Qld) s 23(1), (2)(d). 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: *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).

⁴² *Trusts Act 1973* (Qld) s 24(2). Similar provisions to s 24(2)(a) are included in the trustee legislation of the other Australian jurisdictions: *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).

Duty in relation to discretions

6.32 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’.⁴³ Trustees must not exercise their discretions to accomplish an ulterior purpose.⁴⁴ The requirement for ‘real and genuine consideration’ requires that there is an ‘exercise of active discretion’.⁴⁵

6.33 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’.⁴⁶

6.34 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 in a responsible manner according to its purpose’.⁴⁷ It is not enough for the trustees to ‘refrain from acting capriciously’.⁴⁸ 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.⁴⁹

Duty to act with prudence (the duty of care)

6.35 Trustees are under a duty to act prudently in managing the trust, sometimes referred to as an ‘equitable duty of care’.⁵⁰ This duty is discussed in greater detail later in this chapter.

Classification of duties

6.36 Different commentators have attempted to classify trustees’ duties, and have done so in different ways.

6.37 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

⁴³ *Karger v Paul* [1984] VR 161, 164 (McGarvie J). In this context, ‘good faith’ has been equated with ‘honesty’: 164. This issue is considered in greater detail in Chapter 12.

⁴⁴ *Cowan v Scargill* [1985] 1 Ch 270, 288 (Megarry V-C).

⁴⁵ *Karger v Paul* [1984] VR 161, 164 (McGarvie J), quoting *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 164.

⁴⁶ *Ibid* 166.

⁴⁷ *Re Hay’s Settlement Trusts* [1982] 1 WLR 202, 209 (Megarry V-C).

⁴⁸ *Ibid*.

⁴⁹ *Ibid* 210.

⁵⁰ 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, 235. See also *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 516 (Finn J).

are often described in the former terms.⁵¹ 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'.⁵²

6.38 Hanrahan has suggested that the duties imposed by equity on trustees of public unit trusts ('responsible entities') can be classified into four broad categories:⁵³

- 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.

6.39 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.⁵⁴

6.40 Similarly, Langbein has succinctly described the 'two central duties of trust fiduciary law' as loyalty and prudence.⁵⁵ He has further suggested that the many subrules of fiduciary administration are subsumed under those two duties:⁵⁶

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)

6.41 It has also been suggested that trustee duties can be categorised according to the standard of liability that will be imposed for a breach.⁵⁷

51 *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ). See generally 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, 233–4.

52 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1602].

53 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, 232. Public unit trusts are discussed in *Trusts Discussion Paper* (2012) ch 3.

54 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.010].

55 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.

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

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.

'Core' duties

6.42 Some of the duties of a trustee have been described as 'core' or 'irreducible' duties.⁵⁸ 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.⁵⁹

6.43 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.⁶⁰

6.44 Professor Hayton has suggested that the core duties are:⁶¹

- 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.

6.45 He suggested that the exclusion of the latter duty would 'make a nonsense of the trust relationship as an obligation of confidence'.⁶²

A GENERAL STATUTORY DUTY OF CARE FOR TRUSTEES

The general law

6.46 In *Re Speight*,⁶³ 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

57 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).

58 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.

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

60 [1998] Ch 241, 253–4, cited in *Rankine v Rankine* (Unreported, Supreme Court of Queensland, de Jersey CJ, 3 April 1998).

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

62 Ibid.

63 (1883) 22 Ch D 727, affd *Speight v Gaunt* (1883) 9 App Cas 1.

obligation on the trustee'.⁶⁴ That judgment was upheld by the House of Lords, where Lord Blackburn stated that:⁶⁵

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.

6.47 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:⁶⁶

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)

6.48 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.⁶⁷

6.49 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*.⁶⁸

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

64 Ibid 739 (Jessel MR). Bowen LJ (at 762) expressed a similar view.

65 *Speight v Gaunt* (1883) 9 App Cas 1, 19.

66 (1886) 33 Ch D 347, 355. In *Cowan v Scargill* [1985] 1 Ch 270 Megarry V-C (at 289) adopted this standard of care.

67 (1886) 33 Ch D 347, 350 (Cotton LJ), 358 (Lopes LJ).

68 *Learoyd v Whiteley* (1887) 12 App Cas 727, 733.

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.

6.50 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.⁶⁹

6.51 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 to decide whether to apply a higher standard since the trustees had fallen far short of even the usual prudent business person standard.⁷⁰

6.52 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*⁷¹ in relation to the prudent business person standard ‘as precluding the adoption of a different and higher standard’ in particular circumstances.⁷²

Trusts Act 1973 (Qld)

6.53 The *Trusts Act 1973* (Qld) does not include a statutory duty of care that applies generally to the exercise of a trustee’s powers. However, section 22(1) of the Act includes a specific duty of care that applies when a trustee exercises a power of investment. Section 22 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.

⁶⁹ *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 516 (Finn J).

⁷⁰ *Ibid* 517–18.

⁷¹ (1952) 88 CLR 609.

⁷² (1995) 62 FCR 504, 518, citing *Bartlett v Barclays Trust Co Ltd (No 1)* [1980] Ch 515.

6.54 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.

6.55 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*,⁷³ and places a greater emphasis on the fact that a trustee is not simply managing his or her own affairs.

6.56 Similar provisions are included in the trustee legislation of the other Australian jurisdictions, except that those provisions, unlike section 22(1) of the Queensland Act, apply subject to the trust instrument.⁷⁴

Commonwealth legislation relating to trustees

Superannuation entities

6.57 The *Superannuation Industry (Supervision) Act 1993* (Cth) prescribes a number of covenants that are taken to be included in the governing rules of a superannuation entity.⁷⁵ Effectively, these covenants impose a number of mandatory duties on the trustees of superannuation entities.⁷⁶

6.58 Currently, section 52(2)(b) provides that these 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'.

6.59 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 entities⁷⁷ and self-managed superannuation funds.

6.60 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.

⁷³ See [6.47] above.

⁷⁴ *Trustee Act 1925* (ACT) s 14A(1)–(2); *Trustee Act 1925* (NSW) s 14A(1)–(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).

⁷⁵ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2).

⁷⁶ See CCH Online, *Australian Superannuation Commentary* (at 7 August 2012) ¶¶2-810–¶¶2-815.

⁷⁷ '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').

6.61 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’. 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’.⁷⁸

Responsible entities of managed investment schemes

6.62 Under the *Corporations Act 2001* (Cth), the responsible entity of a managed investment scheme⁷⁹ must ‘exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity’s position’.⁸⁰

Legislation and proposals for reform in overseas jurisdictions

England

6.63 A statutory duty of care is imposed on trustees by section 1 of the *Trustee Act 2000* (UK):⁸¹

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’.

6.64 The statutory duty of care applies to the exercise of various specified powers, including the powers to invest trust property, acquire land, appoint agents,

⁷⁸ Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 (Cth) [1.62].

⁷⁹ 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); see *Trusts Discussion Paper* (2012) [3.46].

⁸⁰ *Corporations Act 2001* (Cth) s 601FC(1)(b).

⁸¹ 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.

nominees and custodians, compound liabilities, insure trust property, and exercise power in relation to reversionary interests not vested in the trustee.⁸²

6.65 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.⁸³ 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:⁸⁴

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.

6.66 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)⁸⁵ would provide 'a clear and accessible statement of the standard of care to be expected from trustees'.⁸⁶ 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:⁸⁷

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)

6.67 However, the statutory duty of care referred to in section 1 of the *Trustee Act 2000* (UK) 'does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply'.⁸⁸

Irish law reform proposals

6.68 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

⁸² *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).

⁸³ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999).

⁸⁴ *Ibid* [3.8].

⁸⁵ *Ibid* [3.14]–[3.21].

⁸⁶ *Ibid* [3.9].

⁸⁷ *Ibid* [3.24].

⁸⁸ *Trustee Act 2000* (UK) c 29, sch 1 para 7.

provision.⁸⁹ In its view, this ‘hybrid objective and subjective’ formulation ‘represents a refinement of the common law “prudent and reasonable man” test’.⁹⁰ It recommended that the duty should be of general application.⁹¹

Scottish law reform proposals

6.69 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.⁹² 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 a standard that is too onerous might discourage professionals from accepting the office of trustee.⁹³ While it proposed two different standards of care, the higher standard of care would not ordinarily apply to professional trustees who are not remunerated.⁹⁴

New Zealand

6.70 The Law Commission of New Zealand has proposed a statutory duty of care, based on the wording of the *Trustee Act 2000* (UK), to:⁹⁵

- (b) exercise such care and skill as is reasonable in the circumstances, having regard in particular—
 - (i) to any special knowledge or experience that the trustee has or holds himself or herself out as having; and
 - (ii) if the trustee is paid for services as a trustee, to any special knowledge or experience that it is reasonable to expect of a person in that role.

6.71 As discussed later in this chapter, the Law Commission of New Zealand proposed that the new trust legislation should include three categories of duties: ‘conduct’ duties, mandatory ‘content’ duties (which cannot be excluded) and default ‘content’ duties (which apply unless they are excluded).

89 Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [3.15]. That recommendation has not been implemented.

90 *Ibid* [3.13].

91 *Ibid* [3.26].

92 Scottish Law Commission, *Supplementary and Miscellaneous Issues Relating to Trust Law*, Discussion Paper No 148 (2011) [6.2].

93 *Ibid* [6.6].

94 *Ibid* [6.11].

95 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 45 (Proposal P5(1)(b)).

6.72 Under its proposals, the duty of care is categorised as a 'conduct duty', since it would govern the manner in which a duty, power or discretion is exercised by a trustee.⁹⁶

6.73 The Law Commission of New Zealand observed that, unlike the duty of honesty and good faith, which is fundamental to the nature of a trust and can never be excluded, 'the duty of care seems in law to be generally excludable'.⁹⁷ It considered that, whether or not the proposed duty of care is excludable or modifiable by the trust deed should depend on whether the duty of care is being applied to a mandatory content duty or to a default content duty.⁹⁸ It therefore made the preliminary proposal that new legislation should provide that the duty of care and skill applies:⁹⁹

- (a) to every exercise of a mandatory [content] duty ... regardless of anything in the terms of the trust; and
- (b) to every other exercise of a duty, power or discretion only to the extent that it has not been excluded or modified by the terms of the trust.

American Uniform Trust Code

6.74 The American Uniform Trust Code includes the following provisions dealing with 'prudent administration':¹⁰⁰

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.

6.75 Both of these sections may be excluded by the trust instrument.¹⁰¹

Canadian law reform proposals

6.76 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

96 Ibid [3.19].

97 Ibid [3.20].

98 Ibid 44–5.

99 Ibid 45 (Proposal P5(3)).

100 Unif Trust Code §§ 804, 806 (amended 2010).

101 Unif Trust Code § 105(b) (amended 2010).

that would apply to trustees in the discharge of their duties and the exercise of their powers.¹⁰² It considered that the emphasis in the formulation of the duty should be on the 'moral responsibility of trusteeship',¹⁰³ 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*.

6.77 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.¹⁰⁴

6.78 The British Columbia Law Institute later recommended the introduction in that province of a general statutory duty of care in virtually the same terms.¹⁰⁵

6.79 Those recommendations have not been implemented in Ontario or British Columbia.

6.80 However, the *Trustee Act* of Saskatchewan includes an express statement of trustees' general duty of care in similar, although not identical, terms:¹⁰⁶

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.

6.81 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.¹⁰⁷ The provision applies in addition to the 'prudent investor' obligation imposed on trustees when investing trust property.¹⁰⁸

6.82 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

¹⁰² Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 79, Rec 1.

¹⁰³ 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).

¹⁰⁴ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 35.

¹⁰⁵ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 31, Proposed *Trustee Act*, cl 6(2)–(3).

¹⁰⁶ *Trustee Act*, SS 2009, c T-23.01, s 7(1)–(2).

¹⁰⁷ Law Reform Commission of Saskatchewan, *Proposals for Reform of the Trustees Act*, Report (2002) Rec 1(1).

¹⁰⁸ *Trustee Act*, SS 2009, c T-23.01, s 25.

all trustees must meet.¹⁰⁹ 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.¹¹⁰

Discussion Paper

6.83 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should include a statutory duty of care that applies to trustees in administering the trust and, if so, whether that duty should:¹¹¹

- be based on section 22(1) of the *Trusts Act 1973* (Qld) or be expressed in some other way;
- apply generally to a trustee in administering the trust or only to the exercise of specified powers (as is the case under the *Trustee Act 2000* (UK));
- be absolute or, alternatively, apply only to the extent that a contrary intention is not expressed in the trust instrument.

Consultation

Whether the Act should include a general statutory duty of care

6.84 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law were all of the view that the legislation should include a statutory duty of care that applies generally to trustees in administering the trust. The Bar Association of Queensland commented that '[t]he inclusion of a statutory duty of care would assist both trustees and those asked to advise them in determining the extent of a trustee's obligations'.

How the statutory duty of care should be expressed

6.85 The Bar Association of Queensland considered that the general statutory duty of care should be expressed in similar terms to section 22(1) of the *Trusts Act 1973* (Qld). In its view, that approach would ensure consistency with the current legislation, whereas the imposition of 'a differently expressed form of duty, or standard, of care to investments ... might result in confusion for trustees'. It also preferred the expression of the duty in section 22(1) to the duty imposed by the English legislation, because section 22(1) emphasises that the trustee is managing the affairs of others:

[T]he substance of the statutory duty in section 1 of the *Trustee Act 2000* (UK), namely the obligation to 'exercise such care and skill as is reasonable in the circumstances' comes close to the expression of the tortious duty of care under the general law.

¹⁰⁹ Alberta Law Reform Institute, *Trustee Investment Powers*, Report No 80 (2000) [143].

¹¹⁰ *Ibid* [144].

¹¹¹ *Trusts Discussion Paper* (2012) 198.

The form of the statutory duty imposed by s 22(1) of the *Trusts Act 1973* (Qld), requiring the exercise of the care, diligence and skill which a prudent person (whether it be a prudent person engaged in a particular profession or a prudent person of business) would exercise in managing the affairs of other persons, more closely reflects a trustee's duty under the general law.

6.86 It observed, however, that it would be necessary to depart from the language of section 22(1) insofar as that provision distinguishes between a trustee whose profession, business or employment is, or includes, 'acting as a trustee or investing money for other persons' and one whose profession, business or employment is not of that kind.

6.87 Professor Lee also favoured a provision to the effect that a trustee who has special skills or expertise, or who is appointed as trustee in reliance on the trustee's representation that the trustee has special skills or expertise, must use those special skills or expertise in administering the trust. He also expressed support for the inclusion of provisions modelled on section 804 of the American Uniform Trust Code, to the effect that a trustee must:

- administer the trust as a prudent person would, having regard to the purposes, terms, distributional requirements, and other circumstances of the trust; and
- act with 'reasonable skill, care, diligence and caution'.

6.88 The Queensland Law Society suggested that the particular formulation of the duty was 'unlikely to enlighten lay trustees as to the correct standard (in the sense of judging whether particular conduct falls below or above a bench mark)'. However, this respondent expressed support for the adoption of the general statutory duty proposed by the Scottish Law Commission, under which the higher standard of care would not ordinarily apply to unremunerated professional trustees.

6.89 The Public Trustee and the Financial Services Council favoured the statutory duty of care imposed by the *Trustee Act 2000* (UK), perhaps with the modification proposed by the Scottish Law Commission in relation to professional trustees who are unremunerated.

Application of the statutory duty of care

6.90 The Queensland Law Society, the Bar Association of Queensland, Professor Lee and a legal practitioner who practises in trusts and succession law considered that the statutory duty of care should apply to a trustee generally 'in administering the trust'.

6.91 The Bar Association of Queensland commented that '[a]pplying the statutory duty of care to only a limited number of specified powers would potentially result in differing standards of duty attaching to different conduct by the same trustee and be productive of confusion for trustees and their advisers'.

6.92 The Public Trustee and the Financial Services Council suggested that the statutory duty of care should apply to trustees in the exercise of their duties.

Whether the statutory duty of care should be subject to a contrary intention

6.93 The Queensland Law Society, the Public Trustee and the Financial Services Council expressed the view that the statutory duty of care should be subject to a clearly expressed contrary intention in the trust instrument. The Public Trustee noted that there 'may be reasons or circumstances where modification of the statutory duties is necessary or appropriate'.

6.94 However, Professor Lee and a legal practitioner who practises in trusts and succession law considered that the duty of care should be absolute. The legal practitioner expressed the view that this is a core duty that should apply whether or not a contrary intention is expressed in the trust instrument. Professor Lee considered that trustee legislation should provide trustees 'with not only sufficient and indeed extended powers but also with good guidance as to the extent of their duties'.

6.95 The Bar Association of Queensland did not express a preference as to whether the statutory duty of care should be capable of being excluded, commenting that there 'are substantial arguments in favour of both positions and this is a matter on which reasonable minds will disagree'. However, it outlined the relevant considerations as follows:

As recognised in the discussion paper, under the general law a settlor can include terms in a trust deed which exclude liability for breaches of duty, be they proscriptive duties (such as the fiduciary duties to avoid conflicts of interest and duty and not to use the position of trustee to obtain a benefit) or prescriptive duties (such as to act with reasonable care and to comply with the terms of the trust). There is a limit to the extent to which liability for breach of trust can be excluded. The minimum duty of the trustee is to perform the trust honestly and in good faith for the benefit of the beneficiaries.

There is therefore an argument that it should remain open to the settlor of the trust to choose to impose only the ultimate obligations of honesty on their chosen trustee. The trust is the settlor's creation. The settlor might have good reasons for wanting to relieve a trustee from the obligation of due care, particularly if the settlor envisages that the beneficiaries might be contentious and the settlor wants a particular person to take up the responsibility of trustee nonetheless. Such circumstances can be easily envisaged as arising in some testamentary trusts for disputatious family members.

The contrary position recognises the importance of the trustee's position and the need to ensure that the interests of beneficiaries are protected by the imposition of a minimum standard of conduct. If a person is not willing to be subject to a requirement to act as a prudent person would in managing the affairs of other persons then is it appropriate for that person to hold the position of trustee?

6.96 The Bar Association of Queensland suggested that, if the statutory duty of care is to be made subject to the contrary intention of the settlor, consideration should be given to drafting the exception so that it applies only in circumstances where the duty has been *expressly* excluded by the trust deed. It further commented that, if the statutory duty is not made absolute:

care should also be taken to ensure that the legislation makes clear that the enactment of the statutory duty of care does not supplant or replace the various duties owed by trustees under the general law so that, in a situation where a trust deed expressly excludes the operation of the statutory duty of care, trustees would continue to be subject to those duties in so far as they are not excluded or modified by the terms of the trust instrument.

The Commission's preliminary view

6.97 In Chapter 7, the Commission has recommended that trustees should have, in relation to the trust property, all the powers of an absolute owner of the property. The introduction of the 'general property power', together with the consequential omission of a number of specific powers (some of which are currently subject to particular limitations) has the effect of conferring wider powers on trustees.

6.98 To ensure that the greater flexibility provided by the general property power is nevertheless subject to appropriate safeguards, the Commission considers it important to provide greater guidance, within the legislation, in relation to the manner in which trustees should exercise their various powers. The Commission therefore recommends that the new legislation should include a statutory duty of care that applies to trustees generally in administering the trust.¹¹²

6.99 The statutory duty of care should be framed in terms that are generally consistent with section 22(1) of the Act. Because that section employs language similar to that used by Lindley LJ in *Re Whiteley*,¹¹³ it places a greater emphasis on the fact that a trustee is not simply managing his or her own affairs, but those of another person.

6.100 The statutory duty of care should, like section 22(1)(a), impose a higher standard of care on trustees whose profession, business or employment includes acting as a trustee. In addition, the higher standard of care should be expressed to apply to those trustees who have special knowledge or experience or who hold themselves out as having such knowledge or experience. The Commission does not consider that there should be any exemption from this higher standard for unremunerated trustees with professional qualifications, as has been proposed by the Scottish Law Commission.

6.101 The enactment of a statutory duty of care in these terms will also clarify the duty that applies when trustees are exercising a power other than a power of investment. Because section 22(1) applies only when a trustee is exercising a power of investment, a trustee, when exercising any other power, is still subject to the duty under the general law to act with prudence, which, as explained earlier, is attended by some uncertainty as to its precise formulation and the standard that

¹¹² The Commission notes that a similar approach was adopted by the *Trusts (Investments) Amendment Act 1999* (Qld), which introduced s 22(1) of the *Trusts Act 1973* (Qld) to give trustees greater guidance in relation to the exercise of their new powers of investment.

¹¹³ (1886) 33 Ch D, 347, 355, quoted at [6.47] above.

applies to professional trustees or those who hold themselves out as having special knowledge, skills or experience.¹¹⁴

6.102 As the new statutory duty of care is intended to operate as a safeguard in relation to the exercise by trustees of their various powers, the Commission is of the view that the new duty should not be capable of being excluded or modified by the instrument (if any) creating the trust. This is consistent with the approach currently taken under the *Trusts Act 1973* (Qld) in relation to the duty imposed by section 22(1), which applies as an absolute duty.

6.103 Finally, because the Commission is not codifying the law in relation to trustees' duties, the new legislation should also ensure that the imposition of this duty does not limit any other duties to which a trustee is subject.

WHETHER ANY SPECIFIC DUTIES SHOULD BE INCLUDED IN THE *TRUSTS ACT 1973* (QLD)

6.104 This part of the chapter considers whether, in addition to a statutory duty of care, the new legislation should include any specific trustee duties in order to give greater guidance to trustees.¹¹⁵

6.105 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.¹¹⁶ In its view, this would also provide the opportunity to clarify the scope of those duties.

6.106 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.¹¹⁷

6.107 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'.¹¹⁸

6.108 The Law Commission of New Zealand has suggested that, if the inclusion of specific duties is not intended to alter the current legal position, 'any statutory

114 See [6.46] ff above.

115 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.

116 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 26–7, 62, 72.

117 British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 10–11.

118 Law Reform Commission of Saskatchewan, *Proposals for Reform of the Trustees Act*, Report (2002).

representation of the duties would need to clearly state that it is a summary only, and intended to restate the case law position'.¹¹⁹

6.109 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

6.110 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:¹²⁰

- (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.

6.111 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 2013.¹²¹

6.112 Those amendments will also introduce additional covenants that will apply to trustees of registrable superannuation entities, but not to trustees of self-managed superannuation funds. The additional covenants included in new section 52(2) will deal with conflicts of interest and the duty to act fairly.¹²²

6.113 The Explanatory Memorandum to the amending Bill explains that the new covenant in relation to conflicts of duty and interest is intended to regulate the management of conflicts where such conflicts would be permitted to continue under the general law:¹²³

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.

¹¹⁹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [3.8].

¹²⁰ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(a), (c).

¹²¹ *Superannuation Industry (Supervision) Act 1993* (Cth) ss 52(2)(a), (c), 52A(2)(a), (c), inserted by *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) s 3, sch 1 item 12.

¹²² *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(d)–(f), inserted by *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) s 3, sch 1 item 12.

¹²³ Explanatory Memorandum, *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012* (Cth) [1.51].

Responsible entities of managed investment schemes

6.114 Under the *Corporations Act 2001* (Cth), the responsible entity of a managed investment scheme is subject to a number of duties:¹²⁴

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
 - (ii) cause detriment to the members of the scheme; ...

Legislation and proposals for reform in overseas jurisdictions

American Uniform Trust Code

6.115 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.

...

¹²⁴

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.

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.

6.116 The commentary to the Code observes, in relation to section 802, that the duty of loyalty is 'perhaps the most fundamental duty of the trustee'.¹²⁵

6.117 The commentary further explains, in relation to section 803, that:¹²⁶

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.

6.118 Generally, the Uniform Trust Code provides that the terms of the trust instrument prevail over a provision of the Code.¹²⁷ 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.¹²⁸ The rationale for this exception has been explained in the following terms:¹²⁹

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.

6.119 However, the duties in sections 802 and 803 may be excluded by the trust instrument.

New Zealand

6.120 The Law Commission of New Zealand has proposed that new legislation should include 'simplified summaries ... of what the duties of trustees are'. It considered that this would provide 'a clear and accessible base from which trustees can gain an understanding of their duties', and give 'greater prominence' to the duties in law.¹³⁰ It commented that the new provisions would not be a code of the

¹²⁵ Unif Trust Code (amended 2010), Comment 134.

¹²⁶ Ibid 139.

¹²⁷ Unif Trust Code § 105(b) (amended 2010).

¹²⁸ Unif Trust Code § 105(b)(2) (amended 2010).

¹²⁹ JH Langbein, 'Mandatory Rules in the Law of Trusts' (2004) 98 *Northwestern University Law Review* 1105, 1124.

¹³⁰ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [3.10].

law of trustee's duties, and that the 'detail of how the law requires the duties to apply in practice would come from case law'.¹³¹

6.121 In addition to its proposed duty of care, the Law Commission proposed another 'conduct' duty, namely, that, in exercising any of the trustee's duties, the trustee must:¹³²

act honestly and in good faith for the benefit of the beneficiaries or a permitted purpose.

6.122 In relation to 'content' duties, it proposed that new legislation should imply the following mandatory (or non-excludable) duties into every trust:¹³³

- (a) the duty to understand and adhere to the terms of the trust;
- ...
- (c) the duty to exercise the powers of a trustee for a proper purpose.

6.123 It further proposed that new legislation should imply the following 'default content' duties into every trust:¹³⁴

- (a) the duty to maintain impartiality or evenhandedness between beneficiaries;
- (b) the duty not to make profit from the trusteeship;
- (c) the duty to act without reward;
- (d) the duty to avoid a conflict of interest;
- (e) the duty to be active (meaning the duty to consider the exercise of the trustees' discretions regularly and not to fetter these discretions);
- (f) the duty to act personally;
- (g) the duty to act unanimously;
- (h) the duty to manage the trust;
- (i) the duty to invest;
- (j) the duty to keep trust property separate from the trustee's own property;
- (k) the duty to keep and render accounts, and to provide information to beneficiaries; and
- (l) the duty to transfer property only to beneficiaries or persons legally authorised to receive property.

131 Ibid [3.11].

132 Ibid 45 (Proposal P5(1)(a)).

133 Ibid 45 (Proposal P6(1)). It also proposed that the legislation should include the duty to account to the beneficiaries for the trust property, discussed at [6.165] ff and [6.231] ff below.

134 Ibid 45–6 (Proposal P7(1)).

6.124 In relation to the default content duties, the Law Commission of New Zealand proposed that the duty to act without reward and the duty to act unanimously should be able to be excluded completely by the trust deed. However, in relation to the remaining default content duties, it proposed that ‘the terms of the trust may modify the extent to which the duty is met, but only insofar as the mandatory duties are not breached’.¹³⁵

Ireland

6.125 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’.¹³⁶ It considered that such a duty would be appropriate since trustees’ fiduciary obligations underlie the exercise of all trustee powers and duties.

Canadian law reform proposals

Good faith

6.126 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:¹³⁷

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.

6.127 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.¹³⁸

Impartiality

6.128 The *Trustee Act* of Saskatchewan includes a duty ‘to act impartially between income and capital beneficiaries, having regard to the trust property’,¹³⁹ implementing a recommendation made by the Law Reform Commission of Saskatchewan.¹⁴⁰

¹³⁵ Ibid 46 (Proposal P7(2)).

¹³⁶ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [1.31]–[1.32]. That recommendation has not been implemented.

¹³⁷ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 31, Proposed *Trustee Act*, cl 6(1).

¹³⁸ *Trustee Act*, SS 2009, c T-23.01, s 7(3).

¹³⁹ *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.

¹⁴⁰ 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. See also Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 286.

6.129 The British Columbia Law Institute has 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'.¹⁴¹

Conflicts of interest

6.130 The *Trustee Act* of Saskatchewan includes provisions dealing with a trustee's duty to avoid conflicts of interest,¹⁴² implementing recommendations of the Law Reform Commission of Saskatchewan to adopt a statutory conflict of interest rule. In the view of that Commission, 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, 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'.¹⁴³

6.131 The Saskatchewan provisions are in similar terms to provisions recommended initially by the Ontario Law Reform Commission¹⁴⁴ and later by the British Columbia Law Institute.¹⁴⁵ 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.

Discussion Paper

6.132 In the Discussion Paper, the Commission sought submissions on whether, apart from a general statutory duty of care, the *Trusts Act 1973* (Qld) should be amended to incorporate, as statutory duties, any of the specific duties that apply to trustees under the general law. It also sought submissions on whether the statutory duties (or any of them) should be absolute or whether they should apply only to the extent that a contrary intention is not expressed in the trust instrument.¹⁴⁶

Consultation

6.133 The majority of respondents who considered this question expressed the view that, with the exception of the duty to keep and produce records as discussed below, the legislation should not be amended to incorporate specific duties.

¹⁴¹ 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.

¹⁴² *Trustee Act*, SS 2009, c T-23.01, ss 9–10.

¹⁴³ Law Reform Commission of Saskatchewan, *Proposals for Reform of the Trustees Act*, Report (2002) Recs 2.3, 2.4.

¹⁴⁴ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 62, 82, Recs 18–19. These recommendations have not been implemented.

¹⁴⁵ 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.

¹⁴⁶ *Trusts Discussion Paper* (2012) 206.

6.134 The Queensland Law Society commented:

To list the duties is to take the risk that the importance of any not listed, is minimised. It may also impede the development of case law.

6.135 Similarly, the Bar Association of Queensland considered that to 'incorporate some, but not all, of the specific duties would risk undue focus by trustees on those duties to the detriment of other aspects of the administration of the trust'.

6.136 The Public Trustee expressed concern about the prospect, by the inclusion of specific duties, of unsettling the law that has developed over time. He considered that the current statutory duty in relation to the exercise of an investment power, together with a general statutory duty of care, were sufficient. The Financial Services Council was of the same view. Similarly, the Bar Association of Queensland considered that the introduction of a general statutory duty of care would be sufficient.

6.137 Professor Lee acknowledged the potential for a lengthy and detailed list of trustees' duties to constrain practitioners and the courts. However, he considered that:

trustee legislation should give good guidance to trustees as to their duties. Otherwise the legislation leaves trustees having to work out what their duties are from case law and academic opinion.

6.138 He suggested the inclusion of a brief statement of some fundamental duties 'expressed in very general terms', based on sections 801 and 802(a) of the American Uniform Trusts Code:

Subject to the provisions of this Act it is the duty of every trustee to administer the trust:

- (a) in good faith and with undivided loyalty;
- (b) in accordance with its terms and purposes; and
- (c) exclusively in the interests of beneficiaries.

6.139 A legal practitioner who practises in trusts and succession law also submitted that the legislation should include a list of specific trustee duties. In his view, the Act should include a statement to the effect that the primary duties of trustees are to 'exercise their powers and comply with their duties in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries'. He also considered that the legislation should state that, where the purpose of the trust is to provide financial benefits for the beneficiaries, the best interests of the beneficiaries are their best financial interests.

6.140 That respondent also submitted that the Act should include a list of the trustees' general duties, including duties to:

- (i) except where this Act and the trust document allow, act personally in the administration of the trust;

- (ii) keep a full and candid record of their trusteeship, including all appropriate financial accounts;
- (iii) whenever reasonably requested by a beneficiary, to make available, unless privilege is claimed, all accounts of the trust to the beneficiary for inspection and to provide copies of the accounts, at the cost of the beneficiary, whenever reasonably requested;
- (iv) inform all beneficiaries of full age and capacity of their entitlements pursuant to the trust;
- (v) review the investments of the trust on a regular basis, as the investments and/or the needs of the beneficiaries require;
- (vi) when it is appropriate or expedient to do so, promptly apply to the court for directions;
- (vi) on retirement, promptly cooperate in the transfer of assets and accounts to the new trustee;
- (vii) unless the trust document allows, not acquire trust assets, directly, indirectly, or through a company or trust in which the trustee has an interest or entitlement without the approval of the court on such terms as the court may require. (note omitted)

6.141 He considered that the duties, and particularly core duties, should apply whether or not there is a contrary intention in the trust instrument.

The Commission's preliminary view

6.142 At the beginning of this chapter, the Commission referred to the view that the many duties to which trustees are subject can be reduced to two main kinds: loyalty and prudence. The earlier recommendation that the new legislation should include a statutory duty of care is an expression of the second category of trustees' duties, namely, prudence.

6.143 In view of the wider powers that will be conferred on trustees by the general property power, the Commission considers it desirable that the legislation should also include, both as a constraint and by way of guidance, an expression of a trustee's duties relating to loyalty, so that the legislation reflects both fundamental aspects of a trustee's role.

6.144 It is not, however, the Commission's intention that the inclusion of specific statutory duties should change the duties to which trustees are subject. For that reason, the Commission is of the view that the new legislation should include a statement of the minimum or 'core' duties that are required to give substance to a trust. At this stage of the review, the Commission considers that the new legislation should reflect the statement of duties expressed by Millett LJ in *Armitage v Nurse*,¹⁴⁷ and should provide that a trustee, in administering the trust, must act honestly and in good faith and for the benefit of the beneficiaries.

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[1998] Ch 241, 253–4, quoted at [6.43] above.

6.145 Because these are the core duties of a trustee, and their exclusion would be repugnant to the existence of a trust, the new legislation should ensure that these duties are not capable of being excluded or modified by the instrument (if any) creating the trust.

6.146 Finally, because the Commission is not, as stated previously, codifying the law in relation to trustees' duties, the new legislation should also ensure that the imposition of these duties does not limit any other duties to which a trustee is subject.

DUTY TO KEEP ACCOUNTS AND OTHER RECORDS

The general law

6.147 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'.¹⁴⁸ As Gummow J explained in *Re Simersall*:¹⁴⁹

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 ...

6.148 Thus, it is the first¹⁵⁰ and ordinary¹⁵¹ duty of a trustee to 'keep proper accounts, and to have them always ready when called upon to render them' to the beneficiaries.¹⁵²

6.149 Ford and Lee explain that 'the trust accounts relate the history of the creation and administration of the trust',¹⁵³ and it has been said that 'proper accounts' are:¹⁵⁴

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.

¹⁴⁸ 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].

¹⁴⁹ (1992) 35 FCR 584, 588–9. See also *Spellson v George* (1987) 11 NSWLR 300, 315–16 (Powell J).

¹⁵⁰ *Wroe v Seed* (1863) 4 Giff 425, 429; 66 ER 773, 774 (Stuart V-C).

¹⁵¹ *McDonald v Ellis* (2007) 72 NSWLR 605, 613 (Bryson AJ).

¹⁵² *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).

¹⁵³ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6210].

¹⁵⁴ *Jones v Estate of Farley* (Unreported, Supreme Court of New South Wales, Santow J, 10 October 1997).

6.150 What is 'proper' will depend on the circumstances of the case, particularly the terms of the trust and the nature of the trust assets.¹⁵⁵ 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.¹⁵⁶ On the other hand, it has been noted that:¹⁵⁷

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.

6.151 In *Antill v Mostyn*, a case involving successive interests under a testamentary trust, it was stated that:¹⁵⁸

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.

6.152 Ford and Lee suggest that trustees must ordinarily maintain: a schedule of trust property listing the assets and liabilities of the trust; 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; and a distribution account, drawn up at the termination of the trust.¹⁵⁹

6.153 Trustees should also maintain 'records or earmarks to effectively distinguish' the trust property from other property that the trustees own or that is subject to another trust.¹⁶⁰ It is a 'hallmark duty' of a trustee not to mix trust funds with other funds.¹⁶¹

6.154 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.¹⁶²

6.155 Further, 'efficient trustees will collect together information that may be needed from time to time for the effective management of the trust', including

155 Ibid.

156 *McDonald v Ellis* (2007) 72 NSWLR 605, 613 (Bryson AJ).

157 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6110].

158 [2010] NSWSC 587, [13] (Bryson AJ).

159 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6050]–[9.6190].

160 *Antill v Mostyn* [2010] NSWSC 587, [14] (Bryson AJ). See also *Freeman v Fairlie* (1817) 3 Mer 29, 41; 36 ER 12, 16.

161 *Puma Australia Pty Ltd v Sportsman's Australia Pty Ltd (No 2)* [1994] 2 Qd R 159, 162 (McPherson ACJ). This rule may be modified by statute or 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).

162 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].

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.¹⁶³

6.156 When a trustee retires, the accounts and other trust documents should be given to the continuing and any new trustees.¹⁶⁴ 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.¹⁶⁵

Whether the Act should include a duty to keep accounts

6.157 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.¹⁶⁶ However, there is no statement in the *Trusts Act 1973* (Qld) of trustees' general duty to keep accounts or other records.

6.158 The position is similar in most of the other Australian jurisdictions except South Australia, where quite detailed provisions apply.

6.159 Section 84B(1) of the *Trustee Act 1936* (SA) requires a trustee to 'keep such records relating to his administration of the trust property as may be prescribed'.¹⁶⁷

6.160 The records are prescribed in detail in a lengthy list in regulation 5 of the *Trustee Regulations 2011* (SA).¹⁶⁸ The prescribed records are not limited to trust accounts. They include such things as: letters received and sent by the trustee; taxation returns; written instructions for the sale or transfer of trust property; insurance records; 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 registers of securities, investments and other property, cash receipt and cash payment books, bank statements, and trust accounts prepared not less than annually.¹⁶⁹

6.161 The records are to be retained for at least five years after the termination of the trust, and, if the trustee administers more than one trust, separate records must be kept in respect of each trust.¹⁷⁰

6.162 A more general approach has been taken elsewhere. For example, the American Uniform Trust Code provides simply that a trustee 'shall keep adequate

¹⁶³ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6210].

¹⁶⁴ Ibid [9.2210], citing *Tiger v Barclays Bank* [1951] 2 KB 556.

¹⁶⁵ See ibid [9.4010], citing *Payne v Evens* (1874) LR 18 Eq 356, 367.

¹⁶⁶ *Trusts Act 1973* (Qld) ss 54(1), 52. Those provisions are discussed in Chapters 4 and 9.

¹⁶⁷ The maximum penalty for non-compliance with s 84B(1) is \$500.

¹⁶⁸ *Trustee Regulations 2011* (SA) reg 5 is set out in full in *Trusts Discussion Paper* (2012) [7.154].

¹⁶⁹ *Trustee Regulations 2011* (SA) reg 5(1).

¹⁷⁰ *Trustee Regulations 2011* (SA) reg 5(2)–(3).

records of the administration of the trust' and 'shall keep trust property separate from the trustee's own property'.¹⁷¹

6.163 The National Committee for Uniform Succession Laws considered that it would be desirable to include an express statutory duty to keep necessary documents in its model administration of estates legislation 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:¹⁷²

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.

6.164 It further recommended that those documents should be maintained for three years after the completion of the administration of the estate.¹⁷³

6.165 Similarly, the Law Commission of New Zealand has proposed the inclusion of a general statutory duty for trustees, 'so far as is reasonable', to retain a copy of certain documents, namely, the trust deed and any variations made to it, a list of the trust assets, records of trustee decisions, written contracts, and 'any accounting records and financial statements prepared during that trustee's trusteeship'.¹⁷⁴

6.166 In its view, 'the duty to account to the beneficiaries for the trust property' (which encompasses the duty to keep records) is 'central to the trust relationship' and should, therefore, be statutorily implied into every trust as a mandatory duty.¹⁷⁵ It commented that:¹⁷⁶

there is merit in including the provision in the interests of educating non-professional trustees and making the law of trusts clear and accessible to the extent possible. The provision would unequivocally establish that these records must be kept by trustees.

6.167 The Law Commission of New Zealand did not consider that it is possible to prescribe what is required by the duty to account for all trusts, and explained that its proposed provision is intended, instead, to 'set out the minimum information that will nearly always be required to be kept'.¹⁷⁷ It explained that the provision would

¹⁷¹ Unif Trust Code § 810(a)–(b) (amended 2010). Similar provision is made in *Trusts (Guernsey) Law, 2007* (Guernsey) ss 25, 27; *Trusts (Jersey) Law 1984* (Jersey) s 21(5)–(6).

¹⁷² *Administration of Estates Report* (2009) vol 1, [11.182], Rec 11-8. It also recommended 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: Recs 11-3, 11-4.

¹⁷³ *Ibid* [11.187], Rec 11-9.

¹⁷⁴ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 71 (Proposal P10).

¹⁷⁵ *Ibid* [3.24]–[3.25], 45 (Proposal P6(1)(b)).

¹⁷⁶ *Ibid* [3.88].

¹⁷⁷ *Ibid* [3.85].

not override any requirement for a trustee to retain other information that is necessary to meet his or her obligations as trustee.¹⁷⁸

Discussion Paper

6.168 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should include a provision requiring trustees to keep adequate records relating to the administration of the trust and, if so:¹⁷⁹

- what particular records, if any, the Act should prescribe;
- for what period of time trustees should be required to maintain the records; and
- whether the legislation should also require trustees who are administering more than one trust to keep separate records in relation to each trust.

6.169 The Commission observed that a provision like that in South Australia might be overly prescriptive, particularly in the case of smaller trusts, and suggested that an obligation framed more generally may be more flexible.¹⁸⁰

Consultation

Inclusion of a statutory duty

6.170 Professor Lee expressed the view that the duty to keep proper accounts is a core duty of trustees. He noted that, although it is clear under the general law that trustees must keep proper accounts, ‘the details of this duty can be apprehended only by reference to case law and academic writing’. In his view, if the Act is to provide adequate guidance to trustees as to their duties, it should include a provision dealing with the duty to keep accounts. He favoured the introduction of detailed provisions in similar terms to those in South Australia, and a requirement to retain the records ‘for at least five years after the termination of the trust’.

6.171 The Bar Association of Queensland also submitted that a ‘provision requiring trustees to keep accurate records would serve as a reminder to trustees of the importance of not simply dealing with trust property in accordance with their obligations but being able to account for those dealings’. In its view, however, the duty ‘should be capable of flexible application depending on the nature of the trust and the trust property’ and so should not prescribe particular records, but should be in more general terms, such as a requirement to ‘keep such accounts and records as is appropriate in the circumstances of the trust’. It considered that, in light of the periods set out in section 27 of the *Limitation of Actions Act 1974* (Qld), an appropriate retention period for the documents would be ‘greater than six years’.

6.172 Similarly, a legal practitioner who practises in trusts and succession law considered that, whilst a duty should be included in the Act, it should specify the

178 Ibid.

179 *Trusts Discussion Paper* (2012) 215.

180 Ibid [7.155].

minimum requirements, rather than detailed and set rules. He suggested a retention period of 'no less than the life of the trust plus, say, six years'.

6.173 On the other hand, the Queensland Law Society did not consider it necessary to include a provision in the Act requiring trustees to keep adequate records. In its view, trustees' obligations to prepare annual taxation returns and to prepare trust accounts upon request 'should be an adequate incentive' for trustees to keep proper records.

6.174 Although the Public Trustee did not express a firm view whether a duty to keep accounts or other records should be included in the Act, he favoured a simple provision — 'a duty to maintain accounts and records' — rather than a lengthy and detailed one. The Public Trustee acknowledged that the South Australian provision 'has benefits', but observed that it 'may be overly prescriptive in respect of smaller trusts'. The Public Trustee suggested that an approach similar to that proposed by the National Committee for Uniform Succession Laws 'might be appropriate', given that the 'likely purpose' of such a provision is to serve as an explicit reminder to non-professional trustees.¹⁸¹ The Financial Services Council expressed a similar view.

Duty to keep separate records for each trust

6.175 The Bar Association, Professor Lee and the legal practitioner also considered that the legislation should require trustees who are administering more than one trust to keep separate records in relation to each trust.

The Commission's preliminary view

6.176 In the Commission's view, the new legislation should include a provision, in general terms, requiring trustees to keep accurate accounts and records of the administration of the trust. The Commission considers that a provision in these terms will serve to remind trustees, especially non-professional trustees, of this important duty. The Commission does not favour the adoption of a more prescriptive provision detailing the particular types of documents that must be retained, as that type of provision can never comprehensively list every document that must be retained to satisfy a trustee's duty to account.

6.177 The new legislation should further provide that, if trustees are administering more than one trust, they must keep separate accounts and records for each trust.

6.178 Finally, the new legislation should specify a minimum period for which trustees are required to maintain the trust accounts and records. While a number of different periods have been suggested, the Commission endorses the view of the National Committee for Uniform Succession Laws in this regard, and recommends that the legislation should require these documents to be maintained for a period of three years following the termination of the trust. Of course, while that is to be the period for which a trustee has a statutory duty to maintain these documents, a trustee may well consider it prudent to maintain the documents for a longer period,

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The recommendation of the National Committee for Uniform Succession Laws is set out at [6.163] above.

particularly having regard to the various limitation periods that apply to causes of action against trustees.¹⁸²

DUTY TO PROVIDE ACCOUNTS AND OTHER INFORMATION

6.179 In addition to keeping proper accounts, a trustee must 'have them always ready when called upon to render them' to the beneficiaries.¹⁸³ 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',¹⁸⁴ and to allow the beneficiaries or their agent, at the beneficiaries' own cost,¹⁸⁵ to inspect the accounts of the trust and other trust documents.¹⁸⁶ As Mahoney JA explained in *Hartigan Nominees Pty Ltd v Rydge*:¹⁸⁷

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.

6.180 The trustee's obligation constitutes a 'positive duty of disclosure'.¹⁸⁸ 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.¹⁸⁹

The entitlement to information: three different approaches

6.181 The precise nature and scope of beneficiaries' rights to information under the general law in Australia is attended by some uncertainty.¹⁹⁰ Three different, sometimes overlapping, approaches to this issue are found in the cases.

6.182 One approach is represented by the following statement of Lord Wrenbury in *O'Rourke v Darbishire*:¹⁹¹

¹⁸² See, eg, *Limitation of Actions Act 1974* (Qld) ss 27 (Actions in respect of trust property), 28 (Actions claiming personal estate of a deceased person).

¹⁸³ *Kemp v Burn* (1863) 4 Giff 348, 349–50; 66 ER 740, 740–1 (Stuart V-C).

¹⁸⁴ *Springett v Dashwood* (1860) 2 Giff 521, 526; 66 ER 218, 221 (Stuart V-C), citing *Clarke v Ormonde* (1821) Jacob 108; 37 ER 791.

¹⁸⁵ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 431 (Mahoney JA); *Re Fairbairn* [1967] VR 633, 640 (Gillard J).

¹⁸⁶ *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, 350; 66 ER 740, 741 (Stuart V-C); *Ottley v Gilby* (1845) 3 Beav 602, 604; 50 ER 237, 238 (Lord Langdale).

¹⁸⁷ (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).

¹⁸⁸ *Green v Wilden Pty Ltd* [2005] WASC 83, [470] (Hasluck J).

¹⁸⁹ 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).

¹⁹⁰ *Re Maguire* [2010] 2 NZLR 845, 854 (Asher J); *Schreuder v Murray (No 2)* (2009) 260 ALR 139, 160 (Buss JA; McLure JA agreeing).

¹⁹¹ [1920] AC 581, 626.

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.

6.183 This had sometimes been taken 'quite literally' to mean that a beneficiary has an actual proprietary interest in the documents of the trust.¹⁹² 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.¹⁹³ Consistent with this 'proprietary approach', it is generally accepted that beneficiaries under a fixed trust have a right (subject to exceptions) to information about the trust property.¹⁹⁴ This approach casts doubt, however, on the entitlement to information of potential beneficiaries under a discretionary trust, who do not have a beneficial interest in the trust property unless and until there has been an exercise of the trustee's discretion in the person's favour, and has been criticised on that basis.¹⁹⁵

6.184 Another approach is found in the dissenting judgment of Kirby P in *Hartigan Nominees Pty Ltd v Rydge*. Disapproving of the proprietary approach, Kirby P adopted the view expressed by Ford and Lee that:¹⁹⁶

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.

6.185 That approach is reflected in 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.¹⁹⁷ This 'provides a conceptual basis' for the prima facie entitlement of potential beneficiaries under a discretionary trust to information,¹⁹⁸ which has been recognised in several cases.¹⁹⁹

6.186 Both this approach and the proprietary approach recognise a prima facie entitlement, subject to exceptions.²⁰⁰

192 *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).

193 *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).

194 See [6.195] below.

195 See, eg, *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 421–2 (Kirby P), 444 (Sheller JA).

196 (1992) 29 NSWLR 405, 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-Streton J); *Morris v Morris* (1993) 9 WAR 150, 153 (Seaman J).

197 (1987) 11 NSWLR 300, 315–16.

198 *Jacobson v Dafna Nominees Pty Ltd* [1999] VSC 529, [95] (Ashley J).

199 See [6.195] below.

200 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1716].

6.187 The third approach differs significantly. It arises from the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd*, on an appeal from a division of the High Court of the Isle of Man, concerning a claim for disclosure by a potential beneficiary under discretionary trusts. In that case, 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.²⁰¹

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.

6.188 It went on to state that.²⁰²

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.

6.189 Some subsequent cases in Australia and New Zealand have followed the decision in *Schmidt*.²⁰³ However, where it has been followed in Australia, its application has been limited to documents other than trust accounts.²⁰⁴

6.190 Other Australian judges have declined to follow *Schmidt* at all, at least in respect of beneficiaries of fixed trusts, preferring the view that there is a prima facie right to information, subject to exceptions.²⁰⁵

6.191 In *McDonald v Ellis*, Bryson AJ doubted the precedent value of *Schmidt*, and questioned the persuasiveness of the Privy Council’s approach.²⁰⁶

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 ...

...

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.

201 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 729 (*‘Schmidt’*).

202 *Ibid* 734.

203 *Silkman v Shakespeare Haney Securities Ltd* [2011] NSWSC 148; *Avanes v Marshall* (2007) 68 NSWLR 595; *Re Maguire* [2010] 2 NZLR 845; *Foreman v Kingstone* [2004] 1 NZLR 841. See also, in England, *Breakspear v Ackland* [2009] Ch 32, 51 (Briggs J).

204 *Avanes v Marshall* (2007) 68 NSWLR 595, 599 (Gzell J), cited in *Silkman v Shakespeare Haney Securities Ltd* [2011] NSWSC 148, [21] (Hammerschlag J).

205 *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.

206 (2007) 72 NSWLR 605, 618–19.

6.192 The authors of *Jacobs' Law of Trusts in Australia* also question whether *Schmidt* represents the law in Australia, noting that, if extended to fixed trusts, it would have an 'unsatisfactory unsettling effect on received principles'.²⁰⁷

6.193 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.²⁰⁸

6.194 The particular approach that is adopted or preferred has consequences for the types of documents or information that must (or need not) be disclosed, as well as the question whether both beneficiaries of fixed trusts and potential beneficiaries under discretionary trusts are entitled to information.

The persons entitled to accounts or other information

6.195 As explained above, in determining a person's entitlement to information, the cases have traditionally drawn a distinction between beneficiaries of fixed trusts and potential beneficiaries under discretionary trusts (that is, persons who are merely the objects of a discretionary trust).²⁰⁹ The position under the general law in Australia appears to be that:

- beneficiaries of fixed trusts, who have vested or contingent interests in the trust property, have a clear prima facie entitlement to trust accounts and information about the trust property, under the proprietary approach,²¹⁰ and
- potential beneficiaries under discretionary trusts may also be entitled to accounts and information,²¹¹ not under the proprietary approach but on the basis of the trustee's fundamental obligation to account to those for whose benefit the trust property is being held.²¹²

6.196 In *Randall v Lubrano*, the potential beneficiaries under a discretionary trust sought accounts of the trust, with information as to the amount of the trust property

207 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1716].

208 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'. His Honour considered, however, that it was unnecessary, in the present case, to express an opinion on those issues (including whether the approach of the Privy Council in *Schmidt* represents the law of Australia).

209 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).

210 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.

211 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, 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. Nevertheless, the position of potential beneficiaries under discretionary trusts has been described as less clear: *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).

212 See [6.184]–[6.185] above.

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 potential beneficiaries were entitled to the accounts:²¹³

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 ...

6.197 That decision was followed in *Spellson v George*, 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:²¹⁴

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 ... (notes omitted)

6.198 On the other hand, concerns have been raised about the obligation to provide information where the class of potential beneficiaries is very wide. For example, in *Hartigan Nominees Pty Ltd v Rydge*, Mahoney JA expressed the view that:²¹⁵

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 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

²¹³ 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, 623.

²¹⁴ (1987) 11 NSWLR 300, 316.

²¹⁵ (1992) 29 NSWLR 405, 432.

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.

6.199 Such considerations would be relevant in the exercise of the court's discretion under the *Schmidt* approach. In *Schmidt*, the Privy Council explained that the nature of the beneficiary's interest 'may be an important part of the balancing exercise' undertaken by the court and that:²¹⁶

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.

The information that must be provided

6.200 Under the general law, it is at least well established in Australia that trustees must provide, or allow inspection of, trust accounts.²¹⁷ The cases also establish that trustees must, in general, provide 'information and documents in relation to trust property'.²¹⁸

6.201 Under the proprietary approach to disclosure, beneficiaries are said to have a prima facie entitlement to inspection of all 'trust documents',²¹⁹ although there is no clear judicial definition of what is 'trust document'.²²⁰ This approach generally 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'.²²¹

6.202 To the extent that *Schmidt* has been applied in Australia, there is no general entitlement to inspect any trust document other than the trust accounts

²¹⁶ *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 734–5.

²¹⁷ See, eg, *Kemp v Burn* (1863) 4 Giff 348, 350; 66 ER 740, 741 (Stuart V-C); *Ottley v Gilby* (1845) 3 Beav 602, 604; 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).

²¹⁸ *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). Although there is some authority for the proposition that trustees must also inform beneficiaries, who on attaining majority are entitled to a share of the trust property, of their interests under the trust, it has been doubted 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': *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 432 (Mahoney JA).

²¹⁹ See *O'Rourke v Darbishire* [1920] AC 581, 626 (Lord Wrenbury); *Re Londonderry's Settlement* [1965] Ch 918, 929 (Harman LJ), 937 (Salmon LJ).

²²⁰ 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'. See also the 'circular' definition given by Lord Salmon (at 938) in *Re Londonderry's Settlement* [1965] Ch 918, set out at *Trusts Discussion Paper* (2012) [7.173].

²²¹ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 432–3, 435 (Mahoney JA).

themselves.²²² Rather, it would be a matter for the court to exercise its discretion in each case by balancing competing interests of different beneficiaries, the trustees and third parties, being always mindful of the trustees' fundamental obligation to be accountable to the beneficiaries.²²³

6.203 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'.²²⁴ Depending on the circumstances and subject to exceptions,²²⁵ the information or documents that a trustee may be required to disclose include:

- deeds or documents constituting or varying the terms of the trust;²²⁶
- information about the identity, appointment and retirement of trustees;²²⁷
- title deeds;²²⁸
- information about investments of, and dealings with, the trust property;²²⁹
- where the trust estate is invested on mortgage, the mortgage deeds;²³⁰
- actuarial reports;²³¹ and
- income tax returns for the estate.²³²

Exceptions to the disclosure of information

6.204 Where the general law in Australia recognises a prima facie entitlement to trust accounts and information or documents about the trust property, it also recognises a number of exceptions to disclosure.

222 *Avanes v Marshall* (2007) 68 NSWLR 595, 599 (Gzell J).

223 Ibid 598; *Foreman v Kingstone* [2004] 1 NZLR 841, 857, 858 (Potter J).

224 *Gray v Guardian Trust Australia* [2003] NSWSC 704, [37] (Austin J).

225 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).

226 *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).

227 *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].

228 *Re Cowin* (1886) 33 Ch D 179, 185–7 (North J).

229 *Spellson v George* (1987) 11 NSWLR 300, 316 (Powell J); *Re Dartrall* [1895] 1 Ch 474; *Re Tillott* [1892] 1 Ch 86, 88 (Chitty J).

230 *Re Tillott* [1892] 1 Ch 86, 88–9 (Chitty J).

231 *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).

232 *Yates v Halliday* [2006] NSWSC 1346, [63] (Lloyd AJ).

6.205 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.²³³ This would include 'notes made for or by a trustee of discussions with other beneficiaries'.²³⁴

6.206 Secondly, there is no entitlement to documents or information that would reveal the trustee's reasons for exercising a discretionary power.²³⁵ 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'.²³⁶ 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.²³⁷

6.207 Thirdly, information may be withheld if it has been given to the trustee with an expectation that it be treated confidentially.²³⁸ 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.²³⁹ It may also apply to 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.²⁴⁰

6.208 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 — may cause embarrassment, family conflict, and animosity towards the trustees.²⁴¹ On the other hand, it has been noted that refusing a request for information may itself create suspicion and friction.²⁴²

6.209 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

²³³ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 432–3, 435 (Mahoney JA).

²³⁴ *Ibid* 433.

²³⁵ *Ibid* 417 (Kirby P in dissent), 434 (Mahoney JA), 444–5 (Sheller JA).

²³⁶ *Re Londonderry's Settlement* [1965] Ch 918, 928 (Harman LJ).

²³⁷ *Ibid* 939. See also *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 444–5 (Sheller JA).

²³⁸ *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).

²³⁹ 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. Apart from a cause of action based on an alleged breach of the trustee's duty to provide information, 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: see generally *Trusts Discussion Paper* (2012) [7.212], n 312.

²⁴⁰ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 433, 435 (Mahoney JA).

²⁴¹ *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).

²⁴² *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).

of the trust, which was likely to have been given on a confidential basis.²⁴³ In that case, Mahoney JA expressed the view that a family discretionary trust invariably involves considerations of privacy.²⁴⁴

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 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.

6.210 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 [the] family' and, on this basis, held that the plaintiff was not entitled to inspect the memorandum.²⁴⁵

6.211 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'.²⁴⁶ 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.²⁴⁷

6.212 On the other hand, Kirby P (in dissent) took a different view and would have allowed the discretionary beneficiary to inspect the memorandum.²⁴⁸

243 (1992) 29 NSWLR 405, 437 (Mahoney JA), 446 (Sheller JA), Kirby P dissenting (at 419, 421). Contra *Breakspear v Ackland* [2009] Ch 32.

244 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 436.

245 *Ibid* 437.

246 *Ibid* 446.

247 *Ibid* 447.

248 *Ibid* 418–19.

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.²⁴⁹ 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 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)

6.213 Fourthly, it has been recognised that the terms of the trust instrument itself may impose a requirement of 'secrecy' as to particular information.²⁵⁰

6.214 Finally, it has been suggested that disclosure may be refused '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'.²⁵¹

6.215 This recognises that 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.²⁵² The discretion to refuse disclosure on this basis 'cannot', however, 'be used as an excuse for paternalism or to disregard the interests of beneficiaries'.²⁵³

6.216 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,²⁵⁴ and expressed the view that:²⁵⁵

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.

249 See *Rydge v Hartigan Nominees Pty Ltd* (Unreported, Supreme Court of New South Wales, Young J, 10 October 1990).

250 Eg, *Tierney v King* [1983] 2 Qd R 580, discussed in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 446 (Sheller JA).

251 *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484, 500 (Doyle CJ; Perry and Martin JJ agreeing).

252 *Ibid* 499–500.

253 *Ibid* 500.

254 See [6.240] below.

255 [2003] NSWSC 704, [39].

6.217 Austin J held that, even if (contrary to his view) the plaintiff-beneficiary was entitled to answers to every question he raised,²⁵⁶ 'his demands exceeded the permissible volume and frequency of a beneficiary's demands for information'.

6.218 It has also been observed that:²⁵⁷

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.

6.219 Under the *Schmidt* approach, 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.²⁵⁸

Whether the Act should include a duty to provide accounts or other information to beneficiaries or other persons

6.220 Detailed legislative provision is made in the *Uniform Civil Procedure Rules 1999* (Qld) for the filing and passing of trustee accounts by the court.²⁵⁹ However, there is no statement in the *Trusts Act 1973* (Qld) of trustees' general duty to provide accounts (or other information) to the beneficiaries.

6.221 In contrast, provisions concerning the obligation of trustees to give accounts or other information to beneficiaries have been introduced or proposed in some other jurisdictions.

Provisions and proposals in other jurisdictions

6.222 Most of the provisions or proposals in other jurisdictions require the relevant information to be provided by the trustee upon the request of a beneficiary, and at the beneficiary's expense, although some impose a mandatory requirement to report annually. For the most part, the entitlement to information is confined to 'beneficiaries', either without defining the persons this encompasses, or by limiting some or all of the available information to certain 'qualified' beneficiaries (typically being those with a vested or contingent interest). In some instances, however, the right to information is specifically extended to persons who are potential beneficiaries under discretionary trusts.

256

Ibid.

257

Foreman v Kingstone [2004] 1 NZLR 841, 859 (Potter J).

258

Ibid.

259

Uniform Civil Procedure Rules 1999 (Qld) ch 15 pt 10 (Assessment of estate accounts), discussed in *Trusts Discussion Paper* (2012) [7.178], n 258. 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'.

Australia

6.223 As explained earlier, section 84B(1) of the *Trustee Act 1936* (SA) requires trustees to keep a number of prescribed records.²⁶⁰ These include trust accounts prepared not less than annually, as well as a wide range of other documents (some of which would be likely, under the general law, to fall within the exceptions to disclosure).²⁶¹ Under section 84B(2) of the Act, the trustee is also 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.²⁶²

6.224 In contrast, section 28 of the *Trustee Act 1898* (Tas) provides that, within 28 days of receiving a written application from 'any person beneficially interested' in property the subject of the trust, the trustee must render to the person, at the person's expense:

true and accurate accounts as to the state of the trust property and of all receipts and payments thereof ... in accordance with the application ... provided that no such true and accurate accounts have been rendered during the 12 months preceding the receipt of such application.

6.225 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.

6.226 The National Committee for Uniform Succession Laws recommended a similar approach. As mentioned earlier, that Committee 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 further recommended a provision to the following effect with respect to a beneficiary's access to those documents.²⁶³

- (2) A beneficiary of the deceased person's estate may, on giving reasonable notice to the personal representative—
 - (a) inspect the documents [that the personal representative is required to keep]; and
 - (b) obtain copies of the documents.
- (3) The personal representative must allow the beneficiary, or the beneficiary's agent—
 - (a) to inspect the documents; or
 - (b) to obtain copies of the documents on payment to the personal representative of the personal representative's reasonable costs of providing the copies.

260 See [6.159] ff above.

261 See the discussion of the exceptions at [6.204] ff above.

262 The maximum penalty for non-compliance with s 84B(2) is \$500.

263 *Administration of Estates Report* (2009) vol 1, [11.201]–[11.207], Recs 11-11 to 11-14, vol 4, model Administration of Estates Bill 2009, cl 615.

- (4) If the personal representative fails to comply with subsection (3), the beneficiary may apply to the Supreme Court for an order requiring the personal representative to comply with subsection (3).

6.227 It also recommended that creditors and persons eligible to apply for family provision should be entitled to apply to court for access to the documents.²⁶⁴

6.228 Commonwealth legislation also imposes disclosure obligations on certain types of trustees.²⁶⁵ In particular, section 601SBB(1) of the *Corporations Act 2001* (Cth) provides that, on application by 'a person with a proper interest in the estate', a licensed trustee company must provide the person with an account of the assets and liabilities of the estate, the trustee company's administration or management of the estate, and any investment, distribution or other expenditure made from the estate.²⁶⁶ The trustee company may charge a 'reasonable fee' for providing an account and, if the trustee company fails to provide a proper account, the court may make an order requiring the preparation and delivery of proper accounts.²⁶⁷

6.229 Section 601RAD(1) of that Act provides that 'a person with a proper interest in the estate' includes, among other persons, 'a beneficiary of the trust' or, in the case of a deceased estate, 'a beneficiary under the person's will' or 'a person who has, or is entitled to, an interest in the deceased's estate'.²⁶⁸ '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).

New Zealand

6.230 At present, section 83A of the *Trustee Act 1956* (NZ) provides that, where an estate is being administered by a trustee corporation, a solicitor or accountant of a beneficiary is entitled to examine the accounts of the estate at any reasonable time.²⁶⁹

6.231 The Law Commission of New Zealand has proposed, however, that the legislation should imply into every trust a mandatory duty 'to account to the beneficiaries for the trust property',²⁷⁰ and that this should include 'the obligation to

²⁶⁴ Ibid vol 1, [11.211]–[11.214], Recs 11-15 to 11-17.

²⁶⁵ Disclosure obligations are imposed on superannuation entities and trustees of managed investment schemes as part of the specific regulatory framework that applies to those entities: see *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(h); *Corporations Act 2001* (Cth) ch 2M.

²⁶⁶ *Corporations Act 2001* (Cth) s 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: see 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.

²⁶⁷ *Corporations Act 2001* (Cth) s 601SBB(3)–(4).

²⁶⁸ *Corporations Act 2001* (Cth) s 601RAD(1)(c), (d)(iii).

²⁶⁹ For trust estates administered other than by a trustee corporation, a beneficiary may inspect the accounts (and auditor's report) after the accounts, pursuant to an application to the Public Trust, have been audited: *Trustee Act 1956* (NZ) s 83B; *Trust Estates Audit Regulations 1958* (NZ).

²⁷⁰ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 45 (Proposal P6(1)(b)).

make such information available to beneficiaries upon request as is reasonably necessary to enable the trust to be enforced'.²⁷¹ It considered that the legislation should include a presumption that trust information will be provided to beneficiaries on request, unless there is a good reason to withhold the information, and that 'trust information' should be defined as any information regarding the terms of the trust, the administration of the trust, or the trust assets.²⁷²

6.232 'Beneficiaries' would be defined to include potential beneficiaries under discretionary trusts:²⁷³

A 'beneficiary' should include anyone who has received or who will or may receive an interest in trust property under a trust in accordance with a trust deed. It should include a discretionary beneficiary, that is, a person who may benefit under a trust at the trustee's discretion or power of appointment, but who does not hold a fixed, vested or contingent interest in the trust property, and a trustee or settlor may also be a beneficiary.

6.233 The legislation should then also impose a specific default duty to notify 'qualifying beneficiaries' of certain information, such as the fact that the person is a beneficiary and has a right to request a copy of the terms of the trust or to be provided with other information.²⁷⁴ A 'qualifying beneficiary' would be defined as:²⁷⁵

- (a) a beneficiary with a vested or contingent interest; or
- (b) a beneficiary who trustees reasonably consider has or may have in the future real prospects of receiving trust property.

6.234 In addition, it proposed that the legislation should include a list of factors that the trustee may take into account in determining whether to withhold trust information. These include issues of confidentiality, the nature of the interests held by the beneficiaries, the impact on the trustees, other beneficiaries and third parties, whether safeguards can be imposed on the use of the documents, and whether, in the case of a family trust, disclosure or non-disclosure 'may embitter family feelings ... to the detriment of the beneficiaries as a whole'.²⁷⁶

6.235 The Law Commission of New Zealand explained of its proposals that:²⁷⁷

there is concern that from a practical perspective it is now difficult for trustees to determine what their obligation to provide beneficiaries with information entails, because the position [under the *Schmidt* approach] relies on a discretion of the court. It appears that trustees are commonly required to make decisions about providing information and could do with greater clarification and guidance.

²⁷¹ Ibid 66 (Proposal P9(1)). It further proposed that provision be made for a trustee or any beneficiary to apply to the court for an order that the trustee supply trust information, and that trustees and beneficiaries may seek advice from the Public Trust about the information that must be released: 67 (Proposal P9(9)–(10)).

²⁷² Ibid 66–7 (Proposal P9(2)(a), (6)).

²⁷³ Ibid 30 (Proposal P1(3)). That definition would apply for the whole Act.

²⁷⁴ Ibid 66–7 (Proposals P9(3)).

²⁷⁵ Ibid 67 (Proposal P9(4)).

²⁷⁶ Ibid 66 (Proposal P9(2)(b)(ii)).

²⁷⁷ Ibid [3.72].

Canada

6.236 The British Columbia Law Institute recommended a provision to the effect that, without limiting the trustee's duty under the common law to provide information on request, the trustee must deliver a report of the trust property for each calendar year in which the trust exists to every 'qualified beneficiary'. The report would be required to include statements of the trust assets and liabilities, the values of the trust assets, receipts, and disbursements.²⁷⁸

6.237 It defined 'qualified beneficiary' as 'a beneficiary who, on the relevant date':²⁷⁹

- (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.

6.238 It also proposed that the legislation should set out the circumstances in which the trustee may withhold information, including where, in the trustee's opinion, disclosure would be detrimental to the best interests of any beneficiary, reveal a trustee's reasons for the exercise of discretion, place an unreasonable administrative burden on the trust, or place the trustee in breach of an obligation to maintain confidence.²⁸⁰

6.239 In contrast, the *Trustee Act* in Saskatchewan provides that a trustee 'shall provide an accounting' to the beneficiary, on the beneficiary's request and that, if the trustee does not comply with the request in a reasonable and timely manner, the court may order the trustee to pass accounts.²⁸¹

American Uniform Trust Code

6.240 The American Uniform Trust Code also distinguishes between 'qualified' and other beneficiaries.²⁸² Section 813(a) of the Code imposes a general duty on trustees to:²⁸³

²⁷⁸ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 33–4, Proposed *Trustee Act*, cl 8. The proposed provision also empowers 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 is refused.

²⁷⁹ *Ibid* 25, Proposed *Trustee Act*, cl 1(e).

²⁸⁰ *Ibid* 33–4, Proposed *Trustee Act*, cl 8(5). These recommendations have not been implemented.

²⁸¹ *Trustee Act*, SS 2009, c T-23.01, s 55.

²⁸² Unif Trust Code § 103(13) (amended 2010) defines 'qualified beneficiary' as a beneficiary who:

- (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
- (c) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

²⁸³ Generally, the terms of the trust prevail over these provisions: Unif Trust Code § 105(b)(9) (amended 2010).

keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests [and] [u]nless unreasonable under the circumstances, ... promptly respond to a beneficiary's request for information related to the administration of the trust. (emphasis added)

6.241 Other disclosure requirements under section 813 of that Code apply in respect of different persons. For example, under section 813(b), a copy of the trust instrument must be given to 'a beneficiary'²⁸⁴ upon request. Under section 813(c), a report of the trust property, liabilities, receipts and disbursements is to be provided 'at least annually and at the termination of the trust' to 'the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it'.

Guernsey and Jersey

6.242 In contrast, the trusts legislation in Guernsey requires a trustee to provide 'full and accurate information as to the state and amount of the trust property', at all reasonable times, on the written request of a beneficiary (subject to the terms of the trust).²⁸⁵ A 'beneficiary' is defined to mean:²⁸⁶

a person entitled to benefit under a trust or in whose favour a power to distribute trust property may be exercised (emphasis added)

6.243 In Jersey, the same definition applies, and the trusts legislation provides that a trustee is not required to disclose a document which relates to, or forms part of, the accounts of the trust, unless the person is a beneficiary under the trust (or the charity named as the beneficiary under a charitable trust).²⁸⁷

Discussion Paper

6.244 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should 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 and, if so:²⁸⁸

- what information or documents the Act should prescribe;
- whether potential beneficiaries under discretionary trusts should be entitled to receive or inspect accounts or other documents; and
- whether the trustee should have a discretion to refuse disclosure in particular circumstances.

²⁸⁴ 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.

²⁸⁵ *Trusts (Guernsey) Law, 2007* (Guernsey), s 26(1).

²⁸⁶ *Trusts (Guernsey) Law, 2007* (Guernsey), s 80(1).

²⁸⁷ *Trusts (Jersey) Law 1984* (Jersey) ss 1(1), 29(d).

²⁸⁸ *Trusts Discussion Paper* (2012) 235.

Consultation

6.245 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee of Queensland, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law all considered that the *Trusts Act 1973* (Qld) should include provisions to clarify the duty of trustees to provide accounts.

6.246 Both the Queensland Law Society and the Bar Association of Queensland considered that the provision should be limited to the accounts of the trust, and should extend to discretionary beneficiaries.

6.247 The Queensland Law Society observed that there is clear authority under the general law for beneficiaries to receive trust accounts. In its view, the Act should impose an absolute duty on all trustees to produce accounts, upon request, to beneficiaries and persons in a discretionary trust who are 'specifically named, or identified by specific description', 'have already been made beneficiaries by objective evidence', or to whom 'there has been a discretionary appointment of income or capital'. In respect of other documents, 'such as trustee minutes and resolutions, correspondence to and from the trustees, external reports and so on', the Queensland Law Society considered that the Act should either remain silent, 'to allow the matter to be developed unhindered, by case law', or should include a general provision in terms such as the following:

The Court may make a declaration concerning the obligation of a trustee to provide documents or information other than accounts.

6.248 The Bar Association of Queensland also suggested that beneficiaries and potential beneficiaries should be entitled to access the trust accounts upon request, provided that the right of access is subject to 'sensible limits' (such as access to accounts on an annual basis and at the applicant's own cost). In its view, the Act should make it clear that the statutory right to access trust accounts 'does not prejudice or exclude any right of access under the general law':

On that basis, although the statutory right of access would be limited to accounts, beneficiaries and potential beneficiaries would still be able to apply to the court for access to a wider scope of documents. A court application, determined in the context of the particular trust, is the most appropriate means for determining access to documents beyond the trust accounts or whether relevant exceptions to access should apply in each case.

6.249 The Queensland Law Society also considered that the legislation should address 'the burden that may fall upon trustees by multiple and repeated requests' from beneficiaries, observing that 'one disgruntled beneficiary can easily impose considerable compliance burdens and expenses upon a trust overall, to the diminution of the entitlements of other beneficiaries who have no complaint with the administration'. It therefore suggested that the legislation should provide, among other things, that a trustee need not respond to a request for accounts within 12 months of a previous request.

6.250 A legal practitioner who practises in trusts and succession law also submitted that both beneficiaries and potential beneficiaries should be entitled to receive information from the trustee. In his view, the trustee should be required to

provide enough information to explain the calculation and satisfaction of the beneficiary's entitlement. With respect to other information, however, this respondent considered that 'the settlor should have the power to say that certain documents are privileged and are only to be released on the trustee's discretion'.

6.251 In contrast, the Public Trustee considered that the Act should allow access to a wider range of 'information and documentation in relation to trust property' (such as the constituent trust deeds and income tax returns), but should limit the entitlement to inspect the accounts or other documents to a beneficiary with a vested interest in the trust property. The Financial Services Council expressed the same view.

6.252 Those respondents suggested that, if the statutory duty lists the categories of documents and information to which it is intended to apply, it may be unnecessary to specify any exceptions to disclosure. They submitted, however, that, if there is any doubt, the exceptions identified in the Discussion Paper should be excluded from the duty.²⁸⁹

6.253 Professor Lee instead favoured the adoption of a provision, in terms similar in part to section 813(a) of the American Uniform Trust Code, requiring the trustees, among other things, to keep the beneficiaries 'reasonably informed about the administration of the trust' and to respond promptly to a beneficiary's request for such information 'unless unreasonable under the circumstances'.

6.254 In his view, the entitlement should apply to 'any person who has received or who is entitled to receive an ascertainable payment or benefit under the trust' (a 'primary beneficiary'), as well as 'a person who is entitled to a benefit only if the trustee may in the future exercise a discretion in that person's favour' (a 'discretionary beneficiary'). However, he suggested that, subject to a direction of the court, a primary beneficiary should be entitled to receive information at the expense of the trust account, whilst a discretionary beneficiary should be entitled only at their own expense.

6.255 On the other hand, a legal academic doubted whether there is any need to impose a general statutory duty of disclosure under the *Trusts Act 1973* (Qld). This respondent noted that trustees should be entitled to refuse disclosure of information that the settlor intended to remain confidential.

6.256 Although it did not specifically address this question, QSuper Ltd observed that, as a regulated superannuation entity, the Board of QSuper is subject to federal supervision and that one of its duties under the *Superannuation Industry (Supervision) Act 1993* (Cth) is to allow a beneficiary access to any prescribed information or documents.

The Commission's preliminary view

6.257 In the Commission's view, the new legislation should include a provision dealing with the duty of trustees to provide information to beneficiaries. The purpose of including a statutory duty is not to change the current law, but to give

289

See *ibid* [7.209] ff.

some guidance to both trustees and beneficiaries about their respective obligations and entitlements.

6.258 As is apparent from the preceding discussion, the law in this area is relatively complex. Several different approaches have been applied by Australian courts and, at least in relation to certain classes of information, a distinction has been drawn between the entitlement of beneficiaries of fixed trusts and persons who are merely potential beneficiaries under discretionary trusts.

6.259 In recognition of these factors, the Commission is of the view that the statutory duty should be framed in terms of the minimum requirement that has been recognised by the courts for the provision of information to both beneficiaries and potential beneficiaries. Accordingly, the new legislation should include a duty requiring a trustee, on request by a beneficiary, or a potential beneficiary, of a trust:

- to make the trust accounts available for inspection by the beneficiary or potential beneficiary; and
- at the expense of the beneficiary or potential beneficiary, to provide copies of the trust accounts.

6.260 The statutory duty should also reflect the fact that, under the general law, the duty to provide information is not absolute, but is subject to exceptions. Accordingly, the trustee's duty should be expressed to apply 'unless unreasonable in the circumstances'. That exception would relieve a trustee of the requirement to provide access to, or copies of, the trust accounts where, for example, a beneficiary had made repeated requests for the trust accounts, without justification, in a short period of time.

6.261 Because the statutory duty would reflect the minimum disclosure requirements recognised under the law, the new legislation should provide expressly that it does not limit:

- any other entitlement that the beneficiary or potential beneficiary has to obtain other information from the trustee; or
- any entitlement that the beneficiary or potential beneficiary has to apply to the court for an order requiring the trustee to provide other information.

DUTY TO ACT JOINTLY

The general law

6.262 It is a long standing principle that, unless the trust instrument provides otherwise,²⁹⁰ co-trustees of a private trust must act jointly:²⁹¹

²⁹⁰ *Dulhunty v Dulhunty* [2010] NSWSC 1465, [35] (Slattery J); *Rodney Aero Club v Moore* [1998] 2 NZLR 192, 195 (Hammond J).

²⁹¹ *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).

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 ...

6.263 The obligation of trustees to act jointly means that an act of the majority cannot bind a dissenting minority or the trust estate.²⁹² Thus, it is said that trustees 'must act unanimously'.²⁹³ In the absence of unanimous agreement, the status quo will prevail unless the court intervenes.²⁹⁴ As Street J explained in *Sky v Body*:²⁹⁵

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.

6.264 When there is disagreement between the trustees, they may approach the court for directions.²⁹⁶

6.265 The obligation to act jointly also means that, ordinarily, trust funds should be under the joint control of all trustees²⁹⁷ and trust investments should be in the joint names of the trustees.²⁹⁸ 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.²⁹⁹ That rule has been modified by section 43 of the *Trusts Act 1973* (Qld).³⁰⁰

6.266 The obligation to act jointly is an aspect of the duty of trustees to act personally,³⁰¹ pursuant to which 'each individual has a separate responsibility to ensure that the terms of the trust are carried out'.³⁰² As such, a trustee's discretions

²⁹² *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).

²⁹³ *Beath v Kousal* [2010] VSC 24, [18] (Kaye J). See also, eg, *Re Billington* [1949] St R Qd 102, 115 (Macrossan CJ).

²⁹⁴ *Dawson v Dawson* [1945] VLR 99, 103 (O'Bryan J); *Sky v Body* (1970) 92 WN (NSW) 934, 935 (Street J).

²⁹⁵ (1970) 92 WN (NSW) 934, 935–6.

²⁹⁶ *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); *Re Just (No 1)* (1973) 7 SASR 508, 513 (Jacobs J). See also *Trusts Act 1973* (Qld) s 96.

²⁹⁷ 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).

²⁹⁸ See *Lewis v Nobbs* (1878) 8 Ch D 591, 594–5 (Hall V-C).

²⁹⁹ 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).

³⁰⁰ See [6.268] below, and the discussion in Chapter 9.

³⁰¹ *Dulhunty v Dulhunty* [2010] NSWSC 1465, [31] (Slattery J).

³⁰² *Re Mulligan* [1998] 1 NZLR 481, 502 (Panckhurst J).

must not be fettered, and a trustee's duties and powers must not, ordinarily, be delegated, either to a third party or a co-trustee.³⁰³ 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'.³⁰⁴ As Underhill explained:³⁰⁵

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.

6.267 However, the usual requirement for trustees to act jointly and unanimously does not apply if the trust instrument provides otherwise.³⁰⁶ Further, the requirement to act unanimously applies only to private trusts — trustees of charitable trusts may act by majority.³⁰⁷

Whether the duty to act jointly should be retained or changed

6.268 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. However, there are some provisions that modify the rule in particular circumstances. For example, the trustees may authorise in writing any one or more of their number to give receipts;³⁰⁸ a trustee or trustees or the majority of trustees may pay money or securities belonging to the trust into court,³⁰⁹ and, where a corporate 'custodian trustee' has been appointed, directions may be given to the custodian trustee by a majority of the remaining 'managing' trustees.³¹⁰

6.269 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:³¹¹

303 See [6.19] ff above.

304 *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).

305 A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 306.

306 See [6.262] above.

307 *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).

308 *Trusts Act 1973* (Qld) s 43. See also *Trustee Act 1898* (Tas) s 23 and the discussion of the power to give receipts in Chapter 9.

309 *Trusts Act 1973* (Qld) s 102(1), (3). See also *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) and the discussion of payment into court in Chapter 12.

310 *Trusts Act 1973* (Qld) s 19(2)(d). See also *Trustees Act 1962* (WA) s 15(2)(d); *Public Trustee Act 1930* (Tas) s 24(e) and the discussion of custodian trustees in Chapter 4.

311 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'.

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.

6.270 Co-trustees might be appointed to take advantage of differing skills or expertise, to ensure all branches of a family are represented,³¹² or to provide 'a safeguard against eccentricity or misconduct'.³¹³

6.271 The principal reason given for the rule is that it ensures careful consideration of trustee decisions and, thereby, the protection of the trust property and the beneficiaries' interests.³¹⁴ As Waddell CJ in Eq commented in *George v McDonald*.³¹⁵

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.

6.272 Although a trustee is not vicariously liable for the breaches of trust of a co-trustee, a trustee can nevertheless become liable for a loss resulting from a co-trustee's breach of trust, for example, where the trustee has participated in the breach or has failed to exercise reasonable care to prevent the co-trustee from committing the breach.³¹⁶ 'Consequently, there is an incentive for each trustee to veto a decision which involves a risk of breach of trust'.³¹⁷

Legislation and proposals for reform in other jurisdictions

Restating the duty to act jointly

6.273 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.³¹⁸

6.274 The Ontario Law Reform Commission recommended the inclusion of a similar provision in the trustee legislation of that province.³¹⁹ It proposed that the legislation should further provide that, if it appears that the trustees are unable to

312 *R v Beeston* (1789) 3 TR 592, 595; 100 ER 750, 752 (Lord Kenyon CJ).

313 Unif Trust Code (amended 2010), Comment 116.

314 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].

315 (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).

316 See G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 442, quoted at [11.112] below.

317 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.

318 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).

319 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 72, 79, Rec 28.

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.³²⁰ That Commission explained:³²¹

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.

6.275 The Law Commission of New Zealand has also proposed that the trusts legislation should provide that, unless otherwise stated in the terms of the trust, the ‘duty to act unanimously’ is implied into every trust.³²² Although that Commission considered the alternative approach of making majority decision-making the default position, it was convinced that:³²³

restating the ideal of unanimous decision-making as the default position would be beneficial. It is more appropriate for majority decision-making to be provided for in a trust deed where safeguards for the dissenting trustees, such as protection from liability for the consequences of a decision and exemption from participating in carrying out decisions with which they disagreed, can be included.

Statutory powers to act by majority

6.276 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.³²⁴ Under section 703 of the Code, unless the terms of the trust provide otherwise, trustees may act by majority decision:³²⁵

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.

³²⁰ Ibid, Rec 29. These recommendations have not been implemented.

³²¹ Ibid 72.

³²² Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 45–6 (Proposal P7(1)(g), (2)).

³²³ Ibid [3.31].

³²⁴ 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).

³²⁵ Unif Trust Code §§ 105(a)–(b), 703(a), (d) (amended 2010).

6.277 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 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.

6.278 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'.³²⁶

In that event, subsection (g) may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct.

6.279 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.³²⁷

6.280 The British Columbia Law Institute has also recommended that provision be made in that province for trustees to act by majority.³²⁸ In its view, this would promote 'the efficient management of trust property' and limit the need for court involvement.³²⁹ It proposed a provision in the following terms,³³⁰ which would apply except as otherwise provided in the trust instrument:³³¹

- (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,

³²⁶ Unif Trust Code (amended 2010), Comment 118.

³²⁷ 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).

³²⁸ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 40. This recommendation has not been implemented.

³²⁹ Ibid.

³³⁰ Ibid Proposed *Trustee Act*, cl 12.

³³¹ Ibid 29.

must join with the majority in doing anything necessary to carry out the decision or act if it cannot be carried out otherwise.

- (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.

6.281 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.

Discussion Paper

6.282 In the Discussion Paper, the Commission sought submissions on whether the duty of co-trustees of a private trust to act jointly should continue or whether the *Trusts Act 1973* (Qld) should provide for trustees of a private trust to act by majority. It also sought submissions on whether, if the Act were to provide for co-trustees to act by majority, that provision should apply subject to a contrary intention in the trust instrument and what provision should be made for the protection of a dissenting trustee.³³²

Consultation

6.283 All of the respondents that addressed this issue expressed support for the duty of trustees of private trusts to act jointly.

6.284 A legal practitioner who practises in trusts and succession law commented that, in his view and experience, attempts to have trustees act by majority 'do not work'. He also expressed concern about the enforceability of any protective mechanism for dissenting co-trustees if a statutory provision allowing trustees to act by majority were to be introduced.

6.285 The Queensland Law Society also considered that it should continue to be the case that trustees of a private trust must act jointly. It observed that, if the settlor 'feels strongly enough about providing for trustees to act by majority, the drafter can create the appropriate wording'.

6.286 Similarly, the Bar Association of Queensland submitted that the present position should be maintained:

[The present] position allows for the trust instrument to authorise trustees to act by majority. That is, a means of avoiding deadlock between co-trustees already exists. While the question of deadlock and the ability of a single trustee to paralyse management of a trust needs to be recognised, those issues can be addressed upon application to the court. If the *Trusts Act* were to permit all co-trustees of private trusts to act by majority then one of the primary objects of appointing co-trustees, namely the protection of the beneficiaries from imprudent decision making, would be weakened — particularly if a dissenting

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Trusts Discussion Paper (2012) 242.

trustee was absolved of any liability for the conduct and thereby lost any incentive to veto conduct that trustee regarded as being in breach of trust.

6.287 The Bar Association of Queensland further submitted that if, contrary to its view, the Act were to include a provision allowing trustees to act by majority, it should apply subject to a contrary intention in the trust instrument.

6.288 The Public Trustee also submitted that the long-standing rule that trustees of a private trust must act jointly should continue to apply. He did not consider it necessary, however, for the legislation to restate this general rule.

6.289 Professor Lee also expressed support for the present rule:

The virtue of the unanimity rule is that it obliges trustees to sort out their differences. A majority rule invites dissension.

6.290 He raised a concern, however, that the exception for charitable trusts may not always be appropriate. For example, a settlor may create a trust for charitable purposes appointing three trustees but without realising that the majority rule will apply, 'with all its problems'. He suggested, therefore, that the legislation extend the unanimity rule to all trusts (private and charitable) that have fewer than five trustees, but allow decisions to be made by a majority if there are five or more trustees. In his view, such a provision should not be capable of being overridden by the settlor.

6.291 Professor Lee was not attracted to the protective provisions given to dissenting trustees in the American Uniform Trust Code or the British Columbia Law Institute, and did not consider it necessary to include such provisions in the legislation, as the law 'allows for the indemnification of a trustee where other trustees have committed a breach'.

6.292 The Financial Services Council considered that:

In addition to the reasons given for rejecting trustees acting by majority, the mechanisms suggested for protecting a dissenting trustee might provide an astute trustee who wants a suspect course of action to go ahead to obtain protection from the consequences if the co-trustees are not savvy enough, not to be out-manoeuvred.

The Commission's preliminary view

6.293 The Commission recognises the potential for a single trustee of a private trust to misuse the requirement for trustees to act jointly in order to create a deadlock among the trustees. On the whole, however, the Commission considers that the unanimity requirement provides a safeguard against imprudent decision-making by trustees. Where, for example, in the context of trustees' investment powers, some trustees are less risk averse than their co-trustees, the rule requires that the investment strategy for the trust is determined by all of the trustees. The Commission also notes the strong support in the submissions for the retention of the current position.

6.294 Accordingly, the Commission is of the view that the new legislation should not change the current requirement that trustees of a private trust must act jointly unless they are authorised by the trust instrument to act by majority.

PRELIMINARY RECOMMENDATIONS

General duties

- 6-1 The new legislation should include a statutory duty of care that:
- (a) is framed in terms that are generally consistent with section 22(1) of the *Trusts Act 1973* (Qld);
 - (b) applies generally to a trustee in administering the trust; and
 - (c) imposes the higher standard of care mentioned in section 22(1)(a) of the Act not only on a trustee whose profession, business or employment includes acting as a trustee, but also on a trustee who has special knowledge or experience or holds himself or herself out as having such knowledge or experience.
- 6-2 The new legislation should provide that a trustee must, in administering the trust, act honestly and in good faith and for the benefit of the beneficiaries.
- 6-3 The new legislation should ensure that the duties referred to in Recommendations 6-1 and 6-2:
- (a) are not capable of being excluded or modified by the instrument (if any) creating the trust; and
 - (b) do not limit any other duties to which a trustee is subject.

Duty to keep accounts and other records

- 6-4 The new legislation should require a trustee:
- (a) to keep accurate accounts and records of the administration of the trust;
 - (b) who is administering more than one trust to keep separate accounts and records for each trust; and
 - (c) to maintain the accounts and records for a minimum period of three years after the termination of the trust.

Duty to provide accounts and other information

6-5 The new legislation should provide that, unless it would be unreasonable in the circumstances, a trustee must, on request by a beneficiary, or a potential beneficiary, of a trust:

- (a)** make the trust accounts available for inspection by the beneficiary or potential beneficiary; and
- (b)** at the expense of the beneficiary or potential beneficiary, provide copies of the trust accounts.

6-6 The new legislation should provide that the provision referred to in Recommendation 6-5 does not limit:

- (a)** any other entitlement that the beneficiary or potential beneficiary has to obtain other information from the trustee; or
- (b)** any entitlement that the beneficiary or potential beneficiary has to apply to the court for an order requiring the trustee to provide other information.

Duty to act jointly

6-7 The new legislation should not change the current requirement that trustees of a private trust must act jointly unless they are authorised by the trust instrument to act by majority.

Chapter 7

Trustees' Management Powers

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INTRODUCTION

7.1 Part 4 of the *Trusts Act 1973* (Qld) deals with the general powers¹ of trustees.² The provisions in Part 4 confer three types of statutory powers — management (or transactional) powers exercised for the management and disposition of trust property (such as the power to sell, exchange, lease or mortgage); ancillary trustee powers that are conferred on trustees to counter, or

¹ Trustees' investment powers are considered in Chapter 5.

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').

modify, specific equitable duties to which trustees would otherwise be subject (such as the power to postpone the sale of trust property); and what may broadly be described as administrative powers (such as the power to give receipts, settle claims or insure trust property).

7.2 This chapter details the Commission's proposal to introduce a general provision, referred to as the 'general property power', that confers all the powers of an absolute owner on a trustee, in place of most of the provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer specific powers for the management and disposition of trust property. It also considers other matters that have a bearing on the nature and scope of the general property power.

7.3 The provisions in Part 4 of the *Trusts Act 1973* (Qld) that deal with ancillary trustee powers are discussed in Chapter 8, while the provisions that deal with the administrative powers of a trustee are discussed in Chapter 9.

THE INTRODUCTION OF A GENERAL PROPERTY POWER

Background

7.4 As explained in Chapter 2, the *Trusts Act 1973* (Qld) made a number of substantive 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 excluded by the expression of a contrary intention in the trust instrument.

7.5 However, many of the provisions in the Act that confer management powers originate 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 At that time, trustees were not usually intended to exercise as wide powers of management and control as those that are usually intended to be conferred on trustees today.⁴

7.6 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

³ JH Langbein, 'Why Did Trust Law Become Statute Law in the United States' (2007) 58(5) *Alabama Law Review* 1069, 1072.

⁴ See [2.2]–[2.8] above. See also 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.

activity.⁵ As mentioned in the Discussion Paper, the range of purposes for which trusts are now used includes estate planning, commercial investment or trading, superannuation and charitable purposes.⁶

7.7 With the evolution of the modern trust, the tendency has been to include a broader statement of a trustee's management powers in the instrument and in statute.⁷ It is in light of this background that many of the provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer powers, and particularly those that confer specific management powers, might now be considered out-dated, overly complex or unduly restrictive.⁸

Options for reform

7.8 In the Discussion Paper, the Commission considered several options for modernising and simplifying the provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer specific powers in relation to the trust property.

The introduction of a general property power

7.9 The first option involved the introduction in the new legislation of a general provision that confers all the powers of an absolute owner on a trustee (the 'general property power'), in lieu of the current stand-alone provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer specific powers for the management and disposition of trust property.

7.10 A general property power has been enacted or proposed in England, New Zealand and the United States. In each of these jurisdictions, the general property power applies subject to a contrary intention in the trust instrument.

7.11 In England, the *Trusts of Land and Appointment of Trustees Act 1996* (UK) confers a general management power on trustees of land. Section 6(1) of that Act provides that 'for the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner'.⁹ A trustee who exercises the powers conferred by that provision is

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

⁷ J Kessler and M Flynn, *Drafting Trusts and Will Trusts in Australia*, (Thomson Lawbook Co, 2008) 246; J Mowbray et al, *Lewin on Trusts* (Sweet & Maxwell, 18th ed, 2008) [36–03]; 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.

⁸ 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.

⁹ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 6 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].

subject to a statutory duty to exercise such care and skill as is reasonable in the circumstances.¹⁰

7.12 A similar power is conferred on trustees who acquire land pursuant to section 8 of the *Trustee Act 2000* (UK).¹¹ Section 8(3) of that Act provides that, '[f]or 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'.

7.13 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.¹² 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.¹³

7.14 In the United States, section 815 of the Uniform Trust Code confers wide powers on trustees. 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.¹⁴ Section 815 also provides that the exercise of a power conferred by the general power is subject to the trustee's fiduciary duties except as modified in the terms of the trust instrument.¹⁵

7.15 A similar policy of conferring a general power on trustees was also 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

¹⁰ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 6(9). The statutory duty is the duty of care set out in s 1 of the *Trustee Act 2000* (UK) c 29, which is discussed at [6.63] ff above. In exercising the powers conferred by s 6 of the *Trusts of Land and Appointment of Trustees Act 1996* (UK), trustees of land must have regard to the rights of the beneficiaries: s 6(5). 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: 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: s 6(8).

¹¹ *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.

¹² Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 76 (Proposal P11(1)).

¹³ *Ibid.*

¹⁴ Unif Trust Code § 815(a) (amended 2010).

¹⁵ Unif Trust Code § 815(b) (amended 2010).

person' doctrine, which enables a trustee to invest trust funds in any form of investment.¹⁶

7.16 The conferral of a general property power would confer wider powers on trustees than they currently have under the *Trusts Act 1973* (Qld). However, the general property power would not give trustees unlimited power to do what they like with the trust fund or to commit any breach of trust.¹⁷ This is because a trustee, as the legal owner of the trust property, is not free to exercise the rights of ownership for the trustee's own benefit, but is under a 'personal obligation', which is annexed to the property, 'to deal with the trust property for the benefit of the beneficiaries'.¹⁸ A trustee is subject to controls that are absent in the case of an ordinary owner of property; this is because the trustee's powers must be exercised in accordance with the trustee's duties (including the duty to act in the interests of the beneficiaries and the duty to adhere to the terms of the trust).¹⁹ Hence, the conferral of a general property power would not provide a defence for a trustee who is charged with a breach of trust in failing to safeguard trust property.

7.17 The enactment of a general property power would obviate the need for many of the current stand-alone provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer specific powers in relation to the trust property. It would also ensure that a trustee has a statutory power to undertake a particular transaction or disposition in respect of the trust property, especially where there is no relevant power conferred by the trust instrument.²⁰ In trusts that may last for many years, it is impossible to anticipate all of the powers that the trustee might require in the future. There may be new types of transactions or new legislative requirements for which the trustee's existing powers are inadequate.

7.18 The introduction of a general property power would also avoid the need to specify and authorise every conceivable type of transaction or disposition that may be required in relation to the trust property. Although the court has power to confer additional powers where, in the opinion of the court it is expedient,²¹ an application for the conferral of an additional power would involve expense and inconvenience.

¹⁶ See [5.3] ff above. A similar policy of conferring a general power has also been applied in the context of corporations law. Section 124(1) of the *Corporations Law 2001* (Cth) confers on a company 'the legal capacity and powers of an individual'.

¹⁷ *Elovalis v Elovalis* [2008] WASCA 141, [63] (Buss JA); *Randall v Lubrano* (2009) 72 NSWLR 621, 622 (Holland J). 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].

¹⁸ 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).

¹⁹ *Randall v Lubrano* (2009) 72 NSWLR 621, 622 (Holland J).

²⁰ 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 [7.30] ff below.

²¹ *Trusts Act 1973* (Qld) s 94.

Retention of stand-alone provisions

7.19 The second option for reform involved retaining the specific management powers conferred by Part 4 of the *Trusts Act 1973* (Qld), and stating them in a simplified form, either in a series of stand-alone provisions (as is presently the case) or in a succinct list of specific powers.

7.20 The Ontario Law Reform Commission adopted this approach in its 1984 report on the law of trusts, by recommending the adoption of a list of specific management powers.²²

7.21 This option would not only be consistent with the current legislative scheme, but would also assist a trustee to determine whether the trustee has a particular power and to demonstrate to a third party that a transaction is within the trustee's powers. However, it would also have the disadvantage that, if a specific power is not included in the new legislation or in the trust instrument, the trustee would need to apply to the court for the additional power. The Commission considered that this problem would not arise if the new legislation were to confer a general property power because the specific power (whether or not included in a series of stand-alone provisions or enumerated in a list) would be encompassed by the general property power.

Discussion Paper

7.22 In the Discussion Paper, the Commission proposed that the new legislation should introduce a general provision, referred to as the 'general property power', that confers all the powers of an absolute owner on a trustee, in place of most of the current stand-alone provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer specific powers for the management and disposition of trust property. The Commission sought submissions on that proposal.²³

Consultation

7.23 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law all supported the amendment of the *Trusts Act 1973* (Qld) to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner.

The Commission's preliminary view

A new general property power

7.24 In the Commission's view, the new legislation should include a provision to the effect that a trustee has, in relation to the trust property, all the powers of an absolute owner. The enactment of such a provision would confer the broadest possible powers, and thereby ensure that a trustee always has sufficient statutory

²² To date, these recommendations have not been implemented.

²³ *Trusts Discussion Paper* (2012) 253.

powers to manage the trust property effectively and efficiently. It also avoids the need to attempt to specify and authorise every conceivable type of transaction or disposition that may be necessary to manage the property. The enactment of a general property power is also consistent with recent developments in trusts law in other jurisdictions.

7.25 Other matters that also have a bearing on the nature and scope of the general property power, including the relationship between the general property power and the trustee's duties, the effect of the settlor's intention and whether it is desirable for the new legislation to include a provision that briefly lists some examples of specific power conferred by the general property power, are generally discussed below.

KEY ASPECTS OF THE GENERAL PROPERTY POWER

The relationship between the general property power and the trustee's duties

7.26 As mentioned above, a trustee is subject to controls that are absent in the case of an ordinary owner of property. This is because the trustee must always exercise his or her powers in accordance with the duties of a trustee.²⁴ An issue to consider, in the context of the conferral of a general property power, is the relationship between the general property power and the trustee's duties.

Consultation

7.27 A legal practitioner who practises in trusts and succession law emphasised the need to limit the scope of the proposed general property power by reference to the trustee's duties and the objects (or purposes) of the trust:

My reason is that a casual trustee simply reading the phrase 'all the powers of an absolute owner' may be tempted to do whatever he or she likes, and I have come across that on a number of occasions. By providing a curtailment, it may avoid 'open slather'.

7.28 The Public Trustee, the Financial Services Council, Professor Lee and the Registrar of Titles expressed a similar view.

The Commission's preliminary view

7.29 The new legislation should make it clear that a trustee, in exercising a power conferred by the general property power, must exercise that power in accordance with the trustee's duties (including the general statutory duty of care recommended in Chapter 6).

²⁴

Randall v Lubrano (2009) 72 NSWLR 621, 622 (Holland J). Trustees' duties are discussed in Chapter 6.

The effect of the settlor's intention

7.30 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. This policy ensures that the wishes of the settlor as to the extent and scope of the powers conferred are paramount.

7.31 Part 4 of the *Trusts Act 1973* (Qld) confers various powers to manage trust property. These provisions generally apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.²⁵ This policy of rendering these powers invariable, so that they cannot be excluded or modified by the trust instrument, is unique to the Queensland Act. Its effect is to prevent legitimate dealings with the trust property from being frustrated, and to avoid the expense and inconvenience of applying to the court for the conferral of an additional power.

7.32 The general property power recommended by the Commission would confer wider management powers than a trustee has currently under the *Trusts Act 1973* (Qld). While this approach gives a trustee greater flexibility to manage the trust property, it also raises the issue of how the effect of the settlor's intention as to the application of those powers should be dealt with under the new legislation.

Discussion Paper

7.33 In the Discussion Paper, the Commission sought submissions on how, if the legislation introduced a general property power, it should deal with the effect of a contrary intention in the trust instrument in relation to the powers conferred by the general property power.²⁶

Consultation

7.34 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, a legal practitioner who practises in trusts and succession law and a Queensland legal academic all considered that, if the *Trusts Act 1973* (Qld) is amended to enact a general property power, the powers conferred by that provision should apply subject to contrary intention in the trust instrument.

7.35 One Queensland legal academic considered that this approach was necessary 'to ensure that the imposition of any fixed set of rules for all trusts does not erode the flexibility of the [trust] relationship, and hence its utility for the variety of legitimate purposes for which trusts have been employed'.

7.36 Professor Lee, however, considered that the powers conferred by the general property power should not apply subject to a contrary intention in the trust instrument. He commented that:

²⁵ *Trusts Act 1973* (Qld) s 31(1).

²⁶ *Trusts Discussion Paper* (2012) 320.

It is not even appropriate for a settlor to limit trustees' powers because trustees' power must be exercised by trustees at the time and ad hoc in circumstances that may be far removed from those at the creation of the trust. The trustees are the persons whose duty it is to exercise their powers within the duties imposed on them.

The Commission's preliminary view

7.37 The Commission considers that, as a general policy, the new legislation should enable the settlor to exclude or modify a power conferred by the general property power.

7.38 Because the general property power would confer the broadest possible powers, it ensures that, in the context of modern trust management, the trustee has sufficient flexibility to manage the trust property efficiently and effectively. In this setting, the Commission considers that the new legislation should recognise a settlor's autonomy to set limits on a trustee's management powers, but set a high bar for establishing those limits.

7.39 Accordingly, the Commission considers that a relatively narrow test should apply, namely, that a power conferred by the general property power may be excluded or modified only by an express statement to that effect in the trust instrument. That test is similar in effect to the standard of 'unless expressly forbidden' that applies in relation to the power of investment under section 21 of the Act, which requires an express prohibition in the trust instrument to be effective.²⁷

7.40 If the exclusion or modification of a particular management power would be to the detriment of the beneficiaries, the trustees could apply to the court for an order conferring an additional power on the trustees.²⁸ The Commission has recommended in Chapter 12 that a provision of the general effect of section 94 of the *Trusts Act 1973* (Qld), which enables the court to confer such an additional power, should be included in the new legislation.²⁹

7.41 The Commission also considers that, in appropriate instances, an exception should be made to that general policy so that a specific power conferred by the general property power applies whether or not the power is expressly excluded or modified by the instrument (if any) creating the trust. At this interim stage of the review, the Commission considers it desirable to limit such exceptions to those powers that are essential or 'core' management powers. This would ensure that a trustee always has the most basic powers that are usually required to manage and dispose of the trust property. It would also avoid the expense, time and effort of making an application to the court for the conferral of one or more of those powers in a particular case.

²⁷ See [5.7]–[5.8] above.

²⁸ 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 at [12.79] below, 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.

²⁹ See Recommendation 12-6 below.

Examples of specific powers conferred by the general property power

7.42 An issue raised by the enactment of a provision conferring a general property power is whether it is desirable for the new legislation to include a provision that lists examples of specific powers conferred by the general property power. Because the general property power would confer all the powers of an absolute owner, such a list would not enlarge the powers already conferred. Nevertheless, it may provide useful guidance and reassurance to trustees and to third parties as to the nature and content of the range of specific powers conferred by the general property power.

7.43 In New Zealand and the United States, the general property power provision that has been proposed or enacted is supplemented by a list of examples of specific powers conferred by the general power.

7.44 The Law Commission of New Zealand has recommended that the new trustee legislation should include a schedule that sets out a non-exhaustive list of commonly-used powers that a trustee would have under its proposed new general property power. These powers include:³⁰

- powers to sell, exchange, let, partition, 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 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.

7.45 In the United States, the general property power set out in section 815 of the Uniform Trust Code is supplemented by a list of specific powers in section 816.³¹ These specific powers, which may also be limited by the terms of the trust, include the power to:

- acquire or sell property, for cash or on credit, at public or private sale;
- exchange, partition, or otherwise change the character of trust property;
- deposit trust money in an account in a regulated financial-service institution;

³⁰ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 76 (Proposal P11(2)).

³¹ Unif Trust Code § 815(a) (amended 2010).

- borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- 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;
- 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;
- 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;
- abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration; and
- 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.

Discussion Paper

7.46 In the Discussion Paper, the Commission sought submissions about whether, if the *Trusts Act 1973* (Qld) is amended to confer a general property power, the Act should also include a provision that lists examples of the specific powers conferred by the general property power.³²

Consultation

7.47 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, a legal practitioner who practises in trusts and succession law and Professor Lee each considered that the new legislation should include a list of examples of the specific powers conferred by the general property power. Several of these respondents commented that the provision of a statutory list of examples of specific powers would give certainty and reassurance to third parties dealing with the trustee as to whether the trustee has a particular power.

7.48 The Financial Services Council also commented that any such list should not be used to 'detract from or limit' the general property power provision.

³²

Trusts Discussion Paper (2012) 253.

The Commission's preliminary view

7.49 The Commission considers that it is desirable for the new legislation to include a provision that briefly states some examples of the specific powers conferred by the general property power.

7.50 At this interim stage of the review, the Commission is of the view that the statutory list should include, for example, those specific management powers that are essential (or core) powers for the management of the trust, or are otherwise particularly useful for the guidance of trustees.

7.51 The Commission also considers that the legislation should not attempt to list all the specific management powers that the *Trusts Act 1973* (Qld) currently confers on a trustee, or any other specific powers that a trustee might exercise in actively managing the trust property. Aside from the inherent difficulty of that task, the inclusion of a very comprehensive statutory list could have the effect of appearing to limit the range of management powers that a trustee may exercise or, alternatively, suggest that the listed power is one that a trustee should, rather than could, exercise, in a particular circumstance.

THE SPECIFIC MANAGEMENT POWERS CONFERRED BY PART 4 OF THE TRUSTS ACT 1973 (QLD)

7.52 As mentioned above, the Commission considers that, at this stage of the review, the new legislation should include a provision that briefly states some examples of the specific powers conferred by the general property power, but without necessarily listing all the specific management powers that are currently conferred on a trustee under Part 4 of the *Trusts Act 1973* (Qld) (or any other specific powers that a trustee might exercise in actively managing the trust property).

7.53 The provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer specific management powers on trustees are the powers:

- to sell trust property (section 32(1)(a));
- relating to the mode and conduct of sale (section 34);
- to concur with others (section 53);
- of a trustee-vendor to secure part of the purchase price by mortgage (section 36);
- of a trustee-vendor to sell on terms of deferred payment (section 37);
- to raise money by the sale, conversion, calling in or mortgage of trust property (section 45);
- to renew, extend or vary a mortgage (section 33(1)(i));
- to dispose of trust property by exchange or partition (section 32(1)(b));

- to lease trust property (section 32(1)(d)–(f), (3));
- to subdivide and undertake other development works (section 33(1)(e)–(f));
- to grant easements etc and execute all necessary documents (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 purchase the equity of redemption in lieu of foreclosure (section 40); and
- to release the equity of redemption of mortgaged property (section 41).

7.54 Section 35 of the Act, which deals with the validity of sales made under depreciatory conditions, also supplements the power of sale.

7.55 The following section of this chapter deals with the issue of whether, in light of the Commission's recommendation to enact a general property power, the specific management powers currently conferred under Part 4 of the *Trusts Act 1973* (Qld) should continue to be the subject of stand-alone provisions, or be omitted or stated more briefly in the legislation as examples of the powers conferred by the general property power. It also deals with the issue of whether or not those specific powers should be capable of being excluded or modified by the trust instrument.³³

7.56 So far, during the course of this review, the Commission has separately considered these particular issues in relation to each of the specific management powers. The Commission's preliminary views about these issues (which are included in this section) may be subject to further refinement or modification in the final stage of the review, particularly as the Commission develops the draft legislation that will implement its final recommendations.

7.57 As well as conferring various management powers on trustees, some of those provisions also provide that a trustee is not, in specified circumstances, responsible for any loss arising from the exercise of the power (or some other formulation) or that a third party is exonerated from seeing to the application of funds or is not affected by notice of a contravention of the provision. The protective elements of these provisions are also examined in this chapter.³⁴

³³ In the Discussion Paper, the Commission sought submissions on these issues in relation to the specific management powers conferred by Part 4 of the *Trusts Act 1973* (Qld): see *ibid* 259, 263, 270, 274, 281, 293-7, 300, 302, 322.

³⁴ See also Chapter 11, which examines the main provisions in relation to indemnities and protection.

Powers of, and incidental to, sale

7.58 Sections 32(1)(a), 34 and 53 of the *Trusts Act 1973* (Qld) confer powers relating to the sale of trust property. Section 32(1)(a) confers a power of sale, while sections 34 and 53 confer powers relating to the exercise of the power of sale.

Sections 32(1)(a), 34 and 53

General power of sale

7.59 Under the general law, a trustee has no power to sell trust property, unless expressly or impliedly authorised by the trust instrument.³⁵

7.60 Section 32(1)(a) of the *Trusts Act 1973* (Qld) gives trustees an unfettered power to 'sell the trust property or any part of the trust property'.

7.61 A statutory power of sale is also conferred under the trustee legislation in the ACT, New South Wales, Victoria and Western Australia.³⁶ 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'.³⁷

Mode and conduct of sale

7.62 Section 34 of the *Trusts Act 1973* (Qld) relates to the mode and conduct of the sale of trust property.

EXERCISE OF POWER OF SALE

7.63 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]'.³⁸ 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.³⁹ By corollary, it is within the trustee's discretion to

³⁵ See JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2002]. 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 (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).

³⁶ *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).

³⁷ 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).

³⁸ *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).

³⁹ *Harper v Hayes* (1860) 2 Giff 210; 66 ER 88. Cf *Clay v Clay* (1999) 20 WAR 427.

conduct the sale of trust property by public auction or private contract, 'as the one or the other mode may be most advantageous according to the circumstances of the case'.⁴⁰ 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.⁴¹

7.64 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*,⁴² reflects the position under the general law, and gives statutory effect to a standard list of powers relating to the sale of trust property usually included in trust instruments at that time. It also provides that a trustee may exercise such a power 'without being answerable for any loss', thereby clarifying that the exercise of the power does not of itself constitute a breach of trust.

7.65 A provision in similar terms to section 34 is included in the trustee legislation of the other Australian jurisdictions.⁴³

SCOPE OF POWER TO SELL OR DISPOSE OF LAND

7.66 Historically, trustees had no power to sell timber,⁴⁴ fixtures,⁴⁵ or minerals⁴⁶ 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'.⁴⁷

7.67 Section 34(2) of the *Trusts Act 1973* (Qld), which is based on an English provision of long-standing,⁴⁸ 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.⁴⁹ It

40 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 Hurly* 2 D & C 681; *Ex parte Ladbrooke* (1834) 1 Mont & A 384; and *Davey v Durrant* (1857) 1 De G & J 533.

41 *Ord v Noel* (1820) 5 Madd 438, 440; 56 ER 962, 963 (Leach V-C).

42 AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 60.

43 *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.

44 *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.

45 *Re Yates* (1888) 38 Ch D 112.

46 *Buckley v Howell* (1861) 29 Beav 546; 54 ER 739 (Sir John Romilly MR); *Re Chaplin and Staffordshire Potteries Waterworks* [1922] 2 Ch 824.

47 *Buckley v Howell* (1861) 29 Beav 546, 554; 54 ER 739, 742 (Sir John Romilly MR). See also *Cholmeley v Paxton* (1825) 3 Bing 207; 130 ER 492 (in which the court set aside a sale of the land by the trustee and the timber on the land by the tenant for life on account of a separation of the timber and the land); *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).

48 *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 12. See also *Trusts Discussion Paper* (2012) 262, n 63.

49 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.

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).

CONCURRING WITH OWNERS OF OTHER PROPERTY IN A JOINT SALE

7.68 The performance of a trustee's duty to use all reasonable diligence to obtain the best price for the property 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.⁵⁰

7.69 Section 34(3) of the *Trusts Act 1973* (Qld) applies if a trustee joins with any other person in selling trust property and other property. Under the general law, trustees who join with another person in selling property 'must take care that their share of the purchase-money is paid to them', such that 'the purchase-money must be so apportioned before the completion of the purchase, and must be paid by the purchaser; the apportioned part coming to the trustees being paid to them'.⁵¹ Section 34(3) restates this general law rule by providing that:⁵²

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; ...

Power to concur with others

7.70 Section 53 of the *Trusts Act 1973* (Qld) deals with the situation where trust property includes an undivided share in any property. It provides that, 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 one 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.

7.71 Ford and Lee have explained that:⁵³

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 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.

⁵⁰ *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).

⁵¹ *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 Ch D 802, 815 (Sir George Jessel MR).

⁵² *Trusts Act 1973* (Qld) s 34(3) also provides that a contravention of that requirement 'does not invalidate and shall not be deemed to have invalidated any instrument intended to affect or evidence the title to the trust property'.

⁵³ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 21 November 2012) [9.19330].

7.72 A similar statutory provision is also found in the ACT, New South Wales, Victoria, Western Australia, New Zealand and England.⁵⁴

Discussion Paper

7.73 In the Discussion Paper, the Commission sought submissions on whether the powers conferred by sections 32(1)(a) and 34 of the *Trusts Act 1973* (Qld) should be retained in some form or omitted.⁵⁵ It did not specifically seek submissions on section 53 of the Act.

Consultation

7.74 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law were of the view that, if the Act is amended to confer all the powers of an absolute owner, the powers conferred by sections 32(1)(a) should be more briefly stated in a provision that lists examples of powers conferred by the general property power.

7.75 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council and the legal practitioner also considered that a brief statement of the powers relating to the manner of sale conferred by section 34 should be included in the Act. However, Professor Lee considered that, because the trustee must exercise his or her powers having regard to his or her duties, it is unnecessary to spell out the manner in which a trustee should exercise the power of sale.

The Commission's preliminary view

7.76 Section 32(1)(a) of the *Trusts Act 1973* (Qld) confers an unfettered power to sell trust property. Such a power would be amongst the powers conferred by the general property power under the new legislation.

7.77 The power of sale is perhaps the most essential power for the active 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 use the proceeds to acquire another asset, if it is prudent to do so and in the interests of the beneficiaries, enables the trustee to vary the trust property to meet the exigencies and changing conditions of the times.

7.78 For this reason, the power to sell trust property should be listed as an example of a specific power conferred by the general property power. The powers conferred by sections 34 and 53 of the Act, which deal with matters affecting the manner of sale, are ancillary to the power of sale conferred by section 32(1)(a), should also be included in the list of examples of specific powers. Further, the new

⁵⁴ *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; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 24.

⁵⁵ *Trusts Discussion Paper* (2012) 263.

legislation should provide that they should apply whether or not they are expressly excluded or modified by the trust instrument.

Section 34(3): Protection of purchasers and the Registrar of Titles

7.79 Section 34(3) also provides that neither a good faith purchaser for value of the trust property nor the registrar of titles 'shall be affected by notice of, or concerned to inquire whether there has been, a contravention' of the requirement:

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 this subsection.

7.80 Section 34(3) was adopted from Victoria.⁵⁶ Provision in the same terms is also included in Western Australia.⁵⁷ These provisions derive from an earlier provision in the *Trustee Act 1953* (Vic).⁵⁸

7.81 The trustee legislation in the ACT and New South Wales also includes a similar provision, restating the obligation to apportion the purchase money in or before the contract of sale and to give a separate receipt for the apportioned share,⁵⁹ and confirming that a failure to meet that requirement does not invalidate 'any instrument intended to affect or evidence the title to any land'.⁶⁰ However, those jurisdictions do not include the further specific protection given to purchasers or to the registrar of titles.

Protection of purchasers

7.82 The provision in section 34(3) protects a purchaser in circumstances where a trustee has acted in breach of the obligation to apportion the purchase money in or before the contract of sale and give a separate receipt for the apportioned share.

7.83 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.

⁵⁶ *Trustee Act 1958* (Vic) s 13(4).

⁵⁷ *Trustees Act 1962* (WA) s 31(3).

⁵⁸ *Trustee Act 1953* (Vic) s 13(4) (repealed). That provision was in turn based, in part, on *Trustee Act 1925* (NSW) s 26(4)–(4A). However, that provision did not (and does not now) include any specific protection for the registrar or other person registering or certifying title.

⁵⁹ See *Trustee Act 1925* (ACT) s 26(4); *Trustee Act 1925* (NSW) s 26(4).

⁶⁰ *Trustee Act 1925* (ACT) s 26(5); *Trustee Act 1925* (NSW) s 26(4A).

7.84 In Chapter 11, the Commission has recommended that the new legislation should include the protection currently given to purchasers by section 46 of the *Trusts Act 1973* (Qld).

Protection of the Registrar of Titles

7.85 Under section 30 of the *Land Title Act 1994* (Qld), the registrar must register an instrument lodged for registration if:⁶¹

- (a) the person who lodged it complies with the requirements of this Act for its registration; and
- (b) the instrument is not inconsistent with another Act or law; and
- (c) if the instrument is a plan of survey—it is not inconsistent with another plan of survey.

7.86 The registrar may register an instrument only if it complies with the *Land Title Act 1994* (Qld) and it appears on its face to be capable of registration.⁶²

7.87 Under the general law, the duty of the registrar to register an instrument which, on its face, is in registrable form is not absolute and the registrar will, in certain cases, have a duty or a discretion to refuse registration.⁶³ The position would appear to be that:

- if there is no manifest breach of trust or other impropriety, the registrar has no duty to make inquiries as to the real facts, to examine the propriety of the bargain or the sufficiency of the consideration, or to require proofs to negative fraud or improper conduct;⁶⁴ but
- if it is clear on the face of the instrument or from other facts within the registrar's knowledge in his or her official capacity that the dealing involves

⁶¹ *Land Title Act 1994* (Qld) s 30(1).

⁶² *Land Title Act 1994* (Qld) s 153. For instance, an instrument of transfer must ordinarily be in the approved form and, among other things, include an acknowledgement of the amount paid or other details of consideration: *Land Title Act 1994* (Qld) ss 10(1)(a), 61. The registrar may, however, register an instrument that is not in the appropriate form if satisfied it is not reasonable to require the instrument to have been executed in the appropriate form: s 10(3). If the transferor holds the property as a trustee, this must also be stated: Department of Environment and Resource Management, *Land Title Practice Manual (Queensland)* (July 2009) [1-2030] <<http://www.nrm.qld.gov.au/property/titles/pdf/part01.pdf>>.

An instrument lodged by a person must comply with the directions of the registrar about how the appropriate form must be filled in and how information to be included in or given with the instrument must be included or given, and the manual of land title practice may include such directions: see ss 9A(2)(a), 10(1)(b).

⁶³ *Beames v Leader* [1998] Q Conv R 60 069, 60 0077 (Muir J); *Re Crompton* [2000] ASC 386, [7] (Holmes J).

⁶⁴ *R v Registrar of Titles (Vic); Ex parte Commonwealth* (1915) 20 CLR 379, 385 (Griffith CJ), 402 (Higgins J); *Templeton (Registrar of Titles (Vic)) v The Leviathan Pty Ltd* (1921) 30 CLR 34, 53 (Knox J), 64 (Higgins J; Starke J agreeing); *Hemer Pty Ltd v Benni (No 2)* [2011] SASFC 143, [19]. See also *Re Transfer of Land Statute; Ex parte Wisewould* (1890) 16 VLR 149; *Re Transfer of Land Act 1890; Ex parte The Equity Trustees Executors and Agency Co Ltd and O'Halloran* [1911] VLR 197; *Re Transfer of Land Act 1890; Hosken v Danaher* [1911] VLR 214; *R v Registrar of Titles; Ex parte Briggs* [1913] VLR 549.

a breach of trust, the registrar has a duty to refuse to register the instrument.⁶⁵

7.88 Under section 193 of the *Land Title Act 1994* (Qld), the registrar is protected from civil liability ‘for an act or omission done honestly and without negligence’ under that Act:

193 Protection from liability

- (1) This section applies to the registrar and land registry staff.
- (2) A person to whom this section applies is not civilly liable for an act or omission done honestly and without negligence under this Act.
- (3) If subsection (2) prevents civil liability attaching to a person, the liability attaches instead to the State.

7.89 The *Land Title Act 1994* (Qld) provides that compensation from the State is available to a person who is deprived of a lot or an interest in a lot because of, for example, the fraud of another person, incorrect registration or breach of duty by the registrar, or if a person suffers loss or damage because of, among other things, incorrect registration or breach of duty by the registrar.⁶⁶ However, under section 189(1) of the Act, compensation is not available in certain circumstances including:

- [for deprivation, loss or damage] because of a breach of a trust or fiduciary duty (whether express, implied or constructive) including a breach of duty arising in the administration of the estate of a deceased person; or
- if the loss, damage or deprivation arises out of a matter about which the registrar is by an Act or law, either expressly or by necessary implication, excused from inquiring.

Consultation

7.90 The Registrar of Titles submitted that consideration be given to maintaining the protection afforded to the Registrar in section 34(3), if the operative provision to which that protection relates is retained, as ‘it is not the place of the Registrar to police such matters’. She observed that the civil liability protection for acts done honestly and without negligence conferred by section 193 of the *Land Title Act 1994* (Qld) ‘is not considered [to] have the same effect as a statement within the *Trusts Act* confirming that the Registrar has no duty to inquire as to certain actions of a trustee’.

The Commission’s preliminary view

7.91 In light of the Commission’s recommendation in Chapter 11 that the new legislation should include the protections given generally to purchasers by section

⁶⁵ *R v Registrar of Titles; Ex parte Briggs* [1913] VLR 549, 551 (Hodges J); *R v Registrar of Titles (Vic); Ex parte Commonwealth* (1915) 20 CLR 379, 385 (Griffith CJ), 405 (Powers J); *Templeton (Registrar of Titles (Vic)) v The Leviathan Pty Ltd* (1921) 30 CLR 34, 53 (Knox J), 63–4 (Higgins J; Starke J agreeing); *Gibb v Registrar of Titles (Vic)* (1940) 63 CLR 503, 513 (Starke J); *Wydgee Pastoral Co Pty Ltd v Registrar of Titles* [1963] WAR 176, 178 (Virtue J); *Beames v Leader* [1998] Q Conv R 60 069, 60 080 (Muir J).

⁶⁶ *Land Title Act 1994* (Qld) ss 188(1)(a), (c), (g), 188A(1)(b), (f).

46 of the *Trusts Act 1973* (Qld), the new legislation should not include the protection currently conferred on a purchaser by section 34(3) of the *Trusts Act 1973* (Qld).

7.92 It is arguable whether the protection currently conferred by section 34(3) of the *Trusts Act 1973* (Qld) on the Registrar of Titles continues to be strictly necessary, at least to the extent that a breach of trust is involved. However, in order to avoid any unforeseen and unintended consequences that may flow from the removal of the protection generally, the current protection should be preserved by the new legislation.

Power to sell subject to depreciatory conditions

7.93 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.⁶⁷ A corollary of 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.⁶⁸ 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.⁶⁹

7.94 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 sale from being completed,⁷⁰ or to impeach the purchaser's title after completion,⁷¹ and providing the purchaser with a good defence to an action for specific performance by the trustees.⁷²

7.95 Section 35 of the *Trusts Act 1973* (Qld) deals with matters affecting the validity of a sale made subject to a depreciatory condition.

7.96 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

67 See [7.63] 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.

68 *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.

69 *Dance v Goldingham* (1873) LR 8 Ch App 902; *Dunn v Flood* (1885) 28 Ch D 586. 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.

70 *Dance v Goldingham* (1873) LR 8 Ch App 902.

71 *Rede v Oakes* (1864) 4 De G J & S 505; 46 ER 1015; *Dance v Goldingham* (1873) LR 8 Ch App 902.

72 *Dunn v Flood* (1885) 28 Ch D 586.

reasonable and proper grounds for its introduction.⁷³ 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.

7.97 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.

7.98 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.⁷⁴ Section 35(3) removes the purchaser's right to object to the title on the grounds of the stringency of the conditions of sale.

7.99 Section 35 of the *Trusts Act 1973* (Qld) has its origins in the English *Trustee Act 1888*.⁷⁵ A similar provision is included in the trustee legislation of the other Australian jurisdictions, New Zealand and England.⁷⁶

Discussion Paper

7.100 In the Discussion Paper, the Commission noted that the principal cases which involved depreciatory conditions, and which gave rise to the enactment of statutory provisions like section 35, related to 'old system land', which involved a purchaser of property being able to trace the sequence of historical transfers of title to the property.⁷⁷ In Queensland, there is no remaining old system land.⁷⁸ The Commission observed that there could be 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, the Commission also observed that a sale made under depreciatory conditions is a breach of trust, and that there is nothing in the provisions to prevent a beneficiary from impeaching a sale, before completion, on the grounds that the

⁷³ *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.

⁷⁴ *Dance v Goldingham* (1873) LR 8 Ch App 902; *Dunn v Flood* (1885) 28 Ch D 586.

⁷⁵ *Trustee Act 1888*, 51 & 52 Vict, c 59, s 3.

⁷⁶ *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.

⁷⁷ See *Trusts Discussion Paper* (2012) 266, n 84.

⁷⁸ Department of Environment and Resource Management, *Land Title Practice Manual (Queensland)* (July 2009) Early History of Titling in Queensland [0.000] <<http://www.derm.qld.gov.au/property/titles/pdf/part00.pdf>>.

terms are such that the sale price has been rendered inadequate,⁷⁹ or, where there has been a completed sale under depreciatory conditions to a bona fide purchaser, from making the trustee liable for any loss arising from the inadequacy of the consideration for the sale.⁸⁰

7.101 The Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to include a provision to the general effect of section 35.⁸¹

Consultation

7.102 The Bar Association of Queensland, the Queensland Law Society, Professor Lee and a practitioner who practises in trusts law considered that the *Trusts Act 1973* (Qld) should not continue to include a provision to the general effect of section 35. Professor Lee considered that the provision is no longer necessary because it 'belongs to old system conveyancing'.

7.103 In contrast, the Public Trustee and the Financial Services Council considered that a provision to the general effect of section 35 should be retained. The Public Trustee observed that:

Ultimately the issue addressed by section 35 is not neatly the trustee's decision to improve a depreciatory condition — rather the capacity for a beneficiary to effectively injunct a sale or prevent a sale proceeding against a purchaser.

Whilst the general equitable position articulates the duty — that is an enquiry as to whether the decision was reasonable and proper, section 35 deals with the capacity to interfere with the sale.

The Commission's preliminary view

7.104 The new legislation should not include a provision to the effect of section 35 of the *Trusts Act 1973* (Qld). The provision is no longer relevant in the context of conditions in a contract of sale not rendered actually necessary by the state of the title, as there is no old system land remaining in Queensland. The circumstances in which these provisions might otherwise operate would now be limited and could, if necessary, be dealt with as indicated at [7.100] above.

Power of trustee-vendor to secure part of purchase price by mortgage

7.105 The *Trusts Act 1973* (Qld), as originally passed, permitted a trustee to invest trust funds in certain listed investments authorised under the Act.⁸² The list of authorised investments included certain first legal or first statutory mortgages.⁸³ As

⁷⁹ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 1983) [1229.5]; *Dunn v Flood* (1885) 28 Ch D 586.

⁸⁰ 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.

⁸¹ *Trusts Discussion Paper* (2012) 266.

⁸² *Trusts Act 1973* (Qld) s 21 (Act as passed).

⁸³ *Trusts Act 1973* (Qld) s 21(b) (Act as passed).

explained in Chapter 5, 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.

7.106 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.

7.107 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. In these circumstances, it has been held that the trustee was simply carrying out the directions in the trust instrument.⁸⁴

7.108 Section 36 of the *Trusts Act 1973* (Qld) restates the power, albeit in more prescriptive terms. 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'.⁸⁵ 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'.

7.109 A statutory power to take a mortgage for part of the purchase money is also provided in South Australia, Victoria and Western Australia.⁸⁶

7.110 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.⁸⁷ As explained in Chapter 5, 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. 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

⁸⁴ *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.

⁸⁵ G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 368.

⁸⁶ *Trustee Act 1936* (SA) s 23; *Trustee Act 1958* (Vic) s 16; *Trustees Act 1962* (WA) s 33.

⁸⁷ *Trusts Act 1973* (Qld) s 30(1) is discussed in Chapter 5.

trust funds on the security of property of all kinds would, subject to satisfying certain other conditions, be protected from liability.

7.111 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).

7.112 If the general property power is enacted, and section 36 is omitted, 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 5, 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. 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.

7.113 In Chapter 5, the Commission has recommended that a provision to the general effect of section 30(1) of the *Trusts Act 1973* (Qld) should be retained, on the basis that there is value in giving an assurance to trustees about their potential liability for investing on the security of property. As a result, 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.

Discussion Paper

7.114 In the Discussion Paper, the Commission expressed the view that, because section 36 confers a limited power, it would not be generally consistent with the approach of conferring a general property power. Accordingly, the Commission proposed that, 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.⁸⁸

7.115 The Commission sought submissions on whether, if the Act is amended to confer a general property power on a trustee, any provision that lists examples of specific powers conferred by the general property power should include the power

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Trusts Discussion Paper (2012) 270.

of a trustee who sells land to secure part of the purchase price by a mortgage over the land.⁸⁹

7.116 The Commission also sought submissions on whether, if section 36 of the *Trusts Act 1973* (Qld) is omitted:⁹⁰

- the Act should include a new protective provision that:
 - 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;
 - 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; and
- it should it be a condition for protection under the new provision 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.

Consultation

7.117 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts law considered that, if the *Trusts Act 1973* (Qld) is amended to confer a general property power on a trustee, section 36 should be omitted. The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council and the legal practitioner also considered that a brief statement of the power should be included in the legislation as an example of the general property power.

7.118 The Bar Association of Queensland and the Queensland Law Society considered that the new legislation should not include a new protective provision in the terms set out above. In this regard, the Bar Association of Queensland noted that, while a protection in those terms ‘provides clear guidance to a trustee as to the type of transaction that it can enter into secure in the knowledge that it will not be liable should the property ultimately be insufficient security for the loan’, the retention of a ‘2/3 to 1/3 buffer’ is not consistent with the trustee’s obligation to make decisions based on the circumstances of the particular trust.

7.119 In contrast, the Public Trustee and the Financial Services Council each favoured the enactment of such a provision.

7.120 A legal practitioner who practises in trusts and succession law favoured the enactment of the new protective provision except to the extent that it provided 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. In this regard, he commented that:

⁸⁹ Ibid.

⁹⁰ Ibid.

A prudent person would obtain a report as to the value of the land. A bank would.

7.121 The Bar Association of Queensland and Professor Lee each considered that a specific requirement that the mortgage 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 should be not included in any new protective provision. The legal practitioner, on the other hand, favoured the enactment of such a provision.

The Commission's preliminary view

7.122 The limited power currently conferred by section 36 of the *Trusts Act 1973* (Qld) would not be generally consistent with the underlying policy of the general property power. Accordingly, the new legislation should not include a stand-alone provision to the effect of section 36 of the *Trusts Act 1973* (Qld). In addition, it should not state the power of a trustee-vendor to secure part of the purchase price by mortgage more briefly as an example of a power conferred by the general property power. However, the new legislation should ensure that the power of a trustee-vendor to secure part of the purchase price by mortgage is capable of being expressly excluded or modified by the instrument (if any) creating the trust.

7.123 In addition, the new legislation should not preserve the protection (or any variation of the protection) given by section 36 of the *Trusts Act 1973* (Qld) to a trustee.

Power to sell trust property on terms of deferred payment

7.124 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.

7.125 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'.⁹¹ That test applies a different standard from section 22 of the Act, which applies when a trustee exercises a power of investment.

7.126 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.

⁹¹

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).

7.127 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.⁹² 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.

7.128 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.

7.129 Section 37 of the *Trusts Act 1973* (Qld) is based on a similar provision in the New South Wales trustee legislation.⁹³ 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.⁹⁴

7.130 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 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.⁹⁵

7.131 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.

7.132 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

⁹² *Trusts Act 1973* (Qld) s 30(1) is discussed in Chapter 5.

⁹³ *Trustee Act 1925* (NSW) s 28.

⁹⁴ *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.

⁹⁵ *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'.

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.

7.133 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.

7.134 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.⁹⁶

Discussion Paper

7.135 In the Discussion Paper, the Commission expressed several concerns about section 37 of the *Trusts Act 1973* (Qld). It noted that the contractual terms required by section 37(3) are quite prescriptive, and not generally consistent with the policy underpinning the conferral of a general property power. In the circumstances of a particular case, it could be consistent with the trustee's duties to accept a deposit of less than 10% of the purchase price. The Commission also considered 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 considered 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).⁹⁷

7.136 For these reasons, the Commission proposed that, if the *Trusts Act 1973* (Qld) is amended to give trustees a general property power, section 37 of the Act should be omitted. It also sought submissions on whether any provision that lists examples of specific powers conferred by the proposed 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)).⁹⁸

7.137 The Commission also sought submissions on whether, if section 37 of the *Trusts Act 1973* (Qld) is omitted, the Act should preserve either the protection currently afforded by section 37(6) or the clarification in section 37(7) (that a trustee's sale of property on terms of deferred payment is deemed not to be the

⁹⁶ *Property Law Act 1974* (Qld) ss 74, 75(3)–(8).

⁹⁷ *Trusts Discussion Paper* (2012) [8.103].

⁹⁸ *Ibid* 274.

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).⁹⁹

Consultation

7.138 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that, if the Act is amended to confer a general property power on a trustee, section 37 of the *Trusts Act 1973* (Qld) should be omitted.

7.139 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee and the Financial Services Council considered that the Act should list the power of a trustee to sell property on terms of deferred payment (including the power to sell land under an instalment contract) as an example of the general power. In contrast, Professor Lee and the legal practitioner considered that the Act should not specifically mention the power as an example of the general power.

7.140 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, Professor Lee and the legal practitioner considered that, if section 37 is omitted, section 37(6) and (7) should not be retained. The Queensland Law Society commented that the investment provisions should govern the matters in section 37(7). In contrast, the Financial Services Council favoured retaining section 37(6) and (7).

The Commission's preliminary view

7.141 The Commission is of the view that the new legislation should not include a stand-alone provision to the effect of section 37 of the *Trusts Act 1973* (Qld), as the power 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)) would be conferred by the general property power. In addition, the new legislation should not state the power to sell property on terms of deferred payment more briefly as an example of a power conferred by the general property power. However, the new legislation should be framed so that the power of a trustee to sell property on terms of deferred payment is capable of being expressly excluded or modified by the trust instrument.

7.142 The Commission is also of the view that the new legislation should not preserve either the protection currently afforded by section 37(6) or 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.

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Ibid.

Power to raise money by sale, conversion, calling in or mortgage

7.143 Section 45 of the *Trusts Act 1973* (Qld) deals with the power to raise money by the sale, conversion, calling in or mortgage of the trust property.¹⁰⁰ It applies where a trustee is authorised 'by the trust instrument or by the *Trusts Act 1973* (Qld) or any other Act¹⁰¹ or by law to expend, pay or apply capital money subject to the trust for any purpose or in any manner'. In those circumstances, the trustee also has the power to raise the money required by the sale, conversion, calling in or mortgage¹⁰² of the trust property.¹⁰³

7.144 A provision in virtually identical terms is contained in the trustee legislation in the ACT, New South Wales, South Australia, Victoria, Western Australia, New Zealand and England.¹⁰⁴

The scope of the power

7.145 The scope of the power conferred by section 45 will depend on the extent to which the trustee is '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'.

7.146 Under the *Trusts Act 1973* (Qld), the provisions that confer the requisite authority for the conferral of power under section 45 are largely those that authorise the expenditure, payment or application of capital money for the limited purposes of the preservation, improvement or development of the existing trust property or for the maintenance, education, advancement or benefit of a beneficiary.¹⁰⁵

7.147 If a trustee does not have the requisite authority from one of the other sources mentioned in the provision (that is, the trust instrument or any other Act or law), the scope of the power conferred by section 45 of the *Trusts Act 1973* (Qld) will be limited to those purposes for which the trustee is authorised under the Act to expend, pay or apply capital money subject to the trust.

¹⁰⁰ Section 45 of the *Trusts Act 1973* (Qld) is discussed in more detail in *Trusts Discussion Paper* (2012) 274–5. 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.

¹⁰¹ See, eg, *Trustee Companies Act 1968* (Qld) s 28(1)(h).

¹⁰² 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].

¹⁰³ Section 45 of the *Trusts Act 1973* (Qld) further provides that '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'.

¹⁰⁴ *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. In the ACT, New South Wales, South Australia, Victoria and England, the provision does not apply to trustees of property held for charitable purposes: *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). There is no similar restriction in Queensland, Western Australia or New Zealand.

¹⁰⁵ See *Trusts Act 1973* (Qld) ss 27(a), 33(1)(a)–(f), 39(2), 47(3)(c)–(d), 62(1).

7.148 This default limitation operates, on the one hand, to ensure that the trustee always has a power under that provision to raise money that may be required for the limited purposes mentioned at [7.146], as is consistent with the trustee's duties in relation to the trust property and the beneficiaries.

7.149 On the other hand, it does not enable a trustee to exercise the power conferred by section 45 beyond the authorities referred to in that provision. This is particularly significant in relation to the power to raise money by mortgaging the trust property. Section 45 does not empower a trustee to 'gear' the value of the trust fund, that is, 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, unless the expenditure of capital money for that type of investment is authorised by the trust instrument or by another Act or law.¹⁰⁶ Without having the requisite authority, it would be necessary for the trustee to apply to the court under section 94 of the *Trusts Act 1973* (Qld) for the conferral of an additional power to mortgage the trust property to raise the money required for that purpose.

7.150 This statutory limitation on the trustee's power to borrow recognises that the mortgage of trust property for the acquisition of additional trust property as an investment has the potential to imperil the trust fund, because, in the case of default, trust assets other than the mortgaged property may also be at risk. As Ford and Lee have explained, 'such activity is speculative and may compromise the standard of prudence imposed on trustees'.¹⁰⁷ In recognition of this risk, the *Superannuation Industry (Supervision) Act 1993* (Cth) also imposes restraints on the trustees of regulated superannuation funds to borrow for the purposes of acquiring additional assets.¹⁰⁸

7.151 An issue raised by the Commission's proposal that the new legislation should enact a provision that confers on a trustee all the powers of an absolute owner of property, is whether the new legislation should continue the current policy of imposing a constraint against the gearing of trust property.

7.152 The default limitation currently imposed by section 45 would not be generally consistent with the policy underpinning the recommended new 'general property power'. The power to raise money by sale, conversion, calling in or mortgage conferred by the general property power would not have that limitation; however, the exercise of the power would be subject to the trustee's duties (including the general statutory duty of care recommended in Chapter 6).

7.153 The Law Commission of New Zealand (which has proposed that new trustee legislation in that jurisdiction should confer a general property power) has

¹⁰⁶ *Re Suenson-Taylor's Settlement Trusts* [1974] 1 WLR 1280, 1283.

¹⁰⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 24 January 2013) [12.10330].

¹⁰⁸ 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. 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.

also recommended the repeal of the equivalent provision in the *Trustee Act 1956* (NZ).¹⁰⁹ That Commission has also proposed that the power to raise money by sale, conversion, calling in or mortgage should be included in a list of examples of powers conferred by the general power.¹¹⁰

7.154 The English trustee legislation adopts a different approach. Although the legislation confers a general property power on trustees of land,¹¹¹ it still retains a provision in similar terms to section 45 of the *Trusts Act 1973* (Qld)¹¹²

The effect of the settlor's intention

7.155 Section 45 of the *Trusts Act 1973* (Qld) applies whether or not a contrary intention is expressed in the instrument (if any) creating the trust,¹¹³ thus preserving the default limitation imposed by that provision. As explained above, a settlor can confer a wider power to mortgage, but a trustee always has that power under section 45 for the purposes of the preservation, improvement or development of the existing trust property or for the maintenance, education, advancement or benefit of a beneficiary.

7.156 If the new legislation was framed so that the power to raise money by the sale, conversion, calling in or mortgage of the trust property could be expressly excluded or modified by the trust instrument, it would enable the settlor to set limits on the investment parameters of the trust. However, it would also mean that the power to mortgage could be excluded completely.

7.157 If, on the other hand, the new legislation provided that the power to raise money by the sale, conversion, calling in or mortgage of the trust property could not be expressly excluded or modified by the trust instrument, the power would be unlimited in its scope.

7.158 The Law Commission of New Zealand has proposed that the power conferred by its counterpart to section 45 of the *Trusts Act 1973* (Qld) (and listed as an example of the general property power proposed by that Commission) should apply subject to the expression of a contrary intention.¹¹⁴

Discussion Paper

7.159 In the Discussion Paper, the Commission sought submissions on the operation of section 45 of the *Trusts Act 1973* (Qld), particularly in relation to the

¹⁰⁹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 76 (Proposal P11(1)).

¹¹⁰ *Ibid* 76–7 (Proposal P11(2)).

¹¹¹ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 6(1).

¹¹² *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 16(1). That provision does not apply to trustees of property held for charitable purposes, or to trustees of a settlement for the purposes of the *Settled Land Act 1925*, not being also the statutory owners: s 16(2).

¹¹³ *Trusts Act 1973* (Qld) s 31(1).

¹¹⁴ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [4.5], 76 (Proposal P11(1)).

power to raise money by way of mortgage, and how that provision should be dealt with under the Act.¹¹⁵

Consultation

7.160 The Bar Association of Queensland commented that, although the default limitation in section 45 is designed to protect the beneficiaries (by requiring that trustees not undertake speculative activity — such as ‘gearing’ the trust property — that may compromise the standard of prudence imposed on trustees in cases where that is not otherwise authorised by the trust instrument), the continued operation of the default limitation is inconsistent with the enactment of a general property power. Accordingly, this respondent suggested that the Act should not continue to include the default limitation provided under section 45, and that it should be left to the drafter of the relevant trust instrument to incorporate such a limitation if the nature of the trust requires it.

7.161 The Queensland Law Society also considered that the scope of the power conferred by section 45, and in particular the power to mortgage, is inconsistent with the conferral of a general property power. It particularly considered that there should be no express limitations on the statutory power to mortgage.

7.162 In contrast, Professor Lee suggested that section 45 should be retained but modified slightly so that it empowers a trustee who expends, pays or applies capital money for either the preservation or better management of the trust property or the maintenance, education or benefit of a beneficiary, to raise the money required by selling, calling in or mortgaging any part of the trust property.

7.163 The Public Trustee and the Financial Services Council also submitted that section 45 should continue to provide a limitation upon the trustee’s powers (including the general property power). These respondents considered that the enlargement of the default power in section 45 to enable the mortgage of trust property for purposes other than those currently stated in that section may lead to the ‘undesirable’ situation of a trustee making speculative investments. They also noted that section 45 ‘can be the subject of specific drafting when a trust is settled’.

7.164 A legal practitioner who practises in trusts and succession law also considered that, if retained in its present form, section 45 should clarify the specific purposes under the Act for which a trustee may be authorised to expend, pay or apply capital money.

The Commission’s preliminary view

7.165 The Commission is of the view that the new legislation should not include a provision in the same terms as section 45 of the *Trusts Act 1973* (Qld), as it would not be generally consistent with the conferral of the general property power (which gives a trustee, in relation to the trust property, all the powers of an absolute owner).

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Trusts Discussion Paper (2012) 279.

7.166 The power to raise money by the sale, conversion, calling in or mortgage conferred by the general property power would have no limitation on its scope (as is currently the case under section 45).

7.167 As a result, a trustee could exercise the power to raise money by the mortgage of trust property free of the constraint against gearing currently imposed by section 45. However, in exercising that power, the trustee would still be subject to his or her duties (including the general statutory duty of care recommended in Chapter 6). Another important consideration in relation to the power to raise money by the mortgage of trust property is the effect of the settlor's intention. In the Commission's view, the new legislation should preserve the settlor's autonomy to determine the investment risk profile of the trust by ensuring that the power to raise money by the mortgage of trust property is capable of being expressly excluded or modified by the trust instrument. The new legislation should also state the power to raise money by the mortgage of trust property more briefly as an example of a power conferred by the general property power.

7.168 The Commission further notes that, without the restrictions on the exercise of the power that currently apply under section 45, the power to raise money by the sale of trust property conferred by the general property power would effectively be an unfettered power of sale. Relevantly, the Commission has recommended that the new legislation should briefly state the power of sale as an example of a power conferred by the general property power, and provide that the power of sale applies whether or not it is expressly excluded or modified by the trust instrument.¹¹⁶

7.169 Finally, the new legislation should not include the power to raise money by the conversion or calling in of trust property as an example of a power conferred by the general property power. However, it should ensure that the power to raise money by the conversion or calling in of trust property is capable of being expressly excluded or modified by the trust instrument.

Power to renew, extend or vary mortgage

7.170 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 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.

7.171 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 of the Act to raise the money by a mortgage of the property. 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.

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See Recommendations 7-5(a), 7-7(a) below.

7.172 Western Australia is the only other Australian jurisdiction that includes a power to renew, extend or vary a mortgage in its trustee legislation.¹¹⁷

Consultation

7.173 The Bar Association of Queensland, the Queensland Law Society, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that section 33(1)(i) of the *Trusts Act 1973* (Qld) should be omitted in view of the proposed enactment of the general property power. Professor Lee also commented that the general property power would be subject to constraints such as the trustee's duties, which would limit a trustee's powers to vary or extend mortgages to within reasonable parameters.

7.174 The Bar Association of Queensland considered that the power to renew, extend or vary a mortgage that is conferred by section 33(1)(i) should not be specifically mentioned as an example of the general property power.

7.175 The legal practitioner considered that the power should be specifically mentioned, as that power was one that 'banks would like to see' in the legislation.

7.176 The Public Trustee and the Financial Services Council considered that the power conferred by section 33(1)(i) of the Act should be retained in its current form so that its exercise is limited to the purposes that are currently stated in section 45.

The Commission's preliminary view

7.177 The power to renew, extend or vary a mortgage conferred by section 33(1)(i) of the *Trusts Act 1973* (Qld) is one of the powers that may be exercised under the general property power recommended by the Commission.

7.178 In the Commission's view, the new legislation should not include a stand-alone provision to the effect of section 33(1)(i) of the Act, but should instead state the power to renew, extend or vary a mortgage more briefly as an example of the general property power. The new legislation should also provide that the power to renew, extend or vary a mortgage applies whether or not it has been expressly excluded or varied by the trust instrument. If a trustee has the power to mortgage trust property, and has exercised that power, it is in the interests of the beneficiaries that the trustee should have the power to renew, extend or vary the mortgage.

Power to dispose of trust property by exchange or partition

7.179 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 has since been held that an ordinary power of sale and exchange is sufficient to enable a trustee to authorise a partition between two or more beneficiaries.¹¹⁸

¹¹⁷ *Trustees Act 1962* (WA) s 30(1)(h). See also *Trustee Act 1956* (NZ) s 15(1)(g).

¹¹⁸ *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.

7.180 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.

7.181 A similar statutory power is included in the Western Australian trustee legislation.¹¹⁹

Consultation

7.182 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law, who all supported the conferral of a general property power on a trustee, were of the view that the power of exchange or partition conferred by section 32(1)(b) should not continue to be the subject of a stand-alone provision.

7.183 The Queensland Law Society, the Public Trustee and the Financial Services Council considered that, if the Act is amended to confer a general property power on a trustee, the power conferred by section 32(1)(b) should be omitted from the Act. In contrast, the Bar Association of Queensland, Professor Lee and the legal practitioner favoured the approach of listing that power as an example of the general property power.

The Commission's preliminary view

7.184 The Commission considers that it is not necessary for the new legislation to include a stand-alone provision to the effect of section 32(1)(b) of the *Trusts Act 1973* (Qld), as the power of exchange and partition conferred by that provision would be conferred by the general property power. It also considers that the new legislation should not briefly state the power of exchange and partition as an example of the powers conferred by the general property power. However, the new legislation should ensure that the power of exchange and partition is capable of being expressly excluded or modified by the trust instrument.

Power to lease trust property

7.185 Under the general law, unless authorised by the trust instrument or by statute, a trustee has limited power to grant a lease of trust property. 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.¹²⁰ In *Fitzpatrick v Waring*, FitzGibbon LJ made the observation that:¹²¹

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)

¹¹⁹ *Trustees Act 1962* (WA) s 27(1)(b).

¹²⁰ 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 Pateson* (1847) 10 Beav 541; 50 ER 690; *Evans v Jackson* (1836) 8 Sim 217; 59 ER 87.

¹²¹ (1882) 11 LR Ir 35, 54.

7.186 A trustee has a 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.¹²² 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.¹²³ 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.¹²⁴ The onus is on the trustee, and the lessee, to show that the lease is reasonable and done in the fair management of the estate.¹²⁵

7.187 In addition, the duty to administer the trust personally requires that trustees should not commit themselves in advance as to their future conduct as trustees.¹²⁶ 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.¹²⁷ The strict application of that principle precludes the grant of an option to purchase, or renew a lease of, trust property.¹²⁸ Nevertheless, the granting of an option to purchase or to renew a lease 'often occurs as a normal part of commercial arrangements',¹²⁹ 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.¹³⁰ It would appear that such an option would have to be of short duration and a prudent transaction in all other respects.¹³¹

7.188 In Queensland, the *Settled Land Act 1886* (Qld), the *Trustees and Executors Act of 1897 Amendment Act of 1898* (Qld) and the *Trustee Companies*

122 Eg, *Re Burgess* [1899] SALR 145 (FC); *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.

123 Eg, *Naylor v Arnitt* (1830) 1 Russ & M 501; 39 ER 193; *Re Mallen* [1929] SASR 154.

124 Eg, *Donely v Donely* [1998] 1 Qd R 602.

125 *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).

126 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2014].

127 Ibid.

128 *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 24 January 2013) [12.5710].

129 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 24 January 2013) [12.5710].

130 *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.

131 *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.

Act 1968 (Qld) modified the general law rules in relation to power to lease.¹³² Many of the leasing powers in the *Trusts Act 1973* (Qld) are largely modelled on the powers conferred on life tenants and trustees (including trustee companies) under those historical Acts.

7.189 Section 32(1)(d)–(f) and (3) of the *Trusts Act 1973* (Qld) deals with a trustee's powers to lease trust property.

7.190 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.¹³³ It also enables a trustee to renew any such lease or tenancy or share-farming agreement.

7.191 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).

7.192 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.¹³⁴

7.193 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:¹³⁵

- to the lessee or sublessee a right of renewal for one or more terms, but only to the extent that the combined duration of the original and the renewal terms does not exceed the maximum single term that could be granted;¹³⁶
- 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.

¹³² These statutory provisions are discussed in *Trusts Discussion Paper* (2012) [8.161]–[8.163].

¹³³ 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).

¹³⁴ 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).

¹³⁵ 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': *Trusts and Settled Land Report* (1971) 33.

¹³⁶ The grant of a lease for a term longer than allowed under s 32(3) has been held to be valid for the term allowed but void as to the extent of the excess term: *Washington Constructions Co Pty Ltd v Ashcroft* [1982] Qd R 776.

Discussion Paper

7.194 In the Discussion Paper, the Commission noted that the leasing powers conferred by section 32 were enacted before the Act was amended to confer a broad investment power on trustees. It observed that the relatively prescriptive content of the statutory leasing powers, 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 with prudence when making investment decisions and in the interests of the beneficiaries.¹³⁷

7.195 The Commission also noted that the American Uniform Trust Code has adopted the approach of briefly stating the leasing powers as examples of the powers conferred by a general property power, and that law reform bodies in New Zealand and British Columbia have proposed a similar approach.¹³⁸ In particular, 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'.¹³⁹ The Commission observed that 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. If the trustees sold the property during the period of the lease, the sale would be subject to the lease.¹⁴⁰

7.196 The Commission sought submissions on whether the leasing powers conferred by section 32 should continue to be the subject of stand-alone provisions, or should otherwise be omitted or more briefly restated as examples of powers conferred by the general property power. It also sought submissions on 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.¹⁴¹

Consultation

7.197 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law each considered that the leasing powers currently conferred by section 32 should not continue to be the subject of stand-alone provisions, but should be restated more briefly in the trustee legislation as examples of the powers conferred by the general property power.

¹³⁷ *Trusts Discussion Paper* (2012) [8.178].

¹³⁸ *Ibid* [8.179].

¹³⁹ Unif Trust Code § 816(9) (amended 2010).

¹⁴⁰ *Trusts Discussion Paper* (2012) [8.179]–[8.180].

¹⁴¹ *Ibid* 293.

7.198 The Bar Association of Queensland, the Queensland Law Society and the legal practitioner considered that the trustee legislation should 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. The Bar Association of Queensland commented that the absence of such a provision might unduly limit the capacity of a trustee to lease advantageously where the trust is contingently terminable.

7.199 Professor Lee also commented that:

Trustees have powers of sale as well as of leasing. There is no impediment to their including an option to purchase in a lease and it is often done. The trustees must have regard to relevant issues such as whether a lease might adversely affect beneficiaries' rights to possession at the termination of the trust or the grant of an option to purchase might bind the trustee's hands as regards price.

7.200 The Public Trustee and the Financial Services Council commented that there should be no statutory limitation on the period for which a trustee may grant a lease, noting that, frequently the duration of the trust may be uncertain, and to provide a limit in that regard might be to expose trustees to unexpected liability.

The Commission's preliminary view

7.201 In the Commission's view, the new legislation should not include stand-alone provisions to the effect of section 32(1)(d)–(f) and (3) of the *Trusts Act 1973* (Qld), as the leasing powers conferred by those provisions would be conferred by the general property power. Because the power to lease, like the power of sale, is one of the key powers used for the active management of trust property, the new legislation should state the power to lease more briefly as an example of the powers conferred by the general property power. The new legislation should also make provision for the power to lease to apply whether or not it is expressly excluded or modified by the instrument (if any) creating the trust.

7.202 The Commission is also of the view that it is not necessary for the new legislation to expressly state that, in exercising the power to lease, a trustee may grant a lease, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust. A trustee, in exercising powers of management in relation to the trust property (including the power to grant a lease), must act in accordance with his or her duties (including the general statutory duty of care recommended in Chapter 6). The Commission considers it sufficient to rely on those general constraints on the exercise of a trustee's powers to ensure that the trustee grants a lease for a period of time that is appropriate in the particular circumstances.

Power to subdivide and undertake development works

7.203 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.¹⁴²

7.204 It has been held that the power of subdivision conferred by section 33(1)(e) of the *Trusts Act 1973* (Qld) would probably be within the power to make improvements or developments conferred by section 33(1)(b) of the Act:¹⁴³

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).

7.205 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.

Consultation

7.206 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that, if the *Trusts Act 1973* (Qld) is amended to confer a general property power, the powers conferred by section 33(1)(e) and (f) (including the powers to subdivide and undertake development works) should be included in the Act as an example of the specific powers conferred by the general power.

The Commission's preliminary view

7.207 The Commission is of the view that the new legislation should not include stand-alone provisions to the effect of section 33(1)(e) and (f) of the *Trusts Act 1973* (Qld), or state the powers currently conferred by those provisions (including the powers to subdivide and undertake development works) more briefly as examples of the powers conferred by the general property power. However, the new legislation should ensure that the powers to subdivide and undertake development works are capable of being expressly excluded or modified by the trust instrument.

¹⁴² *Trusts Act 1973* (Qld) s 33(1)(e). There are similar provisions in Western Australia and New Zealand: *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'.

¹⁴³ *Ryan v The Public Trustee of Queensland* [1998] 1 Qd R 679, 684 (Williams J; Fitzgerald P and Mackenzie J agreeing).

Power to grant easements etc

7.208 As a consequence 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 an easement to it.¹⁴⁴

7.209 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.¹⁴⁵ In New South Wales and the ACT, the trustee legislation provides that a trustee for sale may 'grant and sell any easement, right or privilege of any kind over or in relation to the property'.¹⁴⁶ In South Australia, trustees of land with a power of sale may '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'.¹⁴⁷

7.210 There are no equivalent provisions in the trustee legislation of the Northern Territory, Victoria or Tasmania.

Consultation

7.211 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law each expressed the view that, if the *Trusts Act 1973* (Qld) is amended to confer a general property power on a trustee, the powers conferred by section 33(1)(h) (including the power to grant an easement) should be included in the Act as examples of the specific powers conferred by the general power.

7.212 Professor Lee considered that, if the *Trusts Act 1973* (Qld) is amended to confer a general property power on a trustee, the powers conferred by section 33(1)(h) of the Act (including the power to grant easement) could be omitted.

The Commission's preliminary view

7.213 In the Commission's view, the new legislation should not include a stand-alone provision to the effect of section 33(1)(h) of the *Trusts Act 1973* (Qld), as the power conferred by that provision (including the power to grant an easement) would be conferred by the general property power. In addition, the new legislation should not state the power conferred by section 33(1)(h) more briefly as

¹⁴⁴ *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'.

¹⁴⁵ *Trustees Act 1962* (WA) s 30(1)(f); *Trustee Act 1956* (NZ) s 15(1)(e).

¹⁴⁶ *Trustee Act 1925* (ACT) s 26(1)(c); *Trustee Act 1925* (NSW) s 26(1)(c).

¹⁴⁷ *Trustee Act 1936* (SA) s 20(2a).

an example of the powers conferred by general property power. However, the new legislation should enable that particular power to be capable of being expressly excluded or varied by the trust instrument.

Power to execute all necessary documents

7.214 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 broader 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'.

Discussion Paper

7.215 In the Discussion Paper, Commission expressed the preliminary view that the power to 'execute all necessary documents to give effect thereto' conferred by section 33(1)(h) of the *Trusts Act 1973* (Qld) should be omitted.¹⁴⁸

Consultation

7.216 Professor Lee, the Queensland Law Society, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law expressed the view 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 to the other powers conferred by that provision. The Bar Association of Queensland considered that the power could be stated briefly as an example of the general property power.

The Commission's preliminary view

7.217 In Chapter 9, the Commission has recommended that the new legislation should include a provision to the effect of section 33(1)(n) of the *Trusts Act 1973* (Qld). In light of that recommendation, it is unnecessary to include a provision to the effect of section 33(1)(h) of the Act (to the extent that it confers 'the power to execute all necessary documents to give effect to thereto') in the new legislation.

Power to surrender a life policy

7.218 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.

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Trusts Discussion Paper (2012) [8.188].

7.219 This provision was recommended by this Commission in its 1971 Report. It commented that:¹⁴⁹

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).¹⁵⁰ (note added)

7.220 A similar provision is included in the trustee legislation of Western Australia and New Zealand.¹⁵¹

Consultation

7.221 The Bar Association of Queensland, the Queensland Law Society, and a legal practitioner who practises in trusts and succession law were of the view that the power to surrender life policies conferred by section 33(1)(k) of the *Trusts Act 1973* (Qld) should not continue to be the subject of a stand-alone provision in the Act. These respondents also considered that, if the Act is amended to confer all the powers of an absolute owner of property on a trustee, the power to surrender life policies should be stated briefly in the Act as an example of the power conferred by the trustee's general property power.

7.222 In contrast, Professor Lee, the Public Trustee and the Financial Services Council suggested that section 33(1)(k) should be retained even if a general property power is conferred on a trustee.

The Commission's preliminary view

7.223 The Commission is of the view that the new legislation should not include a stand-alone provision to the effect of section 33(1)(k) of the *Trusts Act 1973* (Qld), or state the power to surrender a life policy currently conferred by that provision more briefly as an example of the powers conferred by the general property power. However, the new legislation should ensure that the power to surrender a life policy is capable of being expressly excluded or modified by the trust instrument.

Power to surrender onerous leases or property

7.224 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.

¹⁴⁹ *Trusts and Settled Land Report* (1971) 35.

¹⁵⁰ *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). However, s 210(3) of the 1995 Act is in similar terms to s 100(3) of the 1945 Act.

¹⁵¹ *Trustees Act 1962* (WA) s 30(1)(j); *Trustee Act 1956* (NZ) s 15(1)(i).

7.225 There are similar provisions in the ACT, New South Wales, South Australia, Victoria, Western Australia and New Zealand.¹⁵² However, with the exception of the Western Australian provision, these provisions do not extend to the surrender of freehold land.¹⁵³

7.226 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:¹⁵⁴

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.

Section 38(1) and (2): Powers of a trustee

7.227 The duty of a trustee to make the trust property productive would usually preclude the trustee from giving the property away. However, if the trust property is of such an onerous nature that its retention is no longer in the interests of the beneficiaries, it may be prudent for the trustee to surrender it.

7.228 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.¹⁵⁵

7.229 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

¹⁵² *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).

¹⁵³ 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).

¹⁵⁴ *Trusts and Settled Land Report* (1971) 36–7.

¹⁵⁵ In certain circumstances, a trustee in bankruptcy has a similar statutory power to disclaim onerous property of a bankrupt person: *Bankruptcy Act 1966* (Cth) s 133. See also *Corporations Act 2001* (Cth) s 568, in relation to the similar power of a liquidator of a company.

be competent), whether the valuer carried on business in the locality where the property is situated or elsewhere.¹⁵⁶

Discussion Paper

7.230 In the Discussion Paper, the Commission noted that a trustee must act prudently in managing trust property. A trustee also has a general obligation to act in good faith for the benefit of the beneficiaries.¹⁵⁷ These obligations may, in the particular circumstances, require the trustee to obtain a valuation in order to surrender the property. The Commission also noted that section 76 of the Act gives the court the power to relieve a trustee from personal liability for a breach of trust.¹⁵⁸

7.231 The Commission sought submissions on whether the power conferred by section 38(1) and (2) of the Act should continue to be the subject of a stand-alone provision, or be omitted or more briefly restated as an example a power conferred by the general property power. It also sought submissions on whether the protective elements in section 38(1) and (2) should be preserved.¹⁵⁹

Consultation

7.232 Professor Lee considered that the power to surrender onerous leasehold or freehold property conferred by section 38(1) and (2) of the *Trusts Act 1973* (Qld) should continue to be the subject of a stand-alone provision. He observed that trustees have a duty to preserve trust assets and so would not surrender leases or other property unless they considered the assets to be onerous.

7.233 The Queensland Law Society, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law submitted that the power to surrender should be listed as an example of a power conferred by a general property power.

7.234 The Bar Association of Queensland, the Queensland Law Society and the legal practitioner considered that it is not necessary to preserve the protection given by section 38(1) and (2) of the Act. The Bar Association of Queensland commented that section 76 of the Act, which empowers the court to relieve a trustee from personal liability for a breach of trust, gives 'sufficient protection' to a trustee. It further noted that a relevant consideration as to whether a trustee should be relieved from liability under that provision would be whether the trustee took advice from an independent registered valuer.

7.235 On the other hand, the Public Trustee and the Financial Services Council considered that those provisions should be retained. The Financial Services Council commented that the protections given by section 38(1) and (2) 'reduce the

¹⁵⁶ Under s 38(1) of the *Trusts Act 1973* (Qld), the valuer must be instructed and employed independently of the lessor.

¹⁵⁷ *Armitage v Nurse* [1998] Ch 241, 253–4 (Millett LJ).

¹⁵⁸ *Trusts Discussion Paper* (2012) [8.201].

¹⁵⁹ *Ibid* 300.

occasions where a trustee might feel the need to seek directions from the court, with the resulting inconvenience and expense’.

The Commission’s preliminary view

7.236 The new legislation should not include a stand-alone provision to the effect of section 38(1) and (2) of the *Trusts Act 1973* (Qld), or include the power to surrender onerous leasehold and freehold property in a list of examples of the powers conferred by the general property power. However, the new legislation should ensure that the power to surrender onerous leasehold or freehold property is capable of being expressly excluded or varied by the trust instrument.

7.237 Further, the new legislation should not provide, as is currently the case under section 38(1) and (2) of the Act, that the trustee is not chargeable with breach of trust and that 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.

Section 38(3): Protection of a subsequent purchaser and the Registrar of Titles

7.238 Section 38(3) of the *Trusts Act 1973* (Qld) applies in respect of the surrender by trustees of an onerous leasehold or freehold property. It provides:

- (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.

7.239 Section 38(3) was based on provisions in the same terms in New South Wales and Western Australia.¹⁶⁰ A similar provision is also included in the ACT.¹⁶¹

7.240 In the context of a surrender of an onerous lease or freehold property, a subsequent purchaser of trust property that has been previously surrendered could generally rely on the system of title by registration provided under the *Land Title Act 1994* (Qld).

7.241 As explained earlier, the Registrar of Titles must register an instrument lodged for registration in accordance with the *Land Title Act 1994* (Qld). Under the general law, however, the duty of the Registrar to register an instrument that is in registrable form is not absolute. If it is clear on the face of the instrument or from other facts within the Registrar’s knowledge that the dealing involves a breach of trust, the registrar has a duty to refuse to register the instrument. However, the Registrar does not otherwise have a duty to make inquiries as to the real facts, to examine the propriety of the bargain or the sufficiency of the consideration, or to require proofs to negative fraud or improper conduct.¹⁶²

7.242 Under section 193 of the *Land Title Act 1994* (Qld), the Registrar and the land registry staff are protected from civil liability ‘for an act or omission done

¹⁶⁰ *Trustee Act 1925* (NSW) s 35(3); *Trustees Act 1962* (WA) s 35(3).

¹⁶¹ *Trustee Act 1925* (ACT) s 35(3).

¹⁶² See [7.85] ff above.

honestly and without negligence' under that Act (for example, registering a title on the freehold land register).¹⁶³

Discussion Paper

7.243 In the Discussion Paper, the Commission expressed the preliminary view that it is not necessary to retain a provision to the effect of section 38(3) of the *Trusts Act 1973* (Qld).¹⁶⁴

Consultation

7.244 Professor Lee submitted that there is no need to retain a provision to the effect of section 38(3), noting that subsequent purchasers would be able to rely on the system of title by registration.

7.245 However, the Registrar of Titles submitted that the protection given by section 38(3) to the Registrar should be preserved, if the operative provision to which that protection relates is retained, as 'it is not the place of the Registrar to police such matters'. That respondent observed that the civil liability protection for acts done honestly and without negligence conferred by section 193 of the *Land Title Act 1994* (Qld) 'is not considered [to] have the same effect as a statement within the *Trusts Act* confirming that the Registrar has no duty to inquire as to certain actions of a trustee'.

The Commission's preliminary view

7.246 The Commission remains of the view that the new legislation should not preserve the protection currently given by section 38(3) of the *Trusts Act 1973* (Qld) to a subsequent purchaser.

7.247 The general protection currently given by section 38(3) of the *Trusts Act 1973* (Qld) to the Registrar of Titles should be included in the new legislation, for the reasons articulated at [7.92] above.

Power to renew a renewable leasehold

7.248 Section 39 of the *Trusts Act 1973* (Qld) deals with the situation where a renewable leasehold is held on trust for successive life tenants. It empowers a trustee, as lessee, to renew the lease.

7.249 Similar provisions were originally contained in *Lord Cranworth's Act*.¹⁶⁵ Prior to the passing of that Act, in the absence of a direction in the trust instrument,

¹⁶³ See also [7.89] above in relation to the availability of compensation for a person who is deprived of a lot or an interest in a lot because of, for example, the fraud of another person, incorrect registration or breach of duty by the Registrar of Titles, or if a person suffers loss or damage because of, among other things, incorrect registration or breach of duty by the Registrar.

¹⁶⁴ *Trusts Discussion Paper* (2012) [8.202].

¹⁶⁵ 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.

a trustee of renewable leaseholds was not bound to renew the lease.¹⁶⁶ 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).¹⁶⁷ 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 money to pay for the renewal by mortgage of the renewed term.¹⁶⁸

7.250 Under the English provisions, 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 object 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 were to be borne between the life tenant or the person entitled in remainder (which required that the expenses be shared among them in proportion to their enjoyment of the estate).¹⁶⁹

7.251 Section 39 of the *Trusts Act 1973* (Qld) has its origins in the English provisions. Although the current English legislation no longer retains the provision, a similar provision is included in the trustee legislation of the ACT, New South Wales, the Northern Territory, South Australia, Tasmania and Western Australia.¹⁷⁰

7.252 Under the terms of section 39(1), a trustee of a renewable leasehold 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 the trust instrument, that person is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal.

¹⁶⁶ 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.

¹⁶⁷ *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.

¹⁶⁸ *Buckeridge v Ingram* (1795) 2 Ves Jun 652; 30 ER 824; *Allan v Backhouse* (1813) 2 V & B 66, 72; 32 ER 243, 246.

¹⁶⁹ *Re Baring* [1893] 1 Ch 61, 64, 69–70 (Kekewich J).

¹⁷⁰ *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).

7.253 Where a trustee does renew, section 39(2) authorises the trustee to pay or apply capital for the purpose of obtaining the renewal.¹⁷¹

Discussion Paper

7.254 In the Discussion Paper, the Commission noted that the power to renew a lease conferred by section 39(1) of the Act would be subsumed by the proposed general property power, and that the exercise of the power to renew a lease would be subject to the trustee's duties in managing the trust property.¹⁷² It sought submissions on whether the power conferred by section 39(1) should continue to be the subject of a stand-alone provision, or otherwise be omitted or briefly stated as an example of a power conferred by the general property power. The Commission also sought submissions on whether the Act should continue to include a provision to the effect of section 39(2) (that is, to authorise the trustee to pay or apply money from capital for the purpose of obtaining the renewal).¹⁷³

Consultation

7.255 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee and a legal practitioner who practises in trusts and succession law expressed the view that, if a statutory general property power is conferred on a trustee, the power to renew a renewable leasehold conferred by section 39(1) of the *Trusts Act 1973* (Qld) should be stated briefly in the trustee legislation as an example of a specific power conferred by the general property power.

7.256 In contrast, Professor Lee expressed the view that there would be no need to make specific mention of the power conferred by section 39(1) in the trustee legislation as that power falls within the scope of the leasing powers of a trustee.

7.257 The Financial Services Council commented that, if section 39(1) is omitted, the beneficiary would no longer have the right to require the trustee to renew the lease, and that the prudent course may be inconsistent with the beneficiary's wishes.

7.258 The Public Trustee, the Financial Services Council and the legal practitioner also considered it desirable to continue to include the power conferred by section 39(2) to authorise a trustee to expend capital money for the purposes of renewing the lease in the trustee legislation.

¹⁷¹ The effect of this authorisation is to empower the trustee, under s 45 of the *Trusts Act 1973* (Qld), to raise the money required for the purpose of obtaining the renewal of the lease by the sale, mortgage, conversion or calling in of all or any of the trust property. Section 45 of the Act is discussed at [7.143] ff 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).

¹⁷² *Trusts Discussion Paper* (2012) [8.207].

¹⁷³ *Ibid* 302.

The Commission's preliminary view

7.259 The Commission is of the view that the new legislation should not include a stand-alone provision to the effect of section 39(1) of the *Trusts Act 1973* (Qld), as the power to renew a renewable leasehold would be conferred by the general property power. In addition, the new legislation should not state the power currently conferred by section 39(1) of the Act more briefly as an example of the powers conferred by the general property power. However, the new legislation should be framed so that the power to renew a lease is capable of being expressly excluded or modified by the trust instrument.

7.260 Further, the Commission considers that the new legislation should not include a provision to the effect of section 39(2) of the *Trusts Act 1973* (Qld).

Power to purchase equity of redemption in lieu of foreclosure

7.261 Section 40 of the *Trusts Act 1973* (Qld) applies when the trustee is a mortgagee of land.¹⁷⁴ 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.

7.262 Section 40 was based on provisions in New South Wales and Western Australia.¹⁷⁵ Similar provision is also made in the ACT and South Australia.¹⁷⁶

7.263 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.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹

¹⁷⁴ '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*).

¹⁷⁵ *Trustee Act 1925* (NSW) s 32A; *Trustees Act 1962* (WA) s 37.

¹⁷⁶ *Trustee Act 1925* (ACT) s 32A; *Trustee Act 1936* (SA) s 23C.

¹⁷⁷ 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).

¹⁷⁸ SE Williams, *Coote's Treatise on the Law of Mortgages* (Stevens & Sons, Sweet & Maxwell, 8th ed, 1912) vol 1, 649–50.

¹⁷⁹ *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 Australia and New Zealand Banking Group Ltd* [1993] 2 Qd R 477, 478 (McPherson ACJ).

7.264 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 could purchase the equity of redemption,¹⁸⁰ saving the expense and uncertainty of foreclosure proceedings.¹⁸¹

7.265 In the absence of an express provision, however, trustee-mortgagees were unable to purchase the equity of redemption as an authorised investment,¹⁸² and it was for this reason that section 40 was included in the Act.¹⁸³ 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.¹⁸⁴

7.266 In *Worman v Worman*, 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, 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.¹⁸⁵

7.267 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.¹⁸⁶ 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.¹⁸⁷

¹⁸⁰ 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.

¹⁸¹ 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).

¹⁸² 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.

¹⁸³ *Trusts and Settled Land Report* (1971) 37.

¹⁸⁴ 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.

¹⁸⁵ (1890) 43 Ch D 296, 303–5, 309–10 (Kekewich J).

¹⁸⁶ 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.

¹⁸⁷ See *Trusts Act 1973* (Qld) ss 22–24.

Limit to old system mortgages

7.268 It appears that section 40 is limited in its terms to mortgages of old system land, of which there is none remaining in Queensland.¹⁸⁸ Under a Torrens system mortgage, the mortgagor retains the legal title, subject to the mortgagee's charge against the land.¹⁸⁹ 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.¹⁹⁰

7.269 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;

7.270 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.

Discussion Paper

7.271 In the Discussion Paper, the Commission noted that 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. The Commission considered that this situation is now unlikely to arise, given the breadth of the general investment power conferred by section 21 of the Act. It also noted that, 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.¹⁹¹ For these reasons, the Commission proposed that section 40 should be omitted from the Act.¹⁹²

¹⁸⁸ 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 174 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].

¹⁸⁹ *Land Title Act 1994* (Qld) s 74.

¹⁹⁰ 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); *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 177 above.

¹⁹¹ *Trusts Discussion Paper* (2012) [8.220].

¹⁹² *Ibid* 306.

Consultation

7.272 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that section 40 of the *Trusts Act 1973* (Qld) should be omitted.

The Commission's preliminary view

7.273 The Commission is of the view that the new legislation should not include a provision to the effect of section 40 of the *Trusts Act 1973* (Qld).

Power to release equity of redemption of mortgaged property

7.274 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.¹⁹³ 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.

7.275 As Ford and Lee put it, the provision enables trustees 'to unburden themselves of a "toxic" mortgage liability'.¹⁹⁴

7.276 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.¹⁹⁵ 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 preserve the trust property in specie for the beneficiaries.¹⁹⁶

7.277 Section 41 was based on provisions in New South Wales and Western Australia.¹⁹⁷ Similar provision is also made in the ACT and South Australia.¹⁹⁸

¹⁹³ 'Registered valuer' is defined as a valuer registered under the *Valuers Registration Act 1992* (Qld): *Trusts Act 1973* (Qld) s 5(1).

¹⁹⁴ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2009) [61.4140].

¹⁹⁵ 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.

¹⁹⁶ 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].

¹⁹⁷ *Trustee Act 1925* (NSW) s 34; *Trustees Act 1962* (WA) s 39.

¹⁹⁸ *Trustee Act 1925* (ACT) s 34; *Trustee Act 1936* (SA) s 28A. The South Australian provision does not include the protection given by s 41(2) of the *Trusts Act 1973* (Qld).

Discussion Paper

7.278 In the Discussion Paper, the Commission noted that 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. The Commission also noted that this power was of principal relevance in the context of a mortgage of old system land.¹⁹⁹ For these reasons, the Commission proposed that section 41 should be omitted from the Act.²⁰⁰

Consultation

7.279 The Bar Association of Queensland, the Queensland Law Society, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that section 41 of the *Trusts Act 1973* (Qld) should be omitted.

7.280 The Public Trustee and the Financial Services Council generally supported the omission of section 41, but also noted that the provision may still have a residual application in relation to an old system mortgage of personal property.

The Commission's preliminary view

7.281 The Commission is of the view that the new legislation should not include a provision to the effect of section 41 of the *Trusts Act 1973* (Qld). As noted previously, there is no old system land remaining in Queensland. To the extent that the power currently conferred by section 41 may have any residual application in relation to an old system mortgage of personal property, the power would fall under the head of the general property power.

PRELIMINARY RECOMMENDATIONS

7-1 The new legislation should include a provision to the effect that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power').

7-2 The new legislation should make it clear that a trustee, in exercising a power conferred by the general property power, must exercise that power in accordance with the trustee's duties, including the general statutory duty of care recommended in Chapter 6.

¹⁹⁹ *Trusts Discussion Paper* (2012) [8.226].

²⁰⁰ *Ibid* 307.

- 7-3** As a general policy, the new legislation should enable the settlor to expressly exclude or modify a specific power conferred by the general property power. In appropriate instances, an exception should be made to that general policy so that a specific power conferred by the general property power applies whether or not the specific power is expressly excluded or modified by the instrument (if any) creating the trust.
- 7-4** The new legislation should include a provision that briefly states some examples of the specific powers conferred by the general property power.
- 7-5** The new legislation should not include stand-alone provisions to the effect of the following sections of the *Trusts Act 1973* (Qld), but should instead state the powers currently conferred by those sections more briefly as examples of the powers conferred by the general property power:
- (a) sections 32(1)(a), 34 and 53 (the powers to sell trust property);
 - (b) section 32(1)(d)–(f) and (3) (the power to lease trust property); and
 - (c) sections 33(1)(i) and 45 (the powers to mortgage trust property and to renew, extend or vary a mortgage of trust property).
- 7-6** The new legislation should not include stand-alone provisions to the effect of the following sections the *Trusts Act 1973* (Qld), or state the powers currently conferred by those sections more briefly as examples of the powers conferred by the general property power:
- (a) section 36 (the power of a trustee-vendor to secure part of the purchase price);
 - (b) section 37 (the power of a trustee-vendor to sell on terms of deferred payment);
 - (c) section 45 (the power to raise money by the conversion or calling in of trust property);
 - (d) section 32(1)(b) (the power to dispose of trust property by exchange or partition);
 - (e) section 33(1)(e)–(f) (the powers to subdivide and undertake other development works);
 - (f) section 33(1)(h) (the power to grant easements etc);
 - (g) section 33(1)(k) (the power to surrender a life policy);

- (h) section 38(1)–(2) (the power to surrender onerous leases or property); and
- (i) section 39(1) (the power to renew a renewable leasehold).

7-7 The new legislation should provide that the following powers conferred by the general property power apply whether or not they are expressly excluded or modified by the instrument (if any) creating the trust:

- (a) the powers to sell trust property;
- (b) the power to lease trust property; and
- (c) the power to renew, extend or vary a mortgage of trust property.

7-8 The new legislation should be framed so that the following powers conferred by the general property power are capable of being expressly excluded or modified by the instrument (if any) creating the trust:

- (a) the power of a trustee-vendor to secure part of the purchase price;
- (b) the power of a trustee-vendor to sell on terms of deferred payment;
- (c) the power to raise money by the conversion, calling in or mortgage of trust property;
- (d) the power to dispose of trust property by exchange or partition;
- (e) the powers to subdivide and undertake other development works;
- (f) the power to grant easements etc;
- (g) the power to surrender a life policy;
- (h) the power to surrender onerous leases or property; and
- (i) the power to renew a renewable leasehold.

Protection of purchasers and the Registrar of Titles in relation to the power to concur with owners of other property in a joint sale

7-9 The new legislation should not preserve the specific protection currently given by section 34(3) of the *Trusts Act 1973* (Qld) to a purchaser.

7-10 The new legislation should preserve the protection currently given by section 34(3) of the *Trusts Act 1973* (Qld) to the Registrar of Titles.

Power to sell subject to depreciatory conditions

7-11 The new legislation should not include a provision to the effect of section 35 of the *Trusts Act 1973* (Qld).

Power of a trustee-vendor to secure part of the purchase price

7-12 The new legislation should not preserve the protection given by section 36 of the *Trusts Act 1973* (Qld) to a trustee.

Power of a trustee-vendor to sell on terms of deferred payment

7-13 The new legislation should not preserve either the protection currently given by section 37(6) of the *Trusts Act 1973* (Qld) or the clarification in section 37(7) of the Act 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 lease trust property

7-14 The new legislation should not expressly state that, in exercising the power to lease, a trustee may 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 execute all necessary documents to give effect to the powers to grant easements etc under section 33(1)(h)

7-15 The new legislation should not include a provision to the effect of section 33(1)(h) of the *Trusts Act 1973* (Qld) (to the extent that it confers 'the power to execute all necessary documents to give effect to thereto').

Power to surrender onerous leases or property

7-16 The new legislation should not provide, as is currently the case under section 38(1) and (2) of the *Trusts Act 1973* (Qld), that the trustee is not chargeable with breach of trust and that 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.

Protection of subsequent purchasers and the Registrar of Titles in relation to the power to surrender an onerous leases or property

7-17 The new legislation should not preserve the protection currently given by section 38(3) of the *Trusts Act 1973* (Qld) to a subsequent purchaser.

7-18 The new legislation should preserve the protection currently given by section 38(3) of the *Trusts Act 1973* (Qld) to the Registrar of Titles.

Power to renew a renewable leasehold

7-19 The new legislation should not include a provision to the effect of section 39(2) of the *Trusts Act 1973* (Qld).

Power to purchase the equity of redemption in lieu of foreclosure

7-20 The new legislation should not include a provision to the effect of section 40 of the *Trusts Act 1973* (Qld).

Power to release the equity of redemption of mortgaged property

7-21 The new legislation should not include a provision to the effect of section 41 of the *Trusts Act 1973* (Qld).

Chapter 8

Ancillary Trustee Powers

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INTRODUCTION

8.1 In Chapter 7, the Commission has proposed that many of the provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer specific management powers on trustees should be replaced by a general provision (referred to as the 'general property power') that confers on a trustee, in relation to the trust property, all the powers of an absolute owner.

8.2 This chapter discusses a number of other provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer ancillary trustee powers. These powers are 'ancillary' in the sense that they are conferred on trustees to counter, or modify, specific equitable duties to which trustees would otherwise be subject. In this sense, they

can be distinguished from the purely management powers that are encompassed by the general property power.

POWER TO POSTPONE SALE OF TRUST PROPERTY

Introduction

8.3 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*.¹

8.4 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*.² It requires that:³

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 wasting⁴ or reversionary⁵ 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.⁶ (notes added)

8.5 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. 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'.⁷ In contrast to a trust where the trustee is given a *power* to sell, a trust for sale or conversion:⁸

¹ 15 & 16 Geo 5, c 20, s 25.

² (1802) 7 Ves Jun 137; 32 ER 56.

³ *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].

⁴ '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).

⁵ 'Reversionary', in this context, refers to a right in property the enjoyment of which is deferred or, more simply, a future interest or estate.

⁶ 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].

⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 22 January 2013) [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).

⁸ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.95].

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)

8.6 Historically, inter vivos trusts for sale developed as an alternative to the 'strict settlement' of land.⁹ The trust for sale enabled the land to be settled as personalty rather than realty¹⁰ 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'.¹¹ A typical settlement of personalty:¹²

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 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.

8.7 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.¹³ Thus, it became common practice for a power to postpone the sale of the land to be included in a trust for sale.¹⁴ A power to postpone was subsequently implied by section 25 of the English *Law of Property Act 1925*, filling any gap that might have been left by a trust instrument,¹⁵ and ultimately simplifying the drafting of trust deeds.

8.8 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',¹⁶ having regard to the settlor's or testator's intention.¹⁷ The power to postpone 'must be exercised in good faith, with reference to relevant considerations including the

⁹ 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.

¹⁰ 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.

¹¹ JM Lightwood, 'Trusts for Sale' (1927) 3 *Cambridge Law Journal* 59, 69.

¹² Ibid 63.

¹³ Ibid.

¹⁴ Ibid. See also *Trusts and Settled Land Report* (1971) 32.

¹⁵ R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 590–1.

¹⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 22 January 2013) [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).

¹⁷ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.105].

rights of the beneficiaries *inter se*'.¹⁸ 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.¹⁹ Other considerations in postponing the sale may include economic conditions, and the difficulty of sale.²⁰

Section 32(1)(c), (4): power to postpone sale

8.9 Section 32(1)(c) of the *Trusts Act 1973* (Qld) gives trustees a general statutory power to postpone the sale of trust property that the trustee has a duty to sell. It provides that 'every trustee, in respect of any trust property, may':²¹

- (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; ...

8.10 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.

8.11 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 jurisdictions and in New Zealand.²²

8.12 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

¹⁸ *Re Marden* [2008] SASC 312, [13] (Gray J), citing *Perpetual Trustee Co Ltd v Noyes* (1925) 42 WN (NSW) 226, 249 (Long Innes J).

¹⁹ 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, 391–2; 34 ER 561, 563 (Grant MR). Contra *Re Crowther* [1895] 2 Ch 56, 61 (Chitty J).

²⁰ 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).

²¹ Cf *Trustee Companies Act 1968* (Qld) s 28(1)(j).

²² *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); *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).

under the rule in *Howe v Dartmouth*.²³

Protection of purchasers

8.13 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; ...

8.14 Similar protections are also given in the other jurisdictions.²⁴

8.15 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.²⁵ Where the trustees 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.²⁶

8.16 The provision in section 32(4) of the Act protects the purchaser in those circumstances.

8.17 However, section 46 of the *Trusts Act 1973* (Qld) includes a general protection for purchasers (and mortgagees) dealing with trustees.

Discussion Paper

8.18 In the Discussion Paper, the Commission noted that the general policy underlying its proposal to confer a general property power on a trustee is to ensure that the trustee has wide powers to deal with the property for the benefit of the beneficiaries. It considered that 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, and noted that 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'.²⁷

²³ (1802) 7 Ves Jun 137; 32 ER 56. See *Trusts and Settled Land Report* (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.

²⁴ *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); *Trustee Act 1956* (NZ) s 14(7). Those provisions refer, however, to directions respecting 'the postponement of sale'.

²⁵ J Hill, *A Practical Treatise on the Law Relating to Trustees, Their Powers, Duties, Privileges and Liabilities* (Stevens & Norton, 1845) 477–8.

²⁶ *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 Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 586–7.

²⁷ *Trusts Discussion Paper* (2012) [8.144], citing WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 54.

8.19 The Commission noted that the general property power would necessarily apply subject to the trustee's duties. It also noted that a duty to sell trust property is imposed on a trustee whenever a direction to that effect is included in the trust instrument, and that, although the historical impetus for the creation of trusts for sale of land has fallen away, trust instruments may still include a direction to sell or convert real or personal property the subject of the trust.²⁸

8.20 The Commission further noted that section 32(1)(c) and (4) of the Act modifies the duty to sell trust property by conferring a power to postpone the sale. It suggested that the conferral of all the powers of an absolute owner would not automatically carry with it a power of postponement, because 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.²⁹

8.21 The Commission also referred to its proposal to retain section 46 of the Act, which includes a general protection for purchasers dealing with trustees. In view of the protection given to purchasers by section 46, the Commission proposed that section 32(4), to the extent that it confers a specific protection on a purchaser, should be omitted.³⁰

Consultation

8.22 The Commission did not specifically seek submissions in its Discussion Paper on whether or not the *Trusts Act 1973* (Qld) should continue to include a statutory power to postpone. However, Professor Lee and the Public Trustee suggested that the Act should continue to confer a statutory power to postpone. The Public Trustee commented that even the conferral of all the powers of an absolute owner on a trustee may not, given the trustee's duties, be sufficient to deal with the tension underlying the enactment of section 32(1)(c).

8.23 Professor Lee, the Bar Association of Queensland, the Queensland Law Society, the Public Trustee and a legal practitioner who practises in trusts and succession law expressed the view that section 32(4), to the extent that it confers protection on a purchaser, should be omitted.

The Commission's preliminary view

8.24 The Commission considers that trustees should continue to have a general statutory power to postpone the sale of trust property. However, because the recommended 'general property power' would apply subject to the trustee's duties, it would not itself confer a power of postponement in a case where the trustee has a duty to sell (namely, under a trust for sale).

²⁸ Ibid [8.145].

²⁹ Ibid [8.146]. See also 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.

³⁰ *Trusts Discussion Paper* (2012) 286.

8.25 For these reasons, the Commission is of the view that the new legislation should include a provision to the general effect of section 32(1)(c) of the Act, to confer the power to postpone the sale of trust property that the trustee has a duty to sell, other than property of a wasting, speculative or reversionary nature. It should also include a provision similar to section 32(4) to allow the trustee, subject to any express direction to the contrary in the trust instrument, to postpone the sale for an indefinite and unlimited period. Although these provisions would qualify the trustee's duty to sell, they would nevertheless apply subject to the trustee's other duties, including the duty to act in good faith for the benefit of the beneficiaries.

8.26 However, in view of the general protection given to purchasers of trust property in section 46 of the Act (and the Commission's recommendation in Chapter 11 to preserve that protection), the Commission does not consider it necessary for the new legislation to include the specific protection currently given by section 32(4) of the Act to purchasers.

POWER TO CARRY ON AN EXISTING BUSINESS

Introduction

8.27 Section 57 of the *Trusts Act 1973* (Qld) deals with the power of trustees and personal representatives to carry on an existing business. Subject to the trust instrument, it allows trustees to continue, for a limited period, to carry on a business that was being carried on with trust property by the settlor or testator when the trust commenced.

8.28 As was explained in the Discussion Paper, there are three main scenarios in which the power of trustees to continue to carry on such a business will arise:³¹

- first, where the trust instrument includes an express power to carry on the business, in which case the existence and scope of the trustee's power will be provided for by the trust instrument and will depend on its terms;³²
- second, where the trust instrument includes an express power to postpone the sale of the business, in which case it confers an implied power to carry on the business for the period of the postponement,³³ and

³¹ See *Trusts Discussion Paper* (2012) [8.240] ff.

³² See, eg, *Edmundsen v Loudoun* [1947] NZLR 321; *Fomsgard v Fomsgard* [1912] VLR 209. This includes both testamentary trusts, where the testator's estate includes a business that the testator directs to be continued, and trusts created inter vivos for the express purpose of carrying on a business, that is, 'trading trusts'. Trading trusts are described in *Trusts Discussion Paper* (2012) ch 3.

³³ *Re Chancellor* (1884) 26 Ch D 42, 47 (Cotton LJ); *Re Crowther* [1895] 2 Ch 56, 60 (Chitty J). If the power to postpone is for a particular period, the power to carry on will be similarly limited. If the power to postpone is in the trustee's discretion, the position is less clear. In some cases, a power to postpone for such period as the trustee thinks fit has been held to limit the trustee's power to carry on the business for such reasonable period as would enable the business to be sold as a going concern, while other cases have taken a more liberal view depending on the nature of the trust: see, respectively, *Re Chancellor* (1884) 26 Ch D 42, 46 (Cotton LJ; Bowen and Fry LJJ agreeing) and *Re Morish* [1939] SASR 305, 314–16 (Murray CJ); *Re Crowther* [1895] 2 Ch 56, 60–1 (Chitty J) and *Re Hammond* (1903) 3 SR (NSW) 270 (AH Simpson CJ in Eq).

- third, 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.

8.29 Section 57 addresses the first and second scenarios by preserving the operation of the trust instrument.³⁴ In other words, if the trust instrument makes provision for the carrying on of a business, section 57(1) has no operation.

8.30 Section 57 addresses the third scenario by providing a statutory default provision where the trust instrument is silent. This scenario typically arises in the case of a deceased estate where there is either no will, or the will does not provide for the carrying on of the business.³⁵

8.31 In such a case, the usual rule under the general law — which has developed mainly in the administration of deceased estates and testamentary trusts — is that the personal representative or trustee may carry on the business only for the limited purpose of winding it up.³⁶ 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'.³⁷ This reflects the duty of a personal representative to 'distribute the estate of the deceased, subject to the administration thereof, as soon as may be',³⁸ and the general principle that, in so doing, the personal representative has a reasonable discretion.³⁹

8.32 What is a reasonable period will depend on the circumstances. Although a period of one year has been a general rule of thumb for the administration of a deceased estate,⁴⁰ it is not possible to 'fix one period for selling every species of property'.⁴¹ In the context of carrying on a business, the courts have sometimes suggested that a period of two years may be reasonable,⁴² but the courts have also sanctioned longer periods in particular cases where it has been beneficial or desirable to do so.⁴³

³⁴ See *Trusts Act 1973* (Qld) s 57(1), (4), creating an exception to s 31(1).

³⁵ See, eg, *Re Benson* (1915) 34 NZLR 639; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319.

³⁶ 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: JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2042].

³⁷ R Cozens-Hardy Home, *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).

³⁸ See *Succession Act 1981* (Qld) s 52(1)(d).

³⁹ *Buxton v Buxton* (1835) 1 My & Cr 80, 93; 40 ER 307, 311–12 (Sir Charles Pepys MR).

⁴⁰ For a discussion of the principle of the 'executor's year' see *Administration of Estates Report* (2009) vol 1, [11.217] ff.

⁴¹ *Hughes v Empson* (1856) 22 Beav 181, 183; 52 ER 1077, 1078 (Sir John Romilly MR).

⁴² *Edmundsen v Loudoun* [1947] NZLR 321, 326 (O'Leary CJ); *Re Chancellor* (1884) 26 Ch D 42.

⁴³ See, eg, *Calcino v Fletcher* [1969] Qd R 8, 28 (Hoare J) (retrospective sanction for six years and sanction for a further three years); and *Re Halloran's Will* [1962] QWN 30 (sanction for seven years). Each of those cases concerned farming or grazing businesses.

8.33 Section 57 of the *Trusts Act 1973* (Qld) is principally directed to this third scenario. It was introduced to ensure that, if the trust instrument had failed to include a power to carry on the business, trustees and personal representatives could continue the business for a certain period in order to avoid the 'grave inconvenience' and potential losses of an immediate, inopportune sale.⁴⁴ As Ford and Lee have observed, the purpose of the statutory power 'is to relieve [trustees] of any duty to sell prematurely at an under price', whilst guiding them towards the sale of the business.⁴⁵

The power to carry on an existing business under section 57

8.34 Section 57(1) confers power on a trustee to continue to carry on an existing business for a limited period. It provides that, where, at the commencement of the trust, the trust property or any part of it was being used by the settlor or testator in carrying on a business, the trustee may continue to carry on the business for any one or more of the following periods:

- (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.

8.35 Importantly, section 57(1) applies subject to the provisions of the trust instrument and so, can be overridden by the settlor or testator.⁴⁶ This means that the time limitations imposed by section 57(1) do not apply if the trust instrument makes specific provision for the business to be continued for a particular period. It also means that section 57(1) effectively operates as a default position in circumstances in which the trust instrument is silent as to the continuation of a business that forms part of the trust estate.

8.36 Section 57(2) and (5) further provide that, when carrying on a business, the trustee has certain incidental powers, including the power to employ any part of the trust property which is subject to the same trusts, to purchase stock and machinery, and to employ managers, agents and employees. Those provisions apply whether the trustee is authorised to carry on the business by section 57(1) or under the trust instrument. They also apply 'whether or not a contrary intention is expressed in the instrument (if any) creating the trust'.⁴⁷

8.37 Finally, under section 57(3), the court is given wide powers to make orders on an application for leave to carry on a business.⁴⁸ An application may be made by the trustee or any person beneficially interested in the estate. The court may

⁴⁴ *Trusts and Settled Land Report* (1971) 45.

⁴⁵ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 24 January 2013) [12.9670].

⁴⁶ *Trusts Act 1973* (Qld) ss 31(1), 57(1), (4).

⁴⁷ See *Trusts Act 1973* (Qld) s 31(1).

⁴⁸ Nothing in that provision affects any other authority the court may have to do those acts: *Trusts Act 1973* (Qld) s 57(4).

give leave for the business to be carried on, or to be carried on subject to conditions, and may make such an order retrospectively.

Whether the legislation should continue to provide for the power to carry on an existing business

8.38 Section 57 applies to all trustees as well as to personal representatives. However, as explained above, it appears that section 57 is of most relevance in the situation in which a deceased estate includes a business but there is either no will, or the will does not contain any provisions dealing with the carrying on of the business. That is, section 57 would seem to apply most often to personal representatives and trustees under testamentary trusts.

8.39 Similar provision, on which section 57 was based, is included in Western Australia and New Zealand.⁴⁹ Unlike Queensland, the provisions in those jurisdictions apply specifically in their terms to deceased estates, and do not apply to trusts generally.

8.40 Section 57 provides a statutory default provision in circumstances where the trust instrument (such as the deceased's will) has failed to provide for the carrying on of a business that forms part of the trust estate. It clarifies the position that would otherwise apply in such a case under the general law by enabling the business to be carried on either for two years or such other period as may be necessary to wind it up. In the context of personal representatives, this not only provides a degree of certainty and guidance, but also ensures some flexibility in the time available for winding-up the business. Nevertheless, section 57 does not provide an open-ended power to carry on the business for an indefinite or unlimited period. This reflects the special position of personal representatives who, unlike most trustees, are under a duty to 'distribute the estate of the deceased, subject to the administration thereof, as soon as may be'.⁵⁰ As such, the limited nature of the power to carry on a business in section 57(1) of the Act would seem to be well-suited to the position of personal representatives.

8.41 Section 57 is not currently limited in its application to personal representatives, but also applies to trustees in situations where the same considerations might not apply. The default periods in section 57(1), which provide flexibility for personal representatives, may provide an undesirable restraint on trustees, and would be inconsistent with the policy underpinning the 'general property power' recommended in Chapter 7.

8.42 In its recent report, the National Committee for Uniform Succession Laws recommended that its model Administration of Estates Bill should include a provision generally modelled on the Western Australian equivalent to section 57 of the *Trusts Act 1973* (Qld).⁵¹ The proposed provision, which is in similar terms to section 57, would give personal representatives a limited power to continue to carry on a business that the deceased person was engaged in carrying on at the time of

⁴⁹ *Trustees Act 1962* (WA) s 55; *Trustee Act 1956* (NZ) s 32.

⁵⁰ *Succession Act 1981* (Qld) s 52(1)(d).

⁵¹ *Administration of Estates Report* (2009) vol 1, [11.267], Rec 11-21.

his or her death. It would apply subject to a contrary intention in the deceased's will.⁵²

408 Carrying on a business

- (1) This section applies if, at the time of a person's death, the person is engaged in carrying on a business.
- (2) Subject to any other Act, it is lawful for the deceased person's personal representative to continue to carry on the business for—
 - (a) the period, up to 2 years from the person's death, necessary or desirable for the winding up of the business; or
 - (b) the further period or periods that the Supreme Court approves.
- (3) For the purpose of carrying on the business, the personal representative may do any of the following—
 - (a) use any part of the deceased's estate that is reasonably necessary;
 - (b) increase or reduce, as necessary, usage of the estate under paragraph (a);
 - (c) purchase stock, machinery, implements and chattels;
 - (d) employ the managers, agents, workers and others the personal representative considers appropriate;
 - (e) at any time, enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the deceased's death or at any time after;
 - (f) enter into share-farming agreements.
- (4) For subsection (3)(e), it does not matter that the personal representative was a partner of the deceased in his or her own right.
- (5) The personal representative or a beneficiary of the deceased's estate may apply to the Supreme Court for leave to carry on the business at any time, whether or not any previous authority to carry on the business has ended.
- (6) For subsection (5), the Supreme Court may make the order, including an order subject to conditions, it considers appropriate.
- (7) Nothing in this section affects any other authority to do the acts authorised to be done under this section.
- (8) If the deceased's estate is being administered under the deceased's will, this section is subject to a contrary intention appearing in the will.

8.43 If such a provision were to be included in the *Succession Act 1981* (Qld), it may be unnecessary and undesirable for the trusts legislation to continue to include a provision to the effect of section 57.

⁵²

Ibid vol 4, model Administration of Estates Bill 2009, cl 408.

8.44 If section 57 were omitted, trustees would be empowered to carry on an existing business by other provisions in the trusts legislation. If the business is held on trust for sale with no power in the trust instrument to postpone the sale, authority to carry on the business would be conferred by the statutory power of postponement recommended in this chapter and currently contained in section 32(1)(c) and (4) of the Act.⁵³ In the absence of a provision to the effect of section 57(1), the statutory power to postpone the sale would enable the trustee, subject to his or her general duties, to continue the business for an unlimited period. In other cases, authority to carry on an existing business, in the interests of the beneficiaries, would be conferred by the 'general property power' recommended in Chapter 7. Although the power to carry on a business under those provisions would be wider than the default power presently contained in section 57(1), it would be consistent with the policy adopted by the Commission of conferring on trustees wide statutory powers restricted by trustees' general duties rather than by specific limitations.

8.45 Further, if a trustee has a power to carry on a business, whether under the trust instrument or otherwise, the incidental powers currently conferred on all such trustees by section 57(2) would be covered by the general property power.

8.46 Additionally, the power of the court to authorise a trustee to carry on a business, which is presently contained in section 57(3), is likely to be adequately covered by the court's general statutory power under section 94 of the Act to give trustees additional powers of management and administration.

8.47 The Law Commission of New Zealand, which has recently proposed a power similar to the 'general property power' recommended in Chapter 7, has proposed that its counterpart to section 57 of the *Trusts Act 1973* (Qld) should be repealed. In its view, this would give trustees more flexible powers to deal with a business, in line with modern practice.⁵⁴ It also considered that the power to carry on a business should be included in a list of examples of powers conferred by the general power.⁵⁵

Consultation

8.48 The Commission did not specifically seek submissions in the Discussion Paper on whether or not the *Trusts Act 1973* (Qld) should continue to include a provision to the effect of section 57. However, two respondents suggested that the section should be replaced or omitted.

8.49 Professor Lee submitted that, in the place of section 57, the legislation should enable trustees, subject to their duties and having regard to the provisions of the trust instrument, to carry on a business that forms part of the trust estate for

⁵³ See generally 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].

⁵⁴ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 76 (Proposal P11(1)), [4.8], [4.11].

⁵⁵ *Ibid* 76–7 (Proposal P11(2)).

the purpose of selling it as a going concern, breaking it up for sale, or carrying it on as a going concern.

8.50 The Bar Association of Queensland submitted that section 57 should be omitted 'as being subsumed within the general property power'. It observed that the retention of section 57, which provides a limited power to carry on a business, would 'carve out an exception from the general property power [that] begins to diminish the purpose of that reform'.

The Commission's preliminary view

8.51 In the Commission's view, the continued utility of the default provision in section 57 of the *Trusts Act 1973* (Qld) is limited to personal representatives. It provides personal representatives with clear guidance, consistent with their general duty to distribute the deceased's estate as soon as may be, but with the flexibility to avoid an immediate sale that may be disadvantageous.

8.52 In light of the Commission's general approach to trustees' management powers in Chapter 7, however, the limited default power conferred by section 57(1) would impose an unnecessary restraint on trustees. In the Commission's view, the power of a trustee to continue to carry on an existing business, where the trust instrument is silent, should be governed instead, if the trustee is a trustee for sale, by the statutory power to postpone the sale of trust property and, otherwise, by the recommended 'general property power'. The exercise of those powers would be subject to the trustees' general duties, including the duty to act in good faith for the benefit of the beneficiaries.

8.53 The Commission also considers that the incidental powers conferred on trustees by section 57(2) and (5) in any case where the trustee has power to carry on a business, and the court's power to authorise the carrying on of the business, would be adequately covered by, respectively, the recommended 'general property power', and the court's jurisdiction under section 94 of the *Trusts Act 1973* (Qld) (which is to be retained by the new legislation).

8.54 For these reasons, the Commission is of the view that the new legislation should not include a provision to the effect of section 57 of the *Trusts Act 1973* (Qld). However, the Commission endorses the recommendation of the National Committee for Uniform Succession Laws for the inclusion of a provision in similar terms to section 57 in the *Succession Act 1981* (Qld), which would apply to personal representatives of deceased estates.

8.55 To provide guidance to trustees and third parties, the Commission also considers that any list of examples of the specific powers covered by the 'general property power' in the new legislation should include the power to continue to carry on a business that was being carried on with trust property at the commencement of the trust.

The relationship of the provision to the statutory power to postpone sale

8.56 If a provision to the general effect of section 57 is to be included in the *Succession Act 1981* (Qld), an issue to consider is whether it should clarify the

effect of the statutory power of postponement which is presently contained in section 32(1)(c) and (4) of the *Trusts Act 1973* (Qld), and which applies both to trustees and personal representatives.⁵⁶

8.57 In the absence of an express statutory declaration, it may be unclear that the specific provision in the *Succession Act 1981* (Qld) is to govern a personal representative's power to carry on a business, rather than the more general, and wider, power of postponement in the *Trusts Act 1973* (Qld).

8.58 Similarly, an express legislative statement may be desirable to ensure that the specific power in the *Succession Act 1981* (Qld) will govern a personal representative's power to carry on a business, rather than any power that might be conferred in more general terms by the recommended 'general property power'.

Discussion Paper

8.59 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should 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).⁵⁷

Consultation

8.60 The Bar Association of Queensland, the Queensland Law Society, and a legal practitioner who practises in trusts and succession law each agreed that the legislation should be amended to ensure that the statutory power to postpone the sale of trust property, conferred by section 32, is subject to the more specific statutory power to carry on a business.

8.61 The Public Trustee considered that the statutory power to carry on a business 'should be tenured temporarily to a limited period'. He did not address the relationship between section 57(1) and the power to postpone conferred by section 32, as he was also of the view that the power to postpone should be limited to a reasonable period.

The Commission's preliminary view

8.62 Earlier in this chapter, the Commission has recommended that a provision to the general effect of section 57 of the *Trusts Act 1973* (Qld), applying to personal representatives, should be included in the *Succession Act 1981* (Qld).

8.63 In the circumstances in which that default provision is to apply, it is the Commission's view that the limitations imposed by that provision should not be capable of being overridden by the wider powers included in the trusts legislation, namely, the statutory power to postpone the sale of trust property and the recommended 'general property power'.

⁵⁶ See *Trusts Act 1973* (Qld) s 5(1) (definition of 'trustee').

⁵⁷ *Trusts Discussion Paper* (2012) 318.

8.64 To clarify this, the Commission considers that, if a provision to the general effect of section 57 of the *Trusts Act 1973* (Qld) is included in the *Succession Act 1981* (Qld), the new trusts legislation should include a provision to ensure that:

- the statutory power to postpone the sale of trust property, presently provided for in section 32(1)(c) and (4); and
- the ‘general property power’, to the extent that it confers power to carry on a business;

apply subject to the specific power to carry on a business that is conferred on personal representatives under the *Succession Act 1981* (Qld).

The application of the provision where there is an implied power to carry on a business in the trust instrument

8.65 As explained earlier, section 57(1) applies subject to the provisions of the trust instrument, if any. This would preserve the effect of an implied power in the trust instrument, arising from an express power to postpone the sale of the business. In that situation, the periods of time provided in section 57(1) would not apply if the trust instrument authorised the sale to be postponed for a particular or longer period.

8.66 If a provision to the general effect of section 57 is to be included in the *Succession Act 1981* (Qld), an issue to consider is whether there is a need for that provision to state more explicitly the effect of an implied power to carry on the business that arises from the deceased’s will.

Discussion Paper

8.67 In the Discussion Paper, the Commission sought submissions on whether section 57 of the *Trusts Act 1973* (Qld) should 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 a business.⁵⁸

Consultation

8.68 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council and a legal practitioner who practises in trusts and succession law agreed with the suggested amendment to clarify the effect of an implied power to carry on a business arising from the terms of the trust instrument.

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Ibid 315.

The Commission's preliminary view

8.69 The Commission has recommended that a provision in similar terms to section 57 of the *Trusts Act 1973* (Qld) should be included in the *Succession Act 1981* (Qld), as was recommended by the National Committee for Uniform Succession Laws. The draft provision recommended by that Committee provides that, if the deceased's estate is being administered under the deceased's will, the section applies 'subject to a contrary intention appearing in the will'.⁵⁹ In the Commission's view, the provision should clarify that the reference to 'the deceased's will' includes a provision of the will that confers on the personal representative the power to postpone the sale of any property that was being used by the testator in carrying on a business. This would preserve the effect of an implied power to carry on the business, arising from an express power in the will to postpone sale, for a particular or longer period than the period provided for in the statutory default provision.

The appropriate period for carrying on the business

8.70 If a provision to the general effect of section 57 is to be included in the *Succession Act 1981* (Qld), an issue to consider is how long the personal representative should be permitted to continue to carry on the business.

8.71 At present, section 57(1)(a)–(b) limits the period for which an existing business may continue to be carried on, without the approval of the court, to two years, or such period as may be necessary to wind up the business.

Discussion Paper

8.72 In the Discussion Paper, the Commission observed that, as it is presently drafted, section 57(1)(a)–(b) envisages a default period of two years or a longer period to wind up the business.⁶⁰

8.73 In contrast, the National Committee for Uniform Succession Laws considered 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 that the legislation should provide that a personal representative may carry on the business for 'the period, up to 2 years from the person's death, necessary or desirable for the winding up of the business', or the further period or periods that the court approves.⁶¹

8.74 The Commission also noted other suggestions to remove any reference to a fixed year period and instead confer a power to carry on a business for 'such

⁵⁹ *Administration of Estates Report* (2009) vol 4, model Administration of Estates Bill 2009, cl 408(8), set out at [8.42] above.

⁶⁰ *Trusts Discussion Paper* (2012) [8.262].

⁶¹ *Ibid*, citing *Administration of Estates Report* (2009) vol 1, [11.279], Rec 11-21(a)(ii).

reasonable period' as may be necessary to sell the business as a going concern or to wind it up.⁶²

8.75 The Commission sought submissions on whether section 57(1)(a)–(b) of the Act should remain in its present form so that the trustee or personal representative 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), or alternatively, whether it should be replaced with one of the following options:⁶³

- the period *up to two years from the commencement of the trust*, that is reasonably necessary to wind-up the business; or
- the period that is reasonably necessary to wind-up the business.

Consultation

8.76 A legal practitioner who practises in trusts and succession law submitted that section 57(1)(a)–(b) should be retained without amendment. In his view, the existing provision takes a 'pragmatic' approach. This respondent also submitted, however, that if the period of time were changed, it should refer to 'realising' the business rather than 'winding up' the business, since the former term connotes both a sale and winding up.

8.77 On the other hand, the Public Trustee preferred that the provision be amended to remove any reference to an upper year limit and to instead refer to a 'reasonable period'. This respondent observed that it is increasingly common for deceased estates to include a business in circumstances in which the personal representative must rely on the statutory default power, and that 'it is not unusual for there to be impediments in respect of realising the assets of a business'.

8.78 As explained earlier, Professor Lee submitted that section 57 should be replaced with a provision in more general terms that would confer power on trustees to carry on a business for the purpose of selling it or carrying it on as a going concern, without limiting it to any particular period of time.

8.79 The Queensland Law Society did not express a view on this issue, but observed that a relevant consideration is the likely intention of the deceased as to the duration for which the business should be carried on.

The Commission's preliminary view

8.80 In the Commission's view, the statutory default provision it has recommended for inclusion in the *Succession Act 1981* (Qld) should provide personal representatives with the flexibility of having longer than the 'executor's year' within which to wind up the business. However, the provision should also provide certainty in terms of the period for which the business may be carried on

⁶² Ibid, citing WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 66 (cl 3.11(1)).

⁶³ Ibid 317.

without resort to the court, and should not be markedly inconsistent with the general duty of personal representatives to distribute the estate as soon as may be.

8.81 To that end, the Commission generally prefers the approach of the National Committee for Uniform Succession Laws, which limits the period for the carrying on of the business to no more than two years, except with the court's approval. However, rather than referring to the period, up to two years from the deceased person's death, that is 'necessary or desirable for the winding up of the business', the Commission considers that the provision should refer to the period, up to two years from the person's death, that is 'reasonably necessary for the realisation of the business'. In the Commission's view, this better reflects the purpose of the provision and the nature of the personal representative's obligation to administer and distribute the estate.

The part of the trust property that may be employed in carrying on the business

8.82 If a provision to the general effect of section 57 is to be included in the *Succession Act 1981* (Qld), another issue to consider is whether the personal representative should be able to employ only a limited part of the property of the estate for the purpose of carrying on the business.

8.83 At present, section 57(2)(a)–(b) provides that a trustee or personal representative 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.

8.84 The usual rule under the general law was that, unless the trust instrument expressly directs otherwise, a trustee with power to carry on a business is entitled to employ only those assets that were used by the testator or settlor in carrying on the business.⁶⁴ In the context of deceased estates, this rule ensured that the administration of the estate would not be delayed by the trustee retaining the whole estate for use in carrying on a business that formed only one part of the estate.⁶⁵

Discussion Paper

8.85 In the Discussion Paper, the Commission observed that the provision in section 57(2)(a)–(b) widens the scope of the assets that may be utilised to those that are subject to the same trusts, so that a trustee or personal representative is not limited to the assets that had been used by the testator or settlor in carrying on the business.⁶⁶

8.86 It sought submissions on whether section 57 of the *Trusts Act 1973* (Qld) should contain any additional qualification on the trust property that may be employed in carrying on a business — for example, that the trustee may employ

⁶⁴ See, eg, *M'Neillie v Acton* (1853) 4 De GM & G 744, 753–4; 43 ER 699, 702–3 (Turner LJ); *Southwell v Martin* (1901) 1 SR (NSW) Eq 32, 35 (Walker J).

⁶⁵ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 1983) [1245].

⁶⁶ *Trusts Discussion Paper* (2012) [8.269].

any part of the trust estate 'as is reasonably necessary'.⁶⁷ The Commission noted that the National Committee for Uniform Succession Laws recommended a provision, in slightly different terms to section 57(2)(a)–(b), that would enable the personal representative to 'use any part of the deceased estate that is reasonably necessary' and to 'increase or reduce, as necessary, usage of the estate'.⁶⁸

Consultation

8.87 A legal practitioner who practises in trusts and succession law submitted that, although the Act could be amended to require that the property that may be employed is that which is 'reasonably necessary', it may be unnecessary to do so since the duty to act in the best interest of the beneficiaries will always apply to the exercise of the power.

8.88 Similarly, the Bar Association of Queensland commented that it is unnecessary to include any further qualification on the assets that may be employed, since this 'is sufficiently governed by the trustee's general duties as trustee'.

8.89 In contrast, the Queensland Law Society submitted that the power to employ other assets in the business should be confined to those that are held on the same trust or a trust which creates identical beneficial interests. In its view, the legislation should not sanction 'a potential encroachment into other parts of the estate (for example residue) which may be earmarked for earlier distribution than the business itself'.

8.90 On the other hand, the Public Trustee was in favour of an amendment to allow trustees to employ any part of the trust property as is reasonably necessary to carry on a business.

The Commission's preliminary view

8.91 The provision for the carrying on of an existing business that the Commission has recommended for inclusion in the *Succession Act 1981* (Qld) would apply to personal representatives in the administration of a deceased estate. As such, the current formulation in section 57(2)(a) of the *Trusts Act 1973* (Qld), which refers to 'trust property which is subject to the same trusts', would not be suitable.

8.92 The Commission considers that, whilst a personal representative should not be unduly restricted in the assets in the estate that may be used to carry on an existing business with a view to its realisation as a going concern, there should be some limitation in order to protect the interests of the beneficiaries.

8.93 For this reason, the Commission is of the view that the provision should provide, in the same terms as the draft provision recommended by the National Committee for Uniform Succession Laws, that the personal representative may 'use

⁶⁷ Ibid 319.

⁶⁸ Ibid [8.270]. See *Administration of Estates Report* (2009) vol 1, [11.280], Rec 11-21(b), vol 4, model Administration of Estates Bill 2009, cl 408(3)(a)–(b).

any part of the deceased's estate that is reasonably necessary' for the purpose of carrying on the business. The personal representative would still be subject to the overriding duties to administer the estate according to law and to distribute the estate as soon as may be.⁶⁹

PAYMENT, APPORTIONMENT AND RECOUPMENT OF TRUST PROPERTY EXPENSES

Introduction

8.94 In managing trust property, a trustee may sometimes wish to expend trust money to improve or preserve the property.

8.95 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.⁷⁰ 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.⁷¹

8.96 Whether or not the act to be done is in the nature of a repair (or an improvement) is a question of degree.⁷² In general, a repair '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'.⁷³

8.97 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. The traditional context in which this situation occurs is where the trust property is held on trust first for a life tenant and then for the person entitled in remainder. In the absence of express provision in the trust instrument, the general law of trust expenses determines whether an expense incurred by the trustee is chargeable to capital or income.

⁶⁹ See *Succession Act 1981* (Qld) s 52(1)(a), (d).

⁷⁰ *Burnip v Jackson* [1905] VLR 16; *Re Broad* [1953] VLR 49.

⁷¹ *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).

⁷² *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).

⁷³ *Ibid.*

8.98 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).⁷⁴ 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).⁷⁵

8.99 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:⁷⁶

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.

8.100 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.⁷⁷

8.101 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.⁷⁸

Section 33(1)(a)–(f): power to expend trust money on trust property expenses

8.102 Trustees’ powers to expend trust money on repairs and improvements have been clarified and, in some respects, extended by the *Trusts Act 1973* (Qld).⁷⁹

⁷⁴ *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].

⁷⁵ 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.

⁷⁶ *Wilkie v Equity Trustees Executors and Agency Co Ltd* [1909] VLR 277, 281–2 (Madden CJ, a’Beckett and Hodges JJ).

⁷⁷ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 53.

⁷⁸ See the discussion of this duty in Chapter 6.

8.103 Under section 33(1)(a)–(f), a trustee may pay or expend money, including capital money, for the following trust property expenses:⁸⁰

- the repair, maintenance, upkeep or renovation of the property (whether or not the work is necessary for the purpose of salvage of the property) (section 33(1)(a));
- the improvement or development of the property (but not, except with the sanction of the court, exceeding \$10 000) (section 33(1)(b));
- the payment of calls on shares subject to those trusts (section 33(1)(c));⁸¹
- rates, premiums, taxes, assessments, insurance premiums and other outgoings in respect of the property (section 33(1)(d));
- the subdivision of land and related expenses (section 33(1)(e));⁸² 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 (section 33(1)(f)).

8.104 Section 33(1)(a)–(f) modifies the general law by empowering a trustee to expend either capital or income on the repairs or other works or other expenses provided for in those subsections. As explained above, under the general law, the usual rule is that ordinary recurring repairs and expenses are borne by income, and more permanent, structural repairs and improvements are borne by capital.

8.105 Specific 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.⁸³ The Queensland provisions are the broadest.⁸⁴

⁷⁹ *Trusts Act 1973* (Qld) s 33(1)(a)–(f) applies whether or not a contrary intention is expressed in the trust instrument: s 31(1).

⁸⁰ 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 raise the money required for those purposes by sale, mortgage, conversion or calling in of all or any of the trust property: s 45. Section 45 is discussed in Chapter 7.

⁸¹ *Trusts Act 1973* (Qld) s 27 also deals with the payment of calls of shares. Whereas s 33(1)(c) of the Act permits a trustee to expend capital or income to pay calls on shares, s 27 limits such expenditure to capital. The Commission has recommended in Chapter 5 that the new legislation should not include a provision to the effect of s 27 of the Act: see [5.70], Recommendation 5-4 above.

⁸² The power of subdivision conferred by s 33(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; Fitzgerald P and Mackenzie J agreeing). 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.

⁸³ *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).

⁸⁴ 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 [8.113] below.

Discussion Paper

8.106 In the Discussion Paper, the Commission sought submissions on how the statutory powers to expend trust money on trust property expenses, currently conferred by section 33(1)(a)–(f) of the *Trusts Act 1973* (Qld), should be dealt with in the new legislation.⁸⁵

Consultation

8.107 The Public Trustee considered that the powers conferred by section 33(1)(a)–(f) of the Act should continue to be the subject of stand-alone provisions. He expressed the concern that, even if a trustee is given the powers of an absolute owner, the ‘important capacities and discretions offered by section 33(1)(a)–(f) do not necessarily follow — dealing as they do with the expenditure of trust monies’. He explained that:

The powers of an absolute owner in the context of a trust would still remain subject to terms of the trust and the general law — in the absence of the power to improve, for example, expressed in section 33 ... the Public Trustee is uncertain as to whether a trustee would have power to use trust monies ... to improve a property (section 33(1)(b)).

8.108 Professor Lee was also of the view that the powers conferred by section 33(1)(a)–(f) should continue to be retained in a stand-alone provision. He also suggested that the powers conferred by section 33(1)(a) and (b) could be stated more simply as the powers to ‘[e]xpend money including capital money subject to the same trusts for the repair, maintenance, upkeep, renovation, improvement or development of the property’.

8.109 In contrast, the Bar Association of Queensland, the Queensland Law Society and a legal practitioner who practises in trusts and succession law each considered that, if a general property power is enacted, the powers conferred by section 33(1)(a)–(f) should be listed as examples of that general power.

The Commission’s preliminary view

8.110 The Commission is of the view that the new legislation should include provisions to the general effect of 33(1)(a)–(f) of the *Trusts Act 1973* (Qld) to empower a trustee to expend money from income or capital to pay for repairs or other works or expenses that are mentioned in those subsections. These provisions ensure that a trustee has sufficient flexibility to pay for any such expense (regardless of whether it is an income or a capital expense) in any given circumstance.

Limitation on expenditure on improvement or development of trust property

8.111 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 for the improvement or

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Trusts Discussion Paper (2012) 327.

development of the trust property without court approval. This expenditure limit was set in 1973, when the Act was passed.

8.112 The equivalent provisions in the ACT, New South Wales, and Western Australia also impose a limitation on the amount that may be spent without court approval.⁸⁶

8.113 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.⁸⁷ 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.⁸⁸ In the ACT, the statutory limit is \$25 000 or one-third of the value of the land, whichever is less.⁸⁹ In New South Wales, the statutory limit is \$50 000 or 30% of the value of the land, whichever is greater.⁹⁰ In both of these jurisdictions, the statutory limit also applies to expenditure on the repair of trust property.

Discussion Paper

8.114 In the Discussion Paper, the Commission noted that the limitation on expenditure in section 33(1)(b) has remained in place, without amendment, for 40 years. This raised the issue 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 limit should be increased or removed altogether.⁹¹

8.115 The Commission also noted that any proposal to increase the expenditure limit also raised the issue of whether any new limit should be framed in terms of a

⁸⁶ *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) are extended to trustees for sale by virtue of s 35 of the *Property Law Act 1958* (Vic).

⁸⁷ *Trustees Act 1962* (WA) s 30(1)(c).

⁸⁸ Law Reform Commission of Western Australia, *Trusts and the Administration of Estates Part V — Trustees' Powers of Investment*, Report, Project No 34 (1984) 63.

⁸⁹ *Trustee Act 1925* (ACT) s 83(1).

⁹⁰ *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.

⁹¹ *Trusts Discussion Paper* (2012) [8.302].

stated sum (as is presently the case) or a proportion of the total value of the trust property. Although expressing the limit as a stated sum would have the benefit of certainty, it would be necessary to review the amount of the expenditure limit periodically and to increase it if warranted. On the other hand, expressing the expenditure limit as a fixed proportion of the total value of the trust property would avoid the need to review or adjust a stated sum periodically, but would also 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 is within the permitted limit.⁹²

8.116 As an alternative, the Commission raised the option of removing the expenditure limit altogether. 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 to act with prudence and in the interests of the beneficiaries. It noted that 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 (c)–(f), for which no expenditure limit applies.⁹³

8.117 The Commission sought submissions on these various issues.⁹⁴

Consultation

8.118 Professor Lee commented that the power to develop trust property should not be subject to an expenditure limit. He considered that it should be up to the trustee to decide whether such expenditure would be prudent. He also observed that, in modern times, it could be argued that a limit of \$10 000 is ‘almost derisory’.

8.119 The Bar Association of Queensland, the Queensland Law Society and a legal practitioner who practises in trusts and succession law also considered that the monetary limit in section 33(1)(b) should be removed.

8.120 The Public Trustee favoured the retention of a statutory limit on the expenditure allowed under section 33(1)(b), but considered that the current \$10 000 limit should be reviewed. He considered that it may be more straightforward to express the statutory limit as a proportion of the value of the asset being improved (as distinct from the trust property generally). He also commented that the ‘30% rule’ contained in the equivalent New South Wales provision would be a convenient starting point for determining an appropriate limit.

8.121 The legal practitioner expressed a different view. He considered that the imposition of a new expenditure limit based on a proportion of the total value of the property would ‘beg arguments as to the value of the property, before and after the improvement’.

92 Ibid [8.302]–[8.305].

93 Ibid [8.306].

94 Ibid 329.

The Commission's preliminary view

8.122 The power to expend trust money for the improvement or development of the trust property is a necessary adjunct to a trustee's powers to manage the trust property. The imposition of a limit on the amount of money that a trustee may expend for those works without the need for court approval would not be generally consistent with the conferral of wider management powers (which the Commission has recommended in Chapter 7). The trustee's duties to act with prudence and in the interests of the beneficiaries are a sufficient brake on the trustee's powers to improve or develop the trust property and, by extension, to expend trust money to pay for those works. For these reasons, the Commission considers that the new legislation should not impose a limit on the expenditure of trust money for the improvement or development of the trust property.

Section 33(1)(g): power of apportionment and recoupment of trust property expenses

8.123 As explained in Chapter 6, 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 trust property expenses out of either capital or income.

8.124 The general law also provided that a trustee could apportion (or share) 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).

8.125 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; ...

8.126 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.

8.127 Western Australia includes a similar provision.⁹⁵ Although the Western Australian legislation gives 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),⁹⁶ the powers of apportionment and recoupment that it confers have a much more limited scope.⁹⁷

8.128 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)

8.129 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.

8.130 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.

⁹⁵ *Trustees Act 1962* (WA) s 30(1)(b). See also *Trustee Act 1956* (NZ) s 15(1)(a). 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).

⁹⁶ See *Trustees Act 1962* (WA) s 30(1)(a), (c)–(e), (g). The Western Australian provision does not expressly state, 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.

⁹⁷ See *Trustees Act 1962* (WA) s 30(1)(b).

8.131 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.⁹⁸

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.

8.132 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 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.

8.133 The Law Commission of New Zealand has proposed that new legislation in that jurisdiction should include a stand-alone apportionment provision,⁹⁹ to replace the provisions in the current Act that contain special rules relating to the apportionment of receipts and outgoings between capital and income.¹⁰⁰ 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. The Law Commission of New Zealand also proposed that the new provision should apply to all trusts, whether or not there is a contrary intention in the trust deed.¹⁰¹

Discussion Paper

8.134 In the Discussion Paper, the Commission sought submissions on whether the powers of apportionment and recoupment, currently conferred by section 33(1)(g) of the *Trusts Act 1973* (Qld) should be retained and, if so, whether their scope is appropriate or should be changed in some way (for example, by extending the power of recoupment to allow expenditure under section 33(1)(a)–(f) that is

⁹⁸ *Trusts and Settled Land Report* (1971) 34–5.

⁹⁹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 99 (Proposal P19).

¹⁰⁰ See, eg, *Trustee Act 1956* (NZ) s 83.

¹⁰¹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 99 (Proposal P19(2)). Under that proposal, clauses on apportionment included in trust deeds would be valid only to the extent that they are consistent with the new provision: [5.43].

made out of income to be recouped from capital if it would be equitable to do so in all the circumstances).¹⁰²

Consultation

8.135 The Public Trustee and a legal practitioner who practises in trusts and succession law considered that the powers conferred by section 33(1)(g) should continue to be the subject of a stand-alone provision, even if a general property power is conferred on a trustee. In this regard, the legal practitioner also commented that section 33(1)(g) 'is not only a power but also a means of accounting for tax purposes and a means of accounting to beneficiaries'.

8.136 The Queensland Law Society considered that the powers conferred by section 33(1)(g) should be listed as examples of the powers conferred by the general property power.

8.137 The Bar Association of Queensland, the Public Trustee and the legal practitioner considered that the power of recoupment conferred by section 33(1)(g) should be extended 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 all the circumstances. The Queensland Law Society also supported the principle of extending the power of recoupment. This respondent commented that the legislation would benefit from provisions that define, or give examples of, the type of expenditure that is attributable to either income or capital or both.

8.138 Professor Lee commented that the conferral of a limited power of recoupment, as is currently the case under section 33(1)(g), is undesirable. He also suggested reframing the provision to deal more generally with the apportionment of both income and expenditure (so that where the trustee is under a duty to maintain separate capital and income accounts, the trustee may apportion any income received or any payment or expenditure incurred between those accounts in such manner as the trustee considers equitable).

The Commission's preliminary view

8.139 In the Commission's view, the new legislation should include a provision to the general effect of 33(1)(g) of the *Trusts Act 1973* (Qld), to empower a trustee to:

- apportion any payment or expenditure made under the provision based on section 33(1)(a)–(f) between capital and income or among the beneficiaries as the trustee considers equitable; and
- where the whole or part of any such payment or expenditure has been made out of capital, to allow 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.

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Trusts Discussion Paper (2012) 332.

8.140 However, the Commission is of the view that the power of recoupment conferred by the provision recommended at [8.139] should be extended to allow expenditure that is made out of income to be recouped from capital if it would be equitable to do so in all the circumstances.

8.141 This overall approach would give a much wider discretion to trustees in dealing with expenditure from the capital and income accounts. The proposed provision would allow a trustee, in accordance with the duty to act impartially between the beneficiaries, to transfer funds between income and capital to make necessary adjustments after paying for an expense. For example, if a trustee wanted to charge the expense to capital but paid for the expense with funds out of income, the trustee could later transfer funds from the capital to income to reimburse the income beneficiaries.

The payment of insurance premiums and the effect of a contrary intention in the trust instrument

8.142 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.¹⁰³ 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.

8.143 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.

8.144 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:¹⁰⁴

- (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.

8.145 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

¹⁰³ *Trusts Act 1973* (Qld) s 31(1).

¹⁰⁴ *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.

of the Act, unlike the provisions in section 33(1)(a)–(g), it may be modified by the settlor.

8.146 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.

Discussion Paper

8.147 In the Discussion Paper, the Commission sought submissions on whether section 47(3) of the *Trusts Act 1973* (Qld) 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. It also sought submissions on the issue of whether the powers to pay and apportion insurance premiums and other trust property expenses under section 33(1) should apply subject to the expression of a contrary intention in the trust instrument.¹⁰⁵

8.148 The Commission noted that, if the general approach of section 33(1)(g) is changed so that it applies *subject to* a contrary intention,¹⁰⁶ it would allow the settlor to determine and direct which beneficiaries’ entitlements are ultimately to be affected by the payment or expenditure. It also noted, however, that 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.¹⁰⁷

Consultation

8.149 Professor Lee considered that section 47(3) should be retained, but in a more general form.¹⁰⁸

8.150 In contrast, the Public Trustee expressed the view that there is merit in retaining a specific provision that deals with insurance premiums if only because of the ‘frequent occasions’ on which such issues arise. He also suggested that, for convenience, section 47(3) could be subsumed into section 33(1).

8.151 A legal practitioner who practises in trusts and succession law considered that section 47(3) should be omitted.

¹⁰⁵ *Trusts Discussion Paper* (2012) 334.

¹⁰⁶ 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.

¹⁰⁷ *Trusts Discussion Paper* (2012) 334.

¹⁰⁸ Professor Lee suggested that the revised provision could be modelled on s 19(1) of the English *Trustee Act 1925*, 15 & 16 Geo 5, c 19, which provides that a trustee may insure any property which is subject to the trust against risks of loss or damage due to any event and pay the premiums out of the trust funds.

8.152 The Public Trustee and the legal practitioner each considered that the powers conferred by section 33(1)(a)–(g) should apply subject to a contrary intention in the trust instrument.

The Commission's preliminary view

8.153 Earlier in this chapter, the Commission has recommended that the new legislation should include provisions to the general effect of section 33(1)(a)–(g) of the *Trusts Act 1973* (Qld).

8.154 The Commission is of the view that the new legislation should provide that the powers conferred by section 33(1)(g) should be capable of being expressly excluded or modified by the trust instrument. This approach preserves the autonomy of the settlor to determine and direct which beneficiaries' entitlements are ultimately to be affected by the payment or expenditure. It would ordinarily be expected that a settlor would have cogent reasons for giving such directions. For example, the settlor may wish to relieve an elderly life tenant (an income beneficiary) of the burden of paying a recurrent property expense, such as the rates (an income expense), by requiring those expenses to be borne by the persons entitled in remainder (the capital beneficiaries). If the provision in the new legislation that is to the general effect of section 33(1)(g) of the *Trusts Act 1973* (Qld) applied so that it was invariable, the settlor's directions would have no effect and may ultimately not be followed by the trustee.

8.155 In light of this recommendation, there is no need for the new legislation to include a provision to the effect of section 47(3) of the *Trusts Act 1973* (Qld) to empower the trustee to pay for and apportion the costs of insurance premiums, subject to the settlor's directions.

APPLICATION OF INCOME BY TRUSTEE-MORTGAGEE IN POSSESSION

8.156 Section 42 of the *Trusts Act 1973* (Qld) governs the application of the income of mortgaged land received by a trustee-mortgagee in possession.¹⁰⁹ It applies when the mortgage debt (rather than the land itself) is held on trust for successive beneficiaries.¹¹⁰

8.157 Similar provisions are included in the trustee legislation of the ACT, New South Wales, South Australia and Western Australia.¹¹¹

8.158 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

¹⁰⁹ See *Trusts Discussion Paper* (2012) [8.328]–[8.339] for a detailed discussion of the scope of the power conferred by s 42 of the *Trusts Act 1973* (Qld).

¹¹⁰ *Re KC Smart's Settlement* (1933) 33 SR (NSW) 412, 415 (Harvey CJ in Eq); *Trust Co of Australia v Braid & Simmons* (Unreported, Supreme Court of Victoria, Eames J, 20 February 1998).

¹¹¹ *Trustee Act 1925* (ACT) s 39A; *Trustee Act 1925* (NSW) s 39A; *Trustee Act 1936* (SA) s 28C; *Trustees Act 1962* (WA) s 40.

the mortgage to the tenant for life, and the payment of rates, taxes, repairs and other outgoings necessary to preserve the security.

8.159 In one case, 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.¹¹² In a subsequent case, 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.¹¹³ That approach has been followed with approval in a more recent decision.¹¹⁴

8.160 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 1938,¹¹⁵ ostensibly to give statutory effect to the first of the two conflicting authorities so that the interest payable to the life tenant is paid out of the net, and not the gross, income from the mortgaged land.¹¹⁶

8.161 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 (including the payment of interest payable to the life tenant).

8.162 However, this is modified by section 42(3) of the Act, which 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.¹¹⁷

8.163 It has been suggested that the effect of the legislative provision, as a whole, is consistent with the approach taken in the second of the two conflicting authorities — 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.¹¹⁸

112 *Farmer v Chard* (1905) 5 SR (NSW) 342, 343–4 (Simpson CJ in Eq).

113 *Re KC Smart's Settlement* (1933) 33 SR (NSW) 412.

114 *Trust Co of Australia Ltd v Braid* (Unreported, Supreme Court of Victoria, Eames J, 20 February 1998) [19].

115 *Conveyancing, Trustee and Probate (Amendment) Act 1938* (NSW) s 5(k).

116 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 November 1938, 3104 (LO Martin, Minister of Justice). *Conveyancing Act 1919* (NSW) s 115(8) 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.

117 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1959], discussing the equivalent provision in New South Wales.

118 *Trust Co of Australia Ltd v Braid* (Unreported, Supreme Court of Victoria, Eames J, 20 February 1998).

Discussion Paper

8.164 In the Discussion Paper, the Commission proposed that the new legislation should include a provision to the effect of section 42 of the Act.¹¹⁹ The Commission did not seek or receive any submissions on that proposal.

The Commission's preliminary view

8.165 The Commission is of the view that the new legislation should include a provision to the effect of section 42 of the *Trusts Act 1973* (Qld). 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.

PRELIMINARY RECOMMENDATIONS

Power to postpone sale of trust property

8-1 Subject to Recommendation 8-2 below, the new legislation should include provisions to the general effect of section 32(1)(c) and (4) of the *Trusts Act 1973* (Qld) to empower trustees:

- (a) to postpone the sale of trust property that the trustee has a duty to sell, other than property of a wasting, speculative or reversionary nature; and
- (b) subject to any express direction to the contrary in the trust instrument, to do so for an indefinite and unlimited period.

8-2 The new legislation should not include a provision to the general effect of section 32(4) of the *Trusts Act 1973* (Qld) to the extent that it gives protection to a purchaser of trust property.

Power to carry on an existing business

8-3 A provision to the general effect of section 57 of the *Trusts Act 1973* (Qld), modelled on the recommended provision of the National Committee for Uniform Succession Laws and applying to personal representatives of deceased estates, should be included in the *Succession Act 1981* (Qld) and should provide that:

- (a) the reference to 'the deceased's will' includes a provision of the will that confers on the personal representative the power to postpone the sale of any property that was being used by the testator in carrying on a business;
- (b) the personal representative is limited to carrying on the business for the period, up to two years from the person's death, that is reasonably necessary for the realisation of the business, or the further period or periods that the court approves; and
- (c) for the purpose of carrying on the business, the personal representative may use any part of the deceased's estate that is reasonably necessary.

8-4 The new legislation should not include a provision to the general effect of section 57 of the *Trusts Act 1973* (Qld) but should:

- (a) be drafted so that any provision that lists examples of specific powers conferred by the 'general property power' includes the power of a trustee to continue to carry on a business that was being carried on by the settlor with trust property at the commencement of the trust; and
- (b) include a provision to ensure that:
 - (i) the statutory power to postpone the sale of trust property; and
 - (ii) the 'general property power', to the extent that it confers power to carry on a business;

apply subject to the specific power to carry on a business that is to be conferred on personal representatives by the *Succession Act 1981* (Qld) under the provision referred to in Recommendation 8-3 above.

Payment, apportionment and recoupage of trust property expenses

8-5 The new legislation should include provisions to the general effect of 33(1)(a)–(f) of the *Trusts Act 1973* (Qld), except that the provision that gives effect to the power currently conferred by section 33(1)(b) of the Act should not impose a statutory limit on the expenditure of capital or income by a trustee on the improvement or development of the trust property.

8-6 The new legislation should include a provision to the general effect of 33(1)(g) of the *Trusts Act 1973* (Qld), except that:

- (a) the provision should also allow for expenditure that is made out of income to be recouped from capital if it would be equitable to do so in all the circumstances; and
- (b) the powers conferred by that provision should be capable of being expressly excluded or modified by the trust instrument.

8-7 The new legislation should not include a provision to the effect of section 47(3) of the *Trusts Act 1973* (Qld).

Application of income by trustee-mortgagee in possession

8-8 The new legislation should include a provision to the effect of section 42 of the *Trusts Act 1973* (Qld).

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INTRODUCTION

9.1 This chapter examines the provisions of Part 4 of the *Trusts Act 1973* (Qld) that deal with the following matters:

- the power to give a receipt and the effect of a receipt (section 43);
- the power to compound liabilities (section 44);
- the power to insure trust property (section 47);
- the application of insurance money (section 48);
- the power to deal with reversionary and other interests not vested in the trustee (section 50);
- the valuation of trust property (section 51);
- the power to cause the accounts of the trust property to be audited (section 52);
- the power of a trustee to sue himself or herself in a different capacity (section 59); and
- certain miscellaneous powers (section 33(1)(j) and (n)).

9.2 Where relevant, it also examines whether some of the specific powers currently conferred by these provisions should be omitted or restated more briefly in the legislation as examples of specific powers conferred by the general property power that the Commission has recommended in Chapter 7.

9.3 As well as conferring various administrative powers on trustees, some of these provisions 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.¹

POWER TO GIVE RECEIPTS AND THEIR EFFECT

Historical background

9.4 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.²

1

See also Chapter 11, which examines the main provisions in relation to indemnities and protection.

2

T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (Maxwell & Son, 2nd ed, 1842) 341–2.

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.

9.5 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'.³ Further, under quite technical rules of equity, such an intention would be implied in relation to some types of trusts.⁴ 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 payer of the obligation to see to the application of the money.⁵

9.6 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,⁶ *Lord Cranworth's Act* provided, in section 29, that the receipt in writing of any trustees or 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.⁷

9.7 In equity, the duty to act personally prevented a trustee from delegating his or her powers either to a stranger or to co-trustees, except in limited circumstances (such as in cases of necessity).⁸ 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'.⁹ Similarly, if there were several trustees, the duty to act jointly meant that they were not justified in authorising one of their number to receive and give a good receipt for trust moneys:¹⁰

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,

3 Ibid 342.

4 Ibid 342–8.

5 Ibid 348.

6 See *Balfour v Welland* (1809) 16 Ves Jun 151; 33 ER 941.

7 *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 14. See *Trusts Discussion Paper* (2012) ch 9, n 18 for the history of this provision.

8 See A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 293.

9 *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).

10 *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596–7 (Kay J).

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 ...

9.8 Consequently, where money was paid to one of several trustees who misapplied the money, it was held that the receipt of that trustee did not constitute a valid discharge and that the payer was personally liable to make good the loss that had resulted to the trust estate.¹¹ It was also 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, that the trustees authorise the purchasers to pay the money into a joint bank account.¹²

Scope of the Queensland provision

9.9 Section 43 of the *Trusts Act 1973* (Qld) deals with the effect of a trustee's receipt. It provides:

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.

9.10 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, there were some circumstances in which a person paying money to trustees was bound to see that the money was properly applied and could be held liable for its misapplication.

9.11 By implication, section 43 also empowers:

- a trustee to authorise any person to give a receipt;
- trustees to authorise any person, including one or more of their number, to give a receipt.

9.12 As explained above, in some older cases, it was held that trustees did not have these powers.

9.13 A provision in virtually identical terms was previously included in section 19 of the *Trustees and Executors Act 1897* (Qld). Section 19 was originally based on the wording of section 20 of the English *Trustee Act 1893*, which, like the current

¹¹ *Lee v Sankey* (1873) LR 15 Eq 204.

¹² *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592.

English provision,¹³ did not make provision for a trustee to appoint an agent to give a receipt or, where there were several trustees, for the trustees to authorise one or more of their number to give a receipt. Those additional matters were inserted into section 19 by the *Trustees and Executors Acts Amendment Act 1906* (Qld).¹⁴ At the time, there was no equivalent in the Act of section 54(1) of the *Trusts Act 1973* (Qld). As explained in Chapter 4, 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'.¹⁵

9.14 The *Trustee Act 1898* (Tas) includes a provision in the same terms as section 43 of the *Trusts Act 1973* (Qld).¹⁶ However, the Tasmanian Act does not have a provision to the effect of section 54(1) of the Queensland Act.

9.15 The trustee legislation of the other Australian jurisdictions and of New Zealand and England includes a provision dealing with the effect of a receipt given by a trustee,¹⁷ but those provisions do not specifically provide for the effect of a receipt given by a person authorised in writing by a trustee to give a receipt or, where there is more than one trustee, of a receipt given by one or more of the trustees who have been so authorised. For example, section 48(1) of the *Trustee Act 1925* (NSW) provides:

48 Receipts

- (1) The receipt in writing of trustees or of a sole trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to the trustees or the sole trustee under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

9.16 In most of these jurisdictions, the power to appoint an agent to give receipts is addressed only in their equivalent to section 54(1) of the *Trusts Act 1973* (Qld).¹⁸

Requirement for authorisation of person or trustee to be in writing

9.17 As mentioned above, section 54(1) of the *Trusts Act 1973* (Qld) also authorises a trustee to employ an agent for a range of purposes, including the

¹³ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 14.

¹⁴ *Trustees and Executors Acts Amendment Act 1906* (Qld) s 3.

¹⁵ *Trusts Act 1973* (Qld) s 54(1) is set out at [4.10] above.

¹⁶ *Trustee Act 1898* (Tas) s 23.

¹⁷ *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.

¹⁸ 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).

'receipt ... of money'. However, unlike section 43 of the Act, section 54(1) does not require the agent's employment to be made in writing.

9.18 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.¹⁹ Those functions would include the giving of receipts.²⁰ 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 property).²¹ 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'.²²

Discussion Paper

9.19 In the Discussion Paper, the Commission sought submissions on whether section 43 of the *Trusts Act 1973* (Qld) should continue to refer to a receipt given by a person authorised by the trustees *in writing* or whether the requirement for the person to be authorised in writing should be omitted. It also sought submissions on whether section 43 of the Act should 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 whether the requirement for the trustees to be authorised in writing should be omitted.²³

Consultation

9.20 The Queensland Law Society and a legal practitioner who practises in trusts and succession law each submitted that section 43 should continue to refer to a receipt given by a person authorised by the trustees in writing, but that the requirement for one or more of several trustees to be authorised in writing by the trustees should be omitted.

9.21 The Bar Association of Queensland expressed the view that:

The requirement that that authorisation be in writing is impractical and can lead to injustice. However, writing facilitates consideration of the trustees' responsibilities and itself can prevent injustice. The requirement that the authorisation be in writing should be replaced with a requirement that the authorisation be evidenced in writing.

9.22 The Public Trustee considered that the requirement for a person to be authorised by trustees in writing to give a receipt should be deleted. He expressed the concern that 'such a requirement means that a payer cannot rely on the agent's

¹⁹ *Trustee Act 2000* (UK) c 29, ss 11–12. These provisions are considered at [4.19], [4.59] ff above.

²⁰ See *Trustee Act 2000* (UK) c 29, s 11(2)–(3).

²¹ *Trustee Act 2000* (UK) c 29, ss 11, 15(1).

²² Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [4.18].

²³ *Trusts Discussion Paper* (2012) 345.

receipt until seeing that written authorisation'. He also suggested that 'if properly construed the appointment by all trustees of one of their number to give receipts would be recognised as the appointment of an agent' under section 54(1), which does not require the appointment of an agent to be made in writing.

9.23 Professor Lee noted the inconsistency between sections 43 and 54(1) and submitted that section 43 should be omitted.

The Commission's preliminary view

9.24 In the Commission's view, the new legislation should include a provision, based on section 43 of the *Trusts Act 1973* (Qld), to deal with the effect of a receipt given by, or on behalf of, a trustee or trustees.

9.25 However, unlike section 43, the new provision should not also confer the power on trustees to authorise a person, or one of their number, to give a receipt. That power should instead be conferred by the general provision for the appointment of agents, which is to be based on section 54(1) of the Act.

9.26 As mentioned earlier, although the authorisation of a trustee or another person under section 43 to give receipts must be in writing, section 54(1) does not include a similar requirement in relation to the appointment of agents generally. Given the wide range of matters in respect of which agents may be appointed under section 54(1), the Commission is of the view that the authorisation of persons to give receipts should be assimilated to the position of agents generally. Accordingly, the new legislation should not retain the current requirement for an authorisation for that specific purpose to be made in writing.

9.27 These changes will remove the current overlap and inconsistency between sections 43 and 54(1) of the Act.

POWER TO COMPOUND LIABILITIES

9.28 Section 44 of the *Trusts Act 1973* (Qld) 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:²⁴

44 Power to compound liabilities

A trustee may, if and as the trustee thinks fit—

- (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

²⁴

For a detailed discussion of the scope of the power conferred by s 44, see *Trusts Discussion Paper* (2012) [9.216].

- (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.

9.29 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'.²⁵ To that end, the provision confers 'wide and flexible powers of compromising and settling disputes'.²⁶

9.30 Section 44 has its origins in section 30 of *Lord Cranworth's Act*,²⁷ which clarified and extended the powers of trustees and personal representatives.²⁸ 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*'.²⁹ 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,³⁰ as where they had acted *bona fide* and to the benefit of the estate.³¹

Whether a more general approach should be adopted

9.31 Similar provisions to section 44 are included in the trustee legislation of the other Australian jurisdictions, as well as New Zealand and England.³² A

²⁵ *Trusts and Settled Land Report* (1971) 41.

²⁶ *Re Earl of Strafford* [1980] Ch 28, 47 (Buckley LJ).

²⁷ *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 in turn 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), which was the predecessor to s 44 of the *Trusts Act 1973* (Qld).

²⁸ CCM Dale, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 9th ed, 1891) 667.

²⁹ J Hill, *A Practical Treatise on the Law Relating to Trustees, Their Powers, Duties, Privileges and Liabilities* (Stevens & Norton, 1845) 503.

³⁰ See generally T Lewin, *A Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 9th ed, 1891) 666.

³¹ 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).

³² *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.

provision in virtually the same terms has also been proposed by the Law Reform Commission of Ireland in its recent review of the law of trusts.³³

9.32 In the American Uniform Trust Code, however, the power to compromise claims is included as one of the many specific powers in section 816 of the Code that supplement the general powers conferred by section 815. Section 816(14) provides that, without limiting the authority conferred by section 815, a trustee may:

- (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;

9.33 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'.³⁴

Discussion Paper

9.34 In the Discussion Paper, the Commission noted that it had proposed 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').³⁵ In light of that proposal, the Commission sought submissions on whether the powers conferred by section 44 of the Act should:³⁶

- continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended to give trustees the general property power); or
- if the Act is amended to give trustees the general property power — be omitted or stated briefly in a provision that lists examples of specific powers conferred by the general property power.

Consultation

9.35 This issue was addressed by the Queensland Law Society, the Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law. All of these respondents submitted that section 44 should continue to be the subject of a stand-alone provision, whether or not the Act is amended to give trustees the general property power.

9.36 Professor Lee commented that the provision gives 'good guidance to trustees in a matter where they may well feel uncertain to the extent of their general power'. The Queensland Law Society also considered that the section 'gives good direction to the trustee when dealing with debts', and noted that it is used often. In that respect, the legal practitioner who practises in trusts and succession law stated that he relied on this section frequently in court appointed administrations.

³³ 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.

³⁴ *Trusts (Scotland) Act 1921* (Scot) s 4(1)(i).

³⁵ *Trusts Discussion Paper* (2012) [9.221].

³⁶ *Ibid* 402–3.

9.37 The Bar Association of Queensland commented that the section should 'remain to underscore the trustee's right to be protected for not pursuing every rabbit down every burrow'.

9.38 The Queensland Law Society, the Public Trustee and the legal practitioner further submitted that, at the very least, the provision should be included briefly in a list of examples of specific powers conferred by the general property power.

The Commission's preliminary view

9.39 In Chapter 7, the Commission has recommended that the new legislation should give trustees, in relation to the trust property, all the powers of an absolute owner (the 'general property power'). Given the breadth of the powers thereby conferred, the Commission is of the view that it is not necessary for the new legislation to include a detailed, stand-alone provision to the effect of section 44 of the *Trusts Act 1973* (Qld). Instead, the powers conferred by section 44 should be stated more briefly in the legislation as examples of the powers conferred by the general property power.

Protection if powers exercised in good faith

9.40 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'. Almost all of the other Australian jurisdictions include the same provision.³⁷ The wording, including the reference to 'good faith', is derived from the earlier English statutes.³⁸

9.41 The requirement in these provisions for good faith is not established merely by proving that the trustee did not exercise the power in bad faith. On the contrary, the trustee must establish that he or she undertook 'a reasoned use of the powers towards the fulfilment of the trusts'.³⁹

9.42 The original reference to 'good faith' in section 15 of the English *Trustee Act 1925* was omitted by the *Trustee Act 2000* (UK),⁴⁰ and the concluding words of that section 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

³⁷ *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. In the ACT, the relevant provision requires the trustees to act 'honestly' rather than 'in good faith': *Trustee Act 1925* (ACT) s 49(3).

³⁸ 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*).

³⁹ *Dwyer v The National Trustees Executors & Agency Co of Australasia Ltd (No 2)* [1939] VLR 417, 433–4 (Mann CJ). 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.

⁴⁰ *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.

care set out in section 1(1) of the *Trustee Act 2000*.⁴¹ The effect of that amendment is to make the protection afforded by section 15 dependent on the exercise of a higher standard of care by the trustee — namely, compliance with the statutory duty of care.

9.43 However, because the standard of care required for a trustee's protection now coincides with the trustee's statutory duty of care, the current English provision no longer gives 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 is not in breach of duty and does not need the protection given by the section; if the trustee does not comply with the statutory duty of care, the section does not afford any protection. Arguably, the same result could have been achieved by omitting altogether that part of section 15 that refers to a trustee's responsibility for loss occasioned by his or her acts, and simply making the section a statement of powers.

Discussion Paper

9.44 In the Discussion Paper, the Commission observed that, 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 nevertheless seek to be relieved from personal liability under section 76 of the Act. It noted, however, that the 'good faith' protection in section 44 operates automatically, whereas relief under section 76 is in the court's discretion.⁴²

9.45 The Commission sought submissions on whether, if a provision to the general effect of section 44 of the *Trusts Act 1973* (Qld) is retained, there is any particular reason to retain the 'good faith' protection in that section.⁴³

Consultation

9.46 This issue was addressed by the Queensland Law Society, the Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law. All of these respondents submitted that the 'good faith' protection in section 44 should be retained. The Bar Association of Queensland commented that:

The protection for good faith ensures that there is no additional inquiry into reasonableness. A complex accounting of debts and liabilities and cross claims as adverted to by Dixon J in *Steeves Agnew*⁴⁴ is one that on an objective examination of the figures yield either a windfall to the trust or a loss. But many subjective factors intrude, as well as the weight given to each. A trustee should not have to justify the reasonableness of an account, because that then opens up the entire decision-making process. Good faith should be enough and to retain the protection expressly underscores this. (note added)

41 *Trustee Act 2000* (UK) c 29, s 1(1) is set out at [6.63] above.

42 *Trusts Discussion Paper* (2012) [9.231]–[9.232].

43 *Ibid* 405.

44 *Federal Commissioner of Taxation v Steeves Agnew and Co (Victoria) Pty Ltd* (1951) 82 CLR 408.

9.47 The Public Trustee referred to the complexities that trustees face in settling claims as a justification for retaining the good faith protection in the current provision.

The Commission's preliminary view

9.48 In Chapter 6, the Commission has recommended that the new legislation should include a general statutory duty of care that will apply to trustees in performing their duties and exercising their powers. That duty is to be based generally on the standard of care currently imposed by section 22 of the Act.

9.49 The Commission considers that, in exercising the power to compound liabilities, a trustee should act with the degree of care, diligence and skill that will apply to the particular trustee under the statutory duty of care. In the Commission's view, it would be inconsistent with the imposition of the new statutory duty of care to preserve the protection currently given by section 44 to a trustee who acts in good faith.

9.50 The Commission acknowledges that a trustee may face difficulties in deciding whether to settle a particular claim. However, it considers that, if a trustee is in doubt about the course of action to adopt, it is more appropriate for the trustee to apply to the court for judicial advice and directions.⁴⁵ As explained in Chapter 12, a trustee who acts in accordance with the court's advice and directions will be taken to have complied with his or her duties in relation to the particular matter.

9.51 Finally, the Commission notes that a trustee who is, or may be, in breach of trust may apply to the court to be relieved from personal liability in respect of the breach.⁴⁶ While relief from liability is a discretionary matter for the court, the Commission considers it more appropriate, and a better safeguard for the interests of the beneficiaries, for a trustee's liability to be addressed on a case-by-case basis, rather than by the blanket protection given by section 44 to a trustee who acts in good faith, but not necessarily in accordance with the required standard of care.

POWER TO INSURE TRUST PROPERTY

Background

9.52 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 insure⁴⁷ 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

⁴⁵ See *Trusts Act 1973* (Qld) ss 96–97, which are considered in Chapter 12.

⁴⁶ See *Trusts Act 1973* (Qld) s 76, which is considered in Chapter 11.

⁴⁷ *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.

consent.⁴⁸ 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.⁴⁹

9.53 Section 7(1) of the English *Trustee Act 1888* and, subsequently, section 18 of the English *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.⁵⁰

[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 ...

Current provision

9.54 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

⁴⁸ 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).

⁴⁹ FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 79.

⁵⁰ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 75.

- (d) any 1 or more of paragraphs (a) to (c) in such proportions as the trustee considers equitable.⁵¹ (note added)

9.55 Provisions conferring a power to insure are found in all other Australian jurisdictions, as well as in New Zealand and England.⁵² The statutory provisions confer a power to insure, but do not impose a duty to do so.⁵³ In Australia, however, the courts have recognised that a trustee's duty to exercise prudence may give rise to a duty to insure trust property (provided that there is income available to pay the premiums).⁵⁴

Nature of the insurance that may be effected

9.56 Section 47(1) of the *Trusts Act 1973* (Qld) gives trustees the power:

- to insure any insurable property 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.

9.57 With the exception of Tasmania, the other Australian jurisdictions also give trustees a similar power to insure.⁵⁵

Amount of insurance

9.58 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,⁵⁶ which is still the position in Tasmania.⁵⁷

9.59 However, section 47(2) of the *Trusts Act 1973* (Qld) provides that 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.⁵⁸

⁵¹ *Trusts Act 1973* (Qld) s 47(3) gives trustees a broad discretion in relation to the trust property that may be applied to pay insurance premiums. For a discussion of the equivalent provisions in the other Australian jurisdictions, see *Trusts Discussion Paper* (2012) ch 9, n 264.

⁵² *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.

⁵³ See *Re McEacham* (1911) 103 LT 900 and the discussion of that decision in *Trusts Discussion Paper* (2012) [9.176].

⁵⁴ See *Pateman v Heyen* (1993) 33 NSWLR 188, 197–8 and the cases referred to in *Trusts Discussion Paper* (2012) [9.177].

⁵⁵ *Trustee Act 1925* (ACT) s 41(1); *Trustee Act 1925* (NSW) s 41(1); *Trustee Act* (NT) s 18A(1); *Trustee Act 1936* (SA) s 25(1); *Trustee Act 1958* (Vic) s 23(1); *Trustees Act 1962* (WA) s 46(1). The Tasmanian provision, which is based on the original form of the English provision, confers a power to insure any building or other insurable property against loss or damage by fire: *Trustee Act 1898* (Tas) s 21(1).

⁵⁶ 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).

⁵⁷ *Trustee Act 1898* (Tas) s 21(1).

⁵⁸ *Trustee Act 1925* (ACT) s 41(2); *Trustee Act 1925* (NSW) s 41(2); *Trustee Act 1958* (Vic) s 23(2).

9.60 The provisions in the other jurisdictions are framed in slightly different terms. 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.⁵⁹ The Western Australian provision limits the amount to the full replacement value of the property.⁶⁰

9.61 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).⁶¹ 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.⁶² 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'.⁶³ Section 19(1) of the *Trustee Act 1925*, as substituted by the *Trustee Act 2000* (UK), no longer includes any limit on the amount of the insurance that may be effected.

Whether a more general approach should be adopted

9.62 In the American Uniform Trust Code, 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.⁶⁴

9.63 In England, however, the *Trustee Act 1925* still includes a stand-alone provision (section 19) empowering a trustee to insure trust property.⁶⁵

9.64 The Law Reform Commission of Ireland has recently recommended a stand-alone provision in relation to the power to insure, based on section 19 of the English *Trustee Act 1925*.⁶⁶

59 *Trustee Act* (NT) s 18A(2); *Trustee Act 1936* (SA) s 25(2).

60 *Trustees Act 1962* (WA) s 46(1).

61 *Trustee Act 2000* (UK) c 29, s 34.

62 Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [9.11].

63 Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [6.4].

64 Unif Trust Code § 816(11) (amended 2010).

65 Although s 6(1) of the *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47 provides that the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner, that provision would not empower trustees to insure property other than land. Further, s 19 of the *Trustee Act 1925* does not simply confer the power 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 trust — matters that would not be suitable for incorporation in a list of specific powers.

66 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.

Discussion Paper

9.65 In the Discussion Paper, the Commission sought submissions on whether the power to insure that is currently conferred by section 47(1)–(2) of the *Trusts Act 1973* (Qld) should:⁶⁷

- continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended to give trustees the general property power); or
- if the Act is amended to give trustees the general property power — be omitted or stated briefly in a provision that lists examples of specific powers conferred by the general property power.

Consultation

9.66 The Queensland Law Society, the Bar Association of Queensland and a legal practitioner who practises in trusts and succession law expressed the view that, if a general property power is introduced, section 47(1)–(2) should be omitted and the power to insure should be stated briefly in a list of examples.

9.67 However, both the Public Trustee and Professor Lee considered that the power to insure should continue to be the subject of a stand-alone provision, whether or not the Act is amended to give trustees the general property power. Professor Lee expressed support for the adoption of a provision in the same terms as section 19 of the English *Trustee Act 1925*.

The Commission's preliminary view

9.68 Given the breadth of the powers that will be conferred on trustees by the general property power, the Commission is of the view that it is not necessary for the new legislation to include a stand-alone provision to the effect of section 47(1)–(2) of the *Trusts Act 1973* (Qld). Instead, the power to insure that is currently conferred by section 47(1) should be stated briefly in the legislation as an example of the powers conferred by the general property power.

9.69 As noted earlier, section 47(3) gives trustees a broad discretion in relation to the trust property that may be applied to pay insurance premiums. A similar power is also conferred by section 33(1)(d) and (g) of the Act. In Chapter 8, the Commission has recommended, subject to certain modifications to the power of recoupment in section 33(1)(g), that the new legislation should include provisions to the effect of section 33(1)(d) and (g), and should not include a separate provision to the effect of section 47(3).

Effect of a direction by beneficiaries not to insure

9.70 In England, section 19(2)–(4) of the *Trustee Act 1925* provides that a trustee's power to insure trust property is subject to a direction given by the beneficiaries, who are of full age and capacity and absolutely entitled to the trust

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Trusts Discussion Paper (2012) 392.

property, that the trust property is not to be insured or is not to be insured except on specified conditions.

9.71 Originally, the statutory power to insure conferred by section 19 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'.⁶⁸ The current provision now 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. In recommending a provision to this effect, the Law Commission of England and Wales stated that, in the relevant 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'.⁶⁹

9.72 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'.⁷⁰

Discussion Paper

9.73 In the Discussion Paper, the Commission observed that section 19(2)–(4) of the English *Trustee Act 1925* takes a pragmatic approach to the question of risk. The Commission suggested, however, that, given that the beneficiaries have chosen to keep the trust on foot instead of terminating it,⁷¹ the power conferred by the English provision was arguably inconsistent with the nature of the trust relationship.⁷² The Commission sought submissions on whether the *Trusts Act 1973* (Qld) should 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.⁷³

Consultation

9.74 This issue was addressed by the Queensland Law Society, the Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law. Each of these respondents was opposed to amending the *Trusts Act 1973* (Qld) to provide that the beneficiaries may direct the trustee not to insure the trust property.

9.75 The Bar Association of Queensland commented that:

68 *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 19(2) (Act as passed).

69 Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [6.5].

70 *Ibid* [6.5], n 12.

71 See *Re Brockbank* [1948] 1 Ch 206, discussed at [3.212] above.

72 *Trusts Discussion Paper* (2012) [9.197].

73 *Ibid* 394.

this conflicts with the general rule that it is for the trustee, not the beneficiaries even if absolutely entitled, to exercise the trust powers: *Re Brockbank*. If the beneficiaries are not content, then they can call for the property and insure or not insure as they please. In this respect, the trustee is trusted by the settlor to look after the property prudently, despite the wishes of those beneficiaries who might still be young and short-sighted.

9.76 The Public Trustee expressed a similar view. He considered that, if the beneficiaries elected to keep the trust on foot, they 'should not be in a position to dictate to the trustee in respect of insurances'.

The Commission's preliminary view

9.77 The Commission is of the view that the power conferred on beneficiaries by section 19(2)–(4) of the English *Trustee Act 1925* is inconsistent with the existence of the trust relationship. If the beneficiaries of a trust are of full age and capacity and, together, are absolutely entitled to the trust property, they may terminate the trust and call for a transfer of the trust property. In that case, they can then decide whether or not to insure the property. However, the Commission considers that, while the trust remains on foot, the beneficiaries should not be able to direct the trustees not to insure the trust property or to insure it only on specified conditions. In the Commission's view, the power to insure should continue to be a power that is exercisable by trustees in accordance with their duties and, in exercising that power, trustees should not be subject to dictation by the beneficiaries.

APPLICATION OF INSURANCE MONEY

9.78 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.⁷⁴

9.79 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,⁷⁵ although the life tenant's entitlement was subject to the provisions of section 83 of the English *Fires Prevention (Metropolis) Act 1774*. That section 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.⁷⁶

⁷⁴ *Re Bladon* [1911] 2 Ch 350, 354 (Neville J).

⁷⁵ *Warwicker 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.

⁷⁶ *Re Quicke's Trusts* [1908] 1 Ch 887.

9.80 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:

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.

9.81 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 is conferred by section 58 of the *Property Law Act 1974* (Qld), which provides (subject to specified exceptions) that:⁷⁷

58 Insurance money from burnt building

Where a building is destroyed or damaged by fire a person who has granted a policy of insurance for insuring it against fire may, and shall, on the request of a person interested in or entitled to the building, cause the money for which the building is insured to be laid out and expended, so far as it will go, towards rebuilding, reinstating, or repairing the building ...

⁷⁷

The policy behind provisions of this kind is to 'deter fraudulent people from arson': *Sinnott v Bowden* [1912] 2 Ch 414, 420 (Parker J). See also *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 176 (Mason J).

Insurance proceeds to be capital money under the trust

9.82 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.

9.83 Similar provisions are included in most of the other Australian jurisdictions, New Zealand and England,⁷⁸ although the provisions in South Australia, Western Australia and New Zealand are subject to a qualification so that, in certain circumstances, the money is to be regarded as income.

9.84 The South Australian provision provides that the money receivable under the policy of insurance ‘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’.⁷⁹

9.85 The Western Australian and New Zealand provisions are worded slightly differently, but have the same effect. They provide that the money ‘shall ... be capital for the purposes of the trust, except so far as it would be regarded as income under any rule of law’.⁸⁰

Discussion Paper

9.86 In the Discussion Paper, the Commission sought submissions on whether section 48(1) of the *Trusts Act 1973* (Qld) should be amended so that, if money is recovered under an insurance policy in respect of loss of income, it is treated as trust income rather than trust capital.⁸¹

Consultation

9.87 The Public Trustee was in favour of amending section 48 to include the qualification that appears in section 25(5) of the *Trustee Act 1936* (SA) or even section 47(1) of the *Trustees Act 1962* (WA). He noted that:

Typical insurance offered now will include a capacity to recover rent upon the happening of an insurable event and the receipt of such proceeds should be treated generally as income.

9.88 However, the Queensland Law Society, the Bar Association of Queensland and Professor Lee were opposed to such an amendment. The Bar Association of Queensland commented that amounts referable to a loss of income can in some circumstances constitute capital:

⁷⁸ *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). See also the discussion of the provisions in these jurisdictions that deal with money receivable in respect of property held on trust for sale: *Trusts Discussion Paper* (2012) [9.202].

⁷⁹ *Trustee Act 1936* (SA) s 25(5).

⁸⁰ *Trustees Act 1962* (WA) s 47(1); *Trustee Act 1956* (NZ) s 25(1).

⁸¹ *Trusts Discussion Paper* (2012) 397.

The difficulty with such an amendment is that it raises the well-known issue of whether amounts calculated by reference to loss of income are nevertheless capital: see *Glenboig Union Fireclay v IRC*.⁸² (note added)

9.89 Professor Lee suggested the introduction of a brief provision to the effect that 'it is the duty of trustees to apply insurance moneys received as near as possible for the purpose for which the insurance was originally taken out'.

The Commission's preliminary view

9.90 The Commission recognises that the risks against which it may be prudent for a trustee to insure are not necessarily limited to loss or damage to property comprising the trust capital. For that reason, the provision based on section 48 of the *Trusts Act 1973* (Qld) should not provide absolutely that the money receivable by a trustee is to be capital money but should, instead, allow for money receivable under an insurance policy to constitute trust income where that would be consistent with the purpose for which the insurance is taken out.

Requirement for consent of any person whose consent is required for the investment of money subject to the trust

9.91 Section 48(4) of the *Trusts Act 1973* (Qld) provides that, where trustees have received money under an insurance policy, any application of that money by the trustees for the purpose of rebuilding, reinstating, replacing or repairing the trust property is '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'.⁸³

9.92 Because section 48(5) further provides that section 48 does not prejudice or affect the right of any person to require the money, or any part of it, to be applied in rebuilding, reinstating or repairing the property, section 48(4) must necessarily be limited to the situation where the trustees wish to apply the money for that purpose but have not been required to do so.

Consultation

9.93 Professor Lee commented that section 48(4) is no longer relevant:

Insurance companies usually insist that in the case of a building the insurance proceeds be applied in repairs or rebuilding. The trustees would have no control over that, nor any 'consentor'.

The Commission's preliminary view

9.94 If a settlor wishes to ensure that, subject to section 48(5) of the Act, any application of the insurance proceeds by the trustee requires the consent of a

⁸² *Glenboig Union Fireclay Co, Ltd v Commissioners of Inland Revenue* (1922) SC (HL) 112.

⁸³ The trustee legislation in a number of other Australian jurisdictions also includes a provision in similar terms to s 48(4): *Trustee Act 1925* (NSW) s 42(5); *Trustee Act 1936* (SA) s 25(9); *Trustee Act 1958* (Vic) s 24(4); *Trustees Act 1962* (WA) s 48(4).

nominated person, the settlor can include a provision to that effect in the trust instrument. In the Commission's view, it is not necessary for the new legislation to continue to make provision for this relatively rare occurrence. Accordingly, the new legislation should not include a provision to the effect of section 48(4) of the *Trusts Act 1973* (Qld).

Insurance proceeds payable to a person other than the trustee

9.95 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.⁸⁴ 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.

Discussion Paper

9.96 In the Discussion Paper, the Commission sought submissions on whether section 48 of the *Trusts Act 1973* (Qld) should be amended to include either (or a combination) of the following:⁸⁵

- a provision in similar terms to section 24(2) of the *Trustee Act 1958* (Vic);
- a provision to the effect that:⁸⁶

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; 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.

Consultation

9.97 The Queensland Law Society, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that section 48 should not be amended to include either a provision in similar terms to section 24(2) of the *Trustee Act 1958* (Vic) or the alternative provision canvassed in the Discussion

⁸⁴ *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).

⁸⁵ *Trusts Discussion Paper* (2012) 398.

⁸⁶ A provision in these terms was recommended in WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 69. See *Trusts Discussion Paper* (2012) [9.210]–[9.211].

Paper. Professor Lee considered that the Victorian provision relates to settled land and that it should not be included in current trustee legislation.

9.98 The Bar Association of Queensland, on the other hand, submitted that section 48 should include a provision similar to section 24(2) of the *Trustee Act 1958* (Vic), but not the alternative provision on which the Commission sought submissions. In its view, the effect of the latter provision was that the benefit that the person chose to confer on the trust by insuring the trust property would become 'a potential burden'.

9.99 In contrast, the Public Trustee favoured the alternative provision set out above, which he considered to be the more effective provision.

The Commission's preliminary view

9.100 The Commission is not aware of any issues in Queensland arising from the lack of a provision to the effect of section 24(2) of the *Trustee Act 1958* (Vic). In the absence of an established need for such a provision, the Commission does not make any recommendation to enact a new provision to that effect.

REVERSIONARY AND OTHER INTERESTS

9.101 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.

9.102 The provision 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.⁸⁷

Purpose of powers conferred by section 50(1)

9.103 Section 50(1) of the *Trusts Act 1973* (Qld) 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

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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.

- (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.

9.104 The purpose of this provision is to assist trustees to discharge their duty to get in the trust property.⁸⁸ It achieves this by giving trustees:⁸⁹

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.

9.105 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.⁹⁰

Discussion Paper

9.106 In the Discussion Paper, the Commission sought submissions on whether the powers conferred by section 50(1) of the *Trusts Act 1973* (Qld) should:⁹¹

- continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended to give trustees the general property power); or
- if the Act is amended to give trustees the general property power — be omitted or stated briefly in a provision that lists examples of specific powers conferred by the general property power.

Consultation

9.107 The Queensland Law Society and a legal practitioner who practises in trusts and succession law expressed the view that, if the general property power is introduced, the powers conferred by section 50(1) should be stated briefly in a

⁸⁸ See, eg, *Trusts and Settled Land Report* (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.

⁸⁹ LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 272.

⁹⁰ *Trusts and Settled Land Report* (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.

⁹¹ *Trusts Discussion Paper* (2012) 406–7.

provision that lists examples of specific powers conferred by the general property power. The Public Trustee expressed a similar view:

Again the Public Trustees view is that trustees ought to be given the power of absolute owners and to the extent that section 50 as a matter of drafting can be recast in a list of examples and achieve the effect of ensuring trustees have that particular power (which of course an absolute owner of property for example would not have to contend with) then it might be in a list of examples.

The difficulty in that regard is that reversionary interests are not matters known to absolute beneficial owners in the ordinary course.

9.108 However, the Bar Association of Queensland considered that the powers conferred by section 50(1) 'should remain expressed specifically, if only to facilitate third party queries as to the extent of the trustee's powers'. In its view, it is 'not uncommon for a third party not to be satisfied with a power expressed generally'.

9.109 Professor Lee, on the other hand, commented that he would omit section 50(1), although he would not oppose its retention:

I have no doubt that trustees have ample power to ensure that reversionary interests are recovered for the trust when they fall in and the section does give guidance to trustees in this context.

The provision is arcane... I would omit it but would not oppose its retention.

The Commission's preliminary view

9.110 Earlier in this chapter, the Commission has recommended that the powers currently conferred by section 44 of the *Trusts Act 1973* (Qld) in relation to the compounding of liabilities should be stated more briefly in the legislation as examples of the powers conferred by the general property power.

9.111 In the Commission's view, the general property power and the brief restatement of the powers conferred by section 44 are sufficient to enable trustees to exercise the powers currently conferred by section 50 in relation to reversionary and other interests. Accordingly, it is not necessary for the new legislation to include a provision to the effect of section 50(1) of the *Trusts Act 1973* (Qld).

9.112 In the Discussion Paper, the Commission also sought submissions on whether, if a provision to the effect of section 50(1) is retained, that provision should include the 'good faith' protection that currently appears in section 50(1).⁹² In view of the Commission's recommendation that the new legislation should not include a provision to the effect of section 50(1) (as well as its earlier recommendation that the new legislation should not preserve the similar 'good faith' protection that is currently given by section 44), it is unnecessary to consider this issue further.

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Ibid 408.

Protection under section 50(2)

9.113 Under the general law, if the trust fund includes an equitable interest, and the legal estate cannot be got in, the trustees are 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'.⁹³

9.114 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.⁹⁴ However, trustees are not required, at their own expense, to bring proceedings to recover trust property.⁹⁵ It has been held that a beneficiary cannot complain of a trustee's omission to institute proceedings for his or her benefit where the beneficiary has omitted to offer to indemnify the trustee in respect of the costs of the proceedings.⁹⁶

9.115 Section 50(2)–(3) deals with these issues. It provides:

- (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.

⁹³ LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 272, citing *Jacob v Lucas* (1839) 1 Beav 436; 48 ER 1009.

⁹⁴ *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.

⁹⁵ *Tudball v Medicott* (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'.

⁹⁶ *Erskine v Pettit* (1901) 1 SR (NSW) Eq 204, 207–8 (AH Simpson CJ in Eq).

9.116 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).

9.117 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'.⁹⁷ It does not, however, relieve the trustee of the obligation to get in the trust property once it falls into possession.⁹⁸

9.118 The provision is directed to the type of situation that arose in *Tudball v Medlicott*.⁹⁹ It has been suggested, however, that the protection afforded by section 50(2)(b) is too wide, and that the provision should be omitted.¹⁰⁰

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 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.

Discussion Paper

9.119 In the Discussion Paper, the Commission sought submissions on whether section 50(2)–(3) of the *Trusts Act 1973* (Qld) still serves any purpose or whether those subsections should be omitted.¹⁰¹

Consultation

9.120 The Queensland Law Society, the Bar Association of Queensland and a legal practitioner who practises in trusts and succession law expressed the view that section 50(2)–(3) should be omitted because the protection that it gives is too wide.

97 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 1 November 2011) [18.810].

98 *Trusts Act 1973* (Qld) s 50(3).

99 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 95 above.

100 WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 2, 227.

101 *Trusts Discussion Paper* (2012) 410.

9.121 However, the Public Trustee submitted that section 50(2)–(3) should be retained. He commented that trustees are often visited with difficult considerations in respect of taking legal proceedings, noting that, even when a beneficiary offers to indemnify the trustee, the value of the indemnity needs to be investigated and its form committed to an agreement and, even then, it is subject to the continued solvency of the beneficiary. The Public Trustee commented further:

Similarly in respect of litigation a judgement as to the likely costs involved and risk of costs exposed to is a difficult one to make.

There is always recourse to the courts for advice and direction, often this of itself in potential actions of limited value may not be justified, at least from a financial perspective.

It is to these types of complexities which section 50 [is] in part addressed and broad discretionary powers and protections ought be afforded trustees.

The Commission's preliminary view

9.122 To the extent that section 50(2) of the *Trusts Act 1973* (Qld) protects a trustee from liability arising from a failure to take legal proceedings, it reflects the principle under the general law that trustees are not required, at their own expense, to bring proceedings to recover trust property.¹⁰² However, section 50(2) extends that principle by additionally providing that a trustee is not required to give a notice or apply for an order mentioned in section 50(2)(a), or to take any proceedings in respect of the matters mentioned in section 50(2)(b), 'unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust'.

9.123 The Commission considers that, in exercising his or her powers in relation to reversionary and other interests, a trustee should act with the degree of care, diligence and skill that will apply to the particular trustee under the general statutory duty of care that is recommended in Chapter 6. In its view, the protection given by section 50(2) of the *Trusts Act 1973* (Qld) is too wide, and is inconsistent with the imposition of the new statutory duty of care. Accordingly, the new legislation should not include provisions to the effect of section 50(2) or (3) of the *Trusts Act 1973* (Qld).

VALUATIONS

9.124 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

¹⁰²

See [9.114] above.

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

9.125 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.

9.126 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 confers the power to appropriate any part of the trust property in or towards the satisfaction of a beneficiary's entitlement and provides that, for that purpose, the trustee may 'value the whole or any part of the property in accordance with section 51'.

9.127 The trustee legislation in Western Australia and New Zealand includes a provision in virtually identical terms to section 51.¹⁰³ 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.¹⁰⁴

9.128 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:¹⁰⁵

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.

¹⁰³ *Trustees Act 1962* (WA) s 50; *Trustee Act 1956* (NZ) s 28.

¹⁰⁴ *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).

¹⁰⁵ *Trusts and Settled Land Report* (1971) 42.

The effect of a valuation made by the trustee

Valuations to which section 51(2) applies

9.129 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.

9.130 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.

9.131 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',¹⁰⁶ while the ACT legislation provides for the effect of a valuation made 'honestly'.¹⁰⁷

Relevant valuation 'binding' on beneficiaries

9.132 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'.

9.133 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.¹⁰⁸

9.134 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).¹⁰⁹

9.135 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.

9.136 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,

¹⁰⁶ *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.

¹⁰⁷ *Trustee Act 1925* (ACT) s 52(2).

¹⁰⁸ *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.

¹⁰⁹ *Trustee Act 2000* (UK) c 29, s 1(1) is set out at [6.63] above.

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.

9.137 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 as 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.

9.138 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 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.¹¹⁰

9.139 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*,¹¹¹ 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.¹¹² The Court of Appeal considered that section 50(1) is facilitative, while section 50(2) is protective:¹¹³

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.

9.140 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

¹¹⁰ *Trusts Act 1973* (Qld) s 113 is considered in Chapter 14.

¹¹¹ (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.

¹¹² 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.

¹¹³ (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).

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.

Discussion Paper

9.141 In the Discussion Paper, the Commission observed that, 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 considered 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.¹¹⁴

9.142 The Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to include a provision that deals with the effect of a valuation made under section 51(1) or, alternatively, whether section 51(2) should be omitted. In the event that the trusts legislation continues to include a provision that deals with the effect of a valuation made under section 51(1), the Commission sought submissions on:¹¹⁵

- which valuations the provision should apply to — for example, a valuation made in 'good faith' or in some other specified way; and
- what the effect of the valuation should be.

Consultation

9.143 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law expressed the view that the *Trusts Act 1973* (Qld) should continue to include a provision that deals with the effect of a valuation made under section 51(1).

9.144 The Bar Association of Queensland considered that this provision 'is an effective means to deal with the competition between beneficiaries and prevents contests as to value'.

9.145 The Public Trustee expressed the view that section 51(1) 'has significant merit' and that section 51(2) is an important protective provision, particularly where a trustee undertakes a valuation in circumstances where the cost and expense of engaging a valuer would exceed the value of the property:

In practical terms the mischief to which it is addressed is not just items of significant value where there has been an appropriation but also cases where (particularly in respect of deceased estates) the property to be considered has little or no value.

¹¹⁴ *Trusts Discussion Paper* (2012) [9.119].

¹¹⁵ *Ibid* 371.

The cost and expense of engaging a valuer in respect of household chattels often will exceed the value of them.

There ought be protection as a consequence for trustees in making such determinations as to value.

9.146 However, Professor Lee suggested that section 51 could be replaced with a short provision to the effect that a trustee must employ a qualified valuer 'when it is desirable or necessary to do so for the purposes of the trust'. He also suggested that the legislation should allow a trustee to undertake a valuation personally only if he or she is a qualified valuer:

The notion that a valuation may be made by an unqualified person may perhaps have been justifiable in the case of settled land where the tenant for life might sometimes have valued property the subject of the settlement informally but it is not justifiable in these days when dependence on professional opinion is increasingly regarded as essential.

Effect of the valuation

9.147 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law expressed the view that section 51(2) should continue to apply to a valuation made in 'good faith' and that such a valuation should continue to be binding on the beneficiaries.

9.148 The Bar Association of Queensland commented that:

The effect of the valuation is to bind the beneficiaries as between themselves. There is *ex hypothesi* no wrongful distribution as between the beneficiaries. Negligence can happen, but it is not every case that requires a remedy.

9.149 The legal practitioner commented that he did not see the harm in the effect of section 51(2), as a beneficiary could still apply under section 8 of the Act to review the trustee's decision. In his view, the requirement for good faith is a sufficient protection for the beneficiaries.

9.150 The Public Trustee suggested that section 51(2) could perhaps be amended to refer to a valuation that was undertaken reasonably and in good faith:

To the extent that section 51(2) ... may be problematic — and leave a beneficiary without recourse in circumstances where there has been a demonstrable undervalue or overvalue of an asset, perhaps the requirement might be that the valuation must be undertaken by the trustee reasonably as well as in good faith.

9.151 The Queensland Law Society also addressed the issue of the valuations to which the provision should apply:

The valuation should continue to be binding on the beneficiaries when obtained in good faith unless there is a clear reason why a valuation should not be relied on, or evidence to suggest further valuations should be obtained. In the latter case, the average figure obtained from two or more valuations can then be used.

9.152 As noted above, Professor Lee suggested that section 51 should be replaced with a short provision enabling a trustee to employ a valuer. He referred to the range of circumstances in which trustees must value trust property, and suggested that the Act should only make provision for an appropriation of property, as distinct from a valuation, to be binding on the other beneficiaries.

The Commission's preliminary view

9.153 In the Commission's view, the new legislation should include a provision to the general effect of section 51 of the *Trusts Act 1973* (Qld).

9.154 Trustees should continue to be able to ascertain the value of any trust or other property personally, subject to the requirement that, if they are not personally qualified to ascertain the value of the property, they must consult a qualified person. As noted by the Public Trustee, this is a beneficial feature of section 51 because it enables trustees personally to value property having a very low value, where the costs of engaging a professional valuer would not be justified.

9.155 It is also desirable for the new legislation to continue to provide for the circumstances in which a valuation of trust property is binding on the beneficiaries. However, the circumstances in which a valuation is binding should be expressed more narrowly than is currently the case under section 51(2).

9.156 The Commission considers that, in exercising the power to ascertain and fix the value of any trust or other property, a trustee should act with the degree of care, diligence and skill that will apply to the particular trustee under the statutory duty of care that is recommended in Chapter 6. Consistent with that view, the new legislation should not have the effect that a valuation that is made negligently, or otherwise in breach of a trustee's duties, is binding on the beneficiaries merely because the trustee has acted in good faith.

9.157 Instead, a valuation made by a trustee under the provision should bind the persons beneficially interested under the trust only if the trustee, in fixing the value of the property, has complied with the statutory duty of care.¹¹⁶

AUDIT OF TRUST ACCOUNTS

9.158 One of the duties of trustees is to keep proper accounts.¹¹⁷ Under the general law:¹¹⁸

¹¹⁶ This is similar to the approach that now applies in England: see [9.134] above.

¹¹⁷ *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740. See the discussion of this duty in Chapter 6.

¹¹⁸ 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.

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.

9.159 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.¹¹⁹ 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]¹²⁰ 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,¹²¹ 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)

9.160 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'.¹²² The Act does not deal with the relationship between sections 54(1) and 52 — in particular, whether the power of a 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.

¹¹⁹ 'Public accountant' is defined in s 5(1) of the *Trusts Act 1973* (Qld).

¹²⁰ 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).

¹²¹ *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.

¹²² *Trusts Act 1973* (Qld) s 54(1) is set out at [4.10] above.

9.161 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.

9.162 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.¹²³

9.163 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.¹²⁴ 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.¹²⁵

Discussion Paper

9.164 In the Discussion Paper, the Commission sought submissions on whether, subject to correcting the second reference to 'trustee' in section 52(1) and omitting the redundant reference to the Public Trustee in section 52(3),¹²⁶ the *Trusts Act 1973* (Qld) should continue to include a provision to the effect of section 52 of the Act. It also asked whether the Act should clarify the relationship between sections 52 and 54.¹²⁷

¹²³ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2009) [61.5240].

¹²⁴ *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'.

¹²⁵ *Trusts and Settled Land Report* (1971) 42.

¹²⁶ See nn 120, 121 above.

¹²⁷ *Trusts Discussion Paper* (2012) 373–4.

Consultation

Retention of a provision to the effect of section 52

9.165 The Bar Association of Queensland submitted that a provision to the effect of section 52 should be retained.

9.166 The Public Trustee and Professor Lee expressed the view that section 52(1) and (2) should be retained, but that section 52(3) should be omitted. In that respect, the Public Trustee commented:

Consideration might be given to the omission of 52(3) in its entirety; whilst it is true that the Public Trustee is sufficiently qualified to maintain appropriate accounts sometimes more significant (and sophisticated) trusts require auditing by an external agency.

The trust instrument might demand this action and section 52(3) presently prevents the recovery of the costs of such an audit.

9.167 In relation to section 52(1), Professor Lee suggested that it was not necessary to require the trustee to provide the accountant with the necessary information:

It is the trustee's obvious duty to do that and the accountant could not certify the audit appropriately without having all the relevant information.

9.168 In relation to section 52(2), Professor Lee considered it necessary to continue to provide expressly for the charging of the costs of the audit against capital and income 'because I suspect some trustees pay audit fees exclusively from the income account in an attempt to maintain the capital value of the trust account'. He suggested, instead of the current section 52(2), a provision to the effect that:

Where separate capital and income accounts are maintained the cost of auditing the accounts shall be borne fairly between them.

9.169 However, the Queensland Law Society and a legal practitioner who practises in trusts and succession law considered that the trusts legislation should not continue to include a provision to the effect of section 52.

Clarification of the relationship between sections 52 and 54(1)

9.170 Professor Lee submitted that the reference in section 54(1) of the Act to the 'audit of trust accounts' should be omitted, so that the employment of an agent for the keeping of trust accounts would be governed by section 54(1), but the appointment of a public accountant for the audit of trust accounts would be governed solely by section 52:

I doubt that section 54(1) covers it sufficiently because the section does not require the auditor to be a public accountant. It also says that trustees may employ an agent for the keeping and audit of trust accounts; but if one were to be pedantic one might wish to say for the keeping or audit of trust accounts. That leads me to suggest that the words 'and audit' in section 54(1) should be omitted, so as to justify a separate provision about audits to ensure that

auditors, when employed, are public accountants. It is the auditing rather than the keeping that requires professionals.

9.171 However, the Bar Association of Queensland and the Public Trustee did not consider it necessary to clarify the relationship between sections 52 and 54. The Public Trustee commented:

In some senses section 52 should be recognised explicitly as an extension of the more general power in section 54 — an auditor is not an agent for the trustee when providing an opinion as to the state of the accounts of a trust.

The Commission's preliminary view

Retention of a provision to the general effect of section 52

9.172 Where the trust accounts are maintained by an agent or employee of the trustee, the trustee may wish to have the accounts audited to ensure that the trustee is complying with his or her duty to maintain proper accounts and otherwise to ensure that the trust property is accounted for.¹²⁸ In the Commission's view, the new legislation should continue to include a provision to the general effect of section 52 of the *Trusts Act 1973* (Qld), except that:

- the provision based on section 52(1) of the Act should refer to information that the public accountant (rather than the trustee) may require; and
- the provision based on section 52(3) of the Act should omit the redundant reference to the Public Trustee.

Clarification of the relationship between sections 52 and 54(1)

9.173 In Chapter 4, the Commission has recommended that the new legislation should include a provision to the effect of section 54(1) of the *Trusts Act 1973* (Qld), which confers a general power to employ agents. As noted above, section 54(1) currently refers to the employment of an agent for 'the keeping *and audit* of trust accounts'.

9.174 An auditor who is appointed to audit trust accounts exercises an independent function, and does not act at the direction of the trustees. Accordingly, the Commission is of the view that the appointment of an auditor should be governed solely by the provision based on section 52 of the Act, and that the provision based on section 54(1) should omit the current reference to the employment of an auditor. This change reflects the proper characterisation of an auditor's role and avoids the current overlap between sections 52 and 54(1) of the Act.

¹²⁸

Public Trustee Act 1978 (Qld) s 60 makes separate provision for any person to make a written request to the Public Trustee for an investigation and audit of the condition and accounts of a trust, and for the Public Trustee to appoint an auditor to carry out such an investigation and audit.

TRUSTEE MAY SUE HIMSELF OR HERSELF IN A DIFFERENT CAPACITY

9.175 Section 59 of the *Trusts Act 1973* (Qld) provides that a trustee may sue himself or herself in a different capacity. It provides:

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.

9.176 The provision is procedural only.¹²⁹ It provides an exception to the general rule that a person may not be both plaintiff and defendant in the same action.¹³⁰ The Commission explained in its 1971 Report that:¹³¹

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.

9.177 Similar provisions are included in the trustee legislation of Western Australia and New Zealand.¹³²

Discussion Paper

9.178 In the Discussion Paper, the Commission outlined the effect of section 59 of the *Trusts Act 1973* (Qld), but did not raise any particular issues about that provision.¹³³

¹²⁹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 May 2012) [1.6410].

¹³⁰ 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.

¹³¹ *Trusts and Settled Land Report* (1971) 46.

¹³² *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.

¹³³ *Trusts Discussion Paper* (2012) [9.288] ff.

Consultation

9.179 None of the respondents to the Discussion Paper commented on section 59 or raised any concerns about that provision.

The Commission's preliminary view

9.180 In the Commission's view, section 59 of the *Trusts Act 1973* (Qld) is a useful procedural provision, and the new legislation should include a provision in similar terms.

MISCELLANEOUS POWERS

Discussion Paper

9.181 In the Discussion Paper, the Commission outlined the effect of the following provisions of the *Trusts Act 1973* (Qld), but did not raise any particular issues about them:

- section 33(1)(j), which provides that a trustee may 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;¹³⁴ and
- section 33(1)(n), which 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'.¹³⁵

Consultation

9.182 None of the respondents to the Discussion Paper commented on these provisions or raised any concerns about them.

The Commission's preliminary view

9.183 In the Commission's view, section 33(1)(j) and (n) still serves a purpose, and the new legislation should confer similar powers.

134 Ibid [9.281] ff.

135 Ibid [9.284] ff.

PRELIMINARY RECOMMENDATIONS***Receipts***

- 9-1 The new legislation should include a provision, based on section 43 of the *Trusts Act 1973* (Qld), to deal with the effect of a receipt given by, or on behalf of, a trustee or trustees.
- 9-2 The provision based on section 54(1) of the *Trusts Act 1973* (Qld) should provide specifically for trustees to appoint another person, or one of their number, to give receipts, but should not require the appointment to be made in writing.

Power to compound liabilities

- 9-3 The new legislation should not include a stand-alone provision to the effect of section 44 of the *Trusts Act 1973* (Qld), but should instead state the powers currently conferred by that section more briefly as examples of the powers conferred by the general property power.
- 9-4 The new legislation should not preserve the protection currently given by section 44 of the *Trusts Act 1973* (Qld) to a trustee who acts in good faith.

Power to insure trust property

- 9-5 The new legislation should not include a stand-alone provision to the effect of section 47 of the *Trusts Act 1973* (Qld), but should instead state the power currently conferred by section 47(1) as an example of the powers conferred by the general property power.

Application of insurance money

- 9-6 The new legislation should include a provision to the effect of section 48 of the *Trusts Act 1973* (Qld), except that the new provision should:
- (a) allow for money receivable under an insurance policy to constitute trust income where that would be consistent with the purpose for which the insurance is taken out; and
 - (b) not include a provision to the effect of section 48(4).

Reversionary and other interests

- 9-7 The new legislation should not include a provision to the effect of section 50 of the *Trusts Act 1973* (Qld).

Valuations

- 9-8 The new legislation should include a provision to the general effect of section 51 of the *Trusts Act 1973* (Qld). However, a valuation made by a trustee under the provision should bind the persons beneficially interested under the trust only if the trustee has complied with the statutory duty of care in fixing the value of the property.

Audit of trust accounts

- 9-9 The new legislation should include a provision to the effect of section 52 of the *Trusts Act 1973* (Qld), except that:
- (a) the provision based on section 52(1) of the Act should refer to information that the public accountant (rather than the trustee) may require; and
 - (b) the provision based on section 52(3) of the Act should omit the redundant reference to the Public Trustee.
- 9-10 The provision based on section 54(1) of the *Trusts Act 1973* (Qld) should not refer to the employment of an agent for the 'audit of trust accounts'.

Trustee may sue himself or herself in a different capacity

- 9-11 The new legislation should include a provision to the general effect of section 59 of the *Trusts Act 1973* (Qld).

Miscellaneous powers

- 9-12 The new legislation should confer similar powers to the powers currently conferred by section 33(1)(j) and (n) of the *Trusts Act 1973* (Qld).

Chapter 10

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INTRODUCTION

10.1 This chapter examines the provisions of Parts 4, 5 and 6 of the *Trusts Act 1973* (Qld) that deal with the following matters:

- the powers to apply income and capital for the maintenance, education, advancement or benefit of a beneficiary (sections 61–63);
- protective trusts (section 64);
- the powers to deliver chattels to life tenants and infants (sections 73–74); and
- the power to appropriate trust property to beneficiaries (section 33(1)(l)–(m), (2)–(5)).

APPLICATION OF INCOME FOR THE MAINTENANCE AND ADVANCEMENT OF A BENEFICIARY

10.2 The court has always had an inherent jurisdiction to make an order authorising trustees to apply income (or capital)¹ for the maintenance of a beneficiary who is a minor.² 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.³ 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.⁴

10.3 In England, a statutory power enabling trustees to apply income for the maintenance of a minor was first introduced by *Lord Cranworth's Act* in 1860.⁵ That provision was ultimately replaced by section 31 of the *Trustee Act 1925*, which remains in force today.

10.4 In Queensland, the power to apply income for the maintenance, education, advancement or benefit of certain beneficiaries is conferred by section 61 of the *Trusts Act 1973* (Qld). In the Discussion Paper, the Commission noted that section 61 deals with inherently complex matters. It made the general observation, however, that, apart from any other changes that might be made to the provision, it would benefit from being redrafted in a more modern style. In particular, the Commission noted that section 61(2) and (4) are very dense provisions and that section 61(2) still refers to 'entailed interests', even though those interests were abolished with the introduction of the *Property Law Act 1974* (Qld). It also noted that section 61 refers to an 'infant', whereas legislation would now refer to a 'minor'.⁶

¹ *Re Lawrence* (1908) 25 WN (NSW) 79.

² JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2057].

³ *Parker v Dowling* (1916) 16 SR (NSW) 234.

⁴ *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); *Administration of Estates Report* (2009) vol 2, [18.127].

⁵ *Trustees, Mortgagees, etc Act 1860*, 23 & 24 Vict, c 145, s 26.

⁶ *Trusts Discussion Paper* (2012) [10.6].

Minor beneficiaries: Application of income

10.5 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' — that is, for a beneficiary who is under 18 years of age.⁷ It provides that the trustee may 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.⁸

10.6 The power conferred by section 61(1) may be exercised 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 education⁹ but, in the case of a contingent interest, is subject to the limitations contained in section 61(4).

10.7 In the ACT and New South Wales, the equivalent provisions are framed in slightly broader terms. Section 43(1) of the *Trustee Act 1925* (NSW), which is in virtually the same terms as the ACT provision, applies where any property is held on trust for an infant 'for any interest whatsoever, whether vested or contingent, and whether absolute or liable to be divested'. The express reference to an interest that is 'liable to be divested' overcomes the strictness of earlier decisions that held, in relation to provisions that referred to an interest held 'either absolutely or contingently', that the provisions applied to an absolute interest and a contingent interest, but not to an interest that was absolute, but subject to defeasance.¹⁰

10.8 Further, the ACT and New South Wales provisions enable the income to be paid not only to a parent or guardian of a minor beneficiary, but also to the person with whom a minor beneficiary 'is for the time being residing'.

Discussion Paper

10.9 In the Discussion Paper, the Commission sought submissions on whether section 61(1) of the Act should be amended:¹¹

- to apply where property is held on trust for any interest, 'whether vested or contingent, and whether absolute or liable to be divested'; and

⁷ See *Trusts Discussion Paper* (2012) [10.7], nn 11, 12.

⁸ *Trusts Act 1973* (Qld) s 61. See also *Trustee Act 1925* (ACT) s 43; *Trustee Act 1925* (NSW) ss 43–43A; *Trustee Act* (NT) s 24; *Trustee Act 1936* (SA) s 33; *Trustee Act 1958* (Vic) s 37; *Trustees Act 1962* (WA) s 58. Although there is no equivalent in the *Trustee Act 1898* (Tas), the Public Trustee has power to apply income or capital for the maintenance of an infant beneficiary: *Public Trustee Act 1930* (Tas) s 34.

⁹ 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.

¹⁰ *Re Buckley's Trusts* (1883) 22 Ch D 583, 585 (Fry J); *Parker v Dowling* (1916) 16 SR (NSW) 234, 238 (Harvey J).

¹¹ *Trusts Discussion Paper* (2012) 427–8.

- 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.

Consultation

Interests to which the provision applies

10.10 The Queensland Law Society, the Public Trustee, the Financial Services Council, Professor Lee and a legal practitioner who practises in trusts and succession law submitted that section 61(1) should be amended to apply where property is held on trust for any interest, 'whether vested or contingent, and whether absolute or liable to be divested'.

10.11 The Queensland Law Society's support for such a change was subject to the qualification that the trustee would not be liable for any loss if the property was divested from the minor beneficiary. In commenting on section 61(1), the Queensland Law Society also suggested that the 'difficulty is generally there is no clear guidance as to what constitutes a valid trust'. In that respect, it suggested that the legislation should set out the essential elements of a valid trust.¹²

Payment to persons other than a parent or guardian

10.12 The Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law submitted that section 61 should be amended 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.

10.13 The Public Trustee considered that such an amendment had merit, noting that he is appointed as trustee of 'many hundreds of funds held on behalf of minors', and has seen instances where the minor beneficiary is residing with a person 'other than a parent or guardian strictly defined'.

10.14 The Queensland Law Society also supported such an amendment, provided that the person with whom the minor is residing is an adult.

10.15 However, the Financial Services Council was concerned that such a change might permit a payment to be made to a person who was not in a protective relationship with the minor, and suggested that any provision should therefore be restricted to the situation where at least one trustee is the Public Trustee or a trustee company.

10.16 The Bar Association of Queensland also expressed concerns about making provision for income to be paid to a person with whom a minor beneficiary is residing:

¹²

See generally *Trusts Discussion Paper* (2012) [3.17] for a discussion of the 'three certainties' that must be satisfied for an express trust to be valid: certainty of intention to create a trust, certainty of subject matter, and certainty of object (that is, that the beneficiaries are ascertainable or that the trust is for a recognised (usually charitable) purpose).

The problem with expanding the range of people is that it raises the issue of whether the other persons are liable to account for the surplus and otherwise for all items of expenditure. See *Countess of Bective v FCT*,¹³ where Dixon J outlines the law relating to payments for the benefit of minors to their parents or guardians. See also in *Re Pauling*,¹⁴ where the issue will be whether the payment is truly for the minor if made to another person. 'Residing' does not connote 'loco parentis' and so radically alters the section. (notes added)

The Commission's preliminary view

Interests to which the provision applies

10.17 The new legislation should include a provision to the general effect of section 61(1) of the *Trusts Act 1973* (Qld). However, to remove any doubt about the application of that provision where the minor's interest in the trust property is vested, but is liable to be divested, the provision should employ the wider language used in section 43(1) of the *Trustee Act 1925* (NSW). The new provision should therefore be expressed to apply where property is held on trust for a minor 'for any interest, whether vested or contingent, and whether absolute or liable to be divested'.

Payment to persons other than a parent or guardian

10.18 The Commission acknowledges that it is not unusual for a child to reside with a family member who is not the child's parent or formal guardian. For that reason, the Commission generally favours enlarging the range of persons to whom a trustee may pay the trust income.

10.19 However, the Commission is concerned that the reference in section 43(1) of the *Trustee Act 1925* (NSW) to the person with whom a minor 'is for the time being residing' might be too wide, since it could encompass persons who do not have a continuing, and responsible, role in the minor's life. Accordingly, the Commission recommends that the new provision should instead authorise the trustee to apply the income to a parent or guardian of a minor, or to a person who exercises parental responsibility in relation to the minor.

The essential elements of a valid trust

10.20 The Commission notes the suggestion made by the Queensland Law Society that the legislation should also set out the essential elements of a valid trust. In the Commission's view, the inclusion in the legislation of a very general statement that a valid trust requires certainty of intention to create a trust, certainty of subject matter, and certainty of object would be unlikely to be of assistance in those instances where there is a genuine doubt as to whether one of those certainties is present. On the other hand, a much more detailed articulation of those requirements would effectively involve codifying an important aspect of the law of trusts. In doing so, it could unsettle the existing law and inhibit its further development. For those reasons, the Commission does not, at this stage, propose

¹³ (1932) 47 CLR 417.

¹⁴ *Re Pauling's Settlement Trusts* [1962] 1 WLR 86; *Re Pauling's Settlement Trusts* [1964] 1 Ch 303 (CA).

to include in the new legislation a statement of the essential elements of a valid trust.

Minor beneficiaries: Accumulation of the residue of the income

10.21 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. Section 61(2) provides for the accumulation and holding of the residue of the income. It provides:

- (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.

10.22 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. Similar provision is made in most of the other Australian jurisdictions.¹⁵

¹⁵

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).

10.23 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.¹⁶ 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.

10.24 However, unlike section 61(2), the equivalent provisions in the ACT, New South Wales, the Northern Territory and South Australia do not include any reference to the marriage of the beneficiary before attaining his or her majority.¹⁷

Discussion Paper

10.25 In the Discussion Paper, the Commission sought submissions on whether, apart from modernising the drafting of section 61(2), including by omitting the reference to 'entailed interests', there are any particular improvements that could be made to the provision.¹⁸

Consultation

10.26 The Queensland Law Society, the Bar Association of Queensland, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that section 61(2) should be amended to omit the reference to a beneficiary who marries before attaining the age of majority. Professor Lee commented that this would be a rare event, and that omitting the reference would simplify the draft considerably.

10.27 However, apart from omitting the reference to entailed interests, the Public Trustee did not suggest any particular amendments to the provision. He noted that 'the reference to marriage in section 61 reflects a position that in some limited circumstances a minor can marry and likely the desirable consequence that would flow is provided for in section 61(2)'.

The Commission's preliminary view

10.28 The new legislation should include a provision to the general effect of section 61(2) of the *Trusts Act 1973* (Qld). However, the new provision should omit the reference to a minor who marries before attaining the age of majority, as well as the reference to entailed interests, which currently appears in section 61(2)(a)(ii). Apart from those matters, the new provision should generally be expressed in a more modern and simplified drafting style.

¹⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 24 January 2013) [12.12300]. See also GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.115].

¹⁷ *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).

¹⁸ *Trusts Discussion Paper* (2012) 429.

Adult beneficiaries

10.29 Section 61(3) of the *Trusts Act 1973* (Qld) deals with the application of income where property is held on trust for an adult beneficiary who has a contingent interest in the property. It provides that the trustee may 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'. The exercise of this power is subject to section 61(4), which applies generally to contingent interests.

10.30 Where, for example, a will leaves property 'to A upon attaining the age of 25', but provides that, 'if A does not attain that age, the property is left to B', A's interest in the property is contingent on turning 25. Subject to section 61(4), section 61(3) enables the trustee, during the period before A turns 25, to apply the income for A's maintenance, education, advancement or benefit.

10.31 Similarly, 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)'.¹⁹

10.32 The authors of *Jacobs' Law of Trusts in Australia* have commented, in relation to the Queensland provision, that:²⁰

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.

Discussion Paper

10.33 In the Discussion Paper, the Commission sought submissions on 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.²¹

Consultation

10.34 The Queensland Law Society and a legal practitioner who practises in trusts and succession law expressed the view that a trustee's power under section 61(3) should apply to both vested and contingent interests, and that a trustee should continue to have a discretion as to the payment of income.

10.35 The Public Trustee considered that 'to remove any doubt certainly the subsection should apply to vested as well as contingent interests'. He also considered that there 'may be some merit in amending section 61(3) [to provide]

¹⁹ *Trustee Act 1936* (SA) s 33(1)(c)(ii).

²⁰ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2065].

²¹ *Trusts Discussion Paper* (2012) 431.

discretion at the suit of the trustee to apply income not only to the adult, contingent beneficiary but also to his or her spouse or child'.

10.36 The Financial Services Council considered that, in cases where there is not a prior life or other interest, the trustee should have similar powers as for minor beneficiaries.

10.37 Professor Lee, on the other hand, suggested that the legislation should provide that, where property is held on trust for a beneficiary of full age who has a contingent interest in that property, 'the trustees shall pay the income of that property unless given elsewhere to that beneficiary'.

10.38 The Bar Association of Queensland submitted that it is unnecessary to amend section 61(3).

The Commission's preliminary view

10.39 In the Commission's view, the new legislation should include a provision to the effect of section 61(3) of the *Trusts Act 1973* (Qld). The Commission does not consider it necessary to extend the provision so as to apply to vested interests. An adult whose interest in the trust property is vested in both interest and possession will be entitled to call for a transfer of the trust property. If, on the other hand, the adult's interest is vested in interest, but not in possession, the person with the interest in possession will already have an existing entitlement to the income of the property.

Contingent interests

10.40 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. It provides:

- (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. (emphasis added)

Contingent interests that carry the intermediate income

10.41 Generally, the effect of section 61(4) is that, in the case of a contingent interest, the power of maintenance and advancement conferred by section 61 applies only if the 'trust carries the intermediate income of the property', being the income generated between the time the trust comes into effect and the time when

the beneficiary's interest ultimately vests.²² The power does not apply if, on the happening of the contingent event, the beneficiary would only be entitled to the legacy without interest.²³

10.42 However, since the enactment of the *Succession Act 1981* (Qld), it has been the case that a contingent disposition of property made by will carries any intermediate income that has not been disposed of by the will.²⁴ That Act has, therefore, enlarged the circumstances in which the power to pay or apply income under section 61 will be exercisable.

Future or contingent legacies by the parent of, or person in loco parentis to, the beneficiary

10.43 More particularly, section 61(4) provides that section 61 also applies 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. This device for describing when the section applies raises quite complex and technical issues in relation to legacies in favour of minors.

10.44 Generally, where a legacy is payable at a future date, interest is payable on the legacy from the date on which it becomes payable.²⁵ However, that rule is subject to several exceptions.²⁶ 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.²⁷ The rationale for the rule is to create a provision for the minor's maintenance.²⁸ 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.²⁹

²² Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) 151. See also at 152.

²³ *Re Dickson* (1885) 29 Ch D 331.

²⁴ *Succession Act 1981* (Qld) s 33H, which replaced s 62 in the same terms, provides:

33H Income of contingent, future or deferred disposition of property

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 *Donovan v Needham* (1846) 9 Beav 164, 167; 50 ER 306, 307 (Lord Langdale MR).

²⁶ See *Administration of Estates Report* (2009) vol 2, [18.125] ff.

²⁷ *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.

²⁸ *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).

²⁹ *Donovan v Needham* (1846) 9 Beav 164, 167; 50 ER 306, 307 (Lord Langdale MR).

10.45 The trustee legislation of Victoria and Western Australia includes a similar provision to section 61(4).³⁰

10.46 However, 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.

10.47 Section 43(4) of the *Trustee Act 1925* (ACT) provides for the minor's interest to carry the intermediate income in particular circumstances, including where it has not be expressly or specifically disposed of:³¹

- (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)

10.48 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)

Discussion Paper

10.49 In the Discussion Paper, the Commission suggested that section 43(4) of the *Trustee Act 1925* (ACT) and section 33(3) of the *Trustee Act 1936* (SA) would arguably provide a simpler way to deal with the issue of contingent interests and intermediate income.³² The Commission therefore sought submissions on whether

³⁰ *Trustee Act 1958* (Vic) s 37(3); *Trustees Act 1962* (WA) s 58(3).

³¹ *Trustee Act 1925* (NSW) s 43(3) is in similar terms.

³² *Trusts Discussion Paper* (2012) [10.36]. The Commission also suggested that the different approach adopted by the Western Australian and South Australian provisions in relation to contingent interests and the application of intermediate income would be more consistent with the recommendation made by the National Committee for Uniform Succession Laws not to include a provision to the effect of s 52(1A) of the *Succession Act 1981* (Qld) in the model administration of estates legislation.

section 61(4) of the *Trusts Act 1973* (Qld) should be replaced with a provision to the effect of section 43(4) of the *Trustee Act 1925* (ACT).³³

Consultation

10.50 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law submitted that section 61(4) of the *Trusts Act 1973* (Qld) should be replaced with a provision to the effect of section 43(4) of the *Trustee Act 1925* (ACT). The Queensland Law Society observed that 'section 43(4) of the *Trustee Act 1925* (ACT) is more user friendly'. The Bar Association of Queensland expressed a similar view.

10.51 The Public Trustee considered that 'intermediate income should generally fall to the minor where it is not otherwise explicitly dealt with in the trust instrument'.

10.52 Professor Lee commented that section 61(4) is 'very complicated but if reference to future or contingent legacies by a parent of the minor is omitted it all becomes far easier to understand and to draft'. He suggested that the provision was 'redolent of old system conveyancing' and doubted whether parents would enter into these kinds of settlements today. He suggested, in substitution for section 61(4), a provision that would be generally consistent with section 33H of the *Succession Act 1981* (Qld):

- (a) This section shall apply in the case of a contingent interest only if the trust carries the intermediate income of the property.
- (b) A contingent interest carries the intermediate income of the property unless and until the income of the property is given to an ascertainable person.

The Commission's preliminary view

10.53 The new legislation should continue to provide for the circumstances in which the power to apply income for the maintenance and advancement of a beneficiary may be exercised in the case of a contingent interest. However, instead of a provision to the effect of section 61(4), the new provision should be framed more generally so as to ensure that the beneficiary's interest in the trust property carries the intermediate income if it is not otherwise specifically disposed of. Apart from simplifying the provision, this will also ensure that it is consistent with the principles underlying section 33H of the *Succession Act 1981* (Qld).

Vested annuities

10.54 Section 61(5) of the *Trusts Act 1973* (Qld) provides that section 61 applies to vested annuities in like manner as if the annuity were the income of property held by a trustee to pay the income thereof to the annuitant, except that accumulations

³³ *Trusts Discussion Paper* (2012) 434.

made during the infancy of the annuitant are to be held in trust for the annuitant or the annuitant's personal representative absolutely.³⁴

Discussion Paper

10.55 In the Discussion Paper, the Commission outlined the effect of section 61(5), but did not seek submissions on any particular aspect of that provision.³⁵

Consultation

10.56 Professor Lee submitted that section 61(5) should be retained.

The Commission's preliminary view

10.57 In the Commission's view, the new legislation should include a provision to the effect of section 61(5) of the *Trusts Act 1973* (Qld) to confer a power of maintenance and advancement where a beneficiary is entitled to a vested annuity.

The effect of a contrary intention

10.58 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.³⁶ However, section 61(7) creates an exception in relation to section 61(2), thus making the requirement to accumulate income, and to hold accumulations of income in particular ways, subject to a contrary intention in the trust instrument.³⁷

10.59 In the other jurisdictions, the statutory power to apply income for maintenance (and not just the power that applies under the counterpart to section 61(2)) applies only if and so far as a contrary intention is not expressed in the trust instrument.³⁸

Discussion Paper

10.60 In the Discussion Paper, the Commission sought submissions on whether, apart from section 61(2) of the *Trusts Act 1973* (Qld), section 61 should continue to apply whether or not a contrary intention is expressed in the trust instrument.³⁹

³⁴ Similar provision is made in most of the other Australian jurisdictions: *Trustee Act 1925* (ACT) s 43(10); *Trustee Act 1925* (NSW) s 43(9); *Trustee Act 1936* (SA) s 33(7); *Trustee Act 1958* (Vic) s 37(4); *Trustees Act 1962* (WA) s 58(4).

³⁵ *Trusts Discussion Paper* (2012) [10.37].

³⁶ *Trusts Act 1973* (Qld) s 60.

³⁷ *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)'.

³⁸ *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.

³⁹ *Trusts Discussion Paper* (2012) 435.

Consultation

10.61 The Queensland Law Society, the Public Trustee and a legal practitioner who practises in trusts and succession law expressed the view that, apart from section 61(2) of the *Trusts Act 1973* (Qld), section 61 should continue to apply whether or not a contrary intention is expressed in the trust instrument. The Public Trustee noted that ‘the objectives of section 61 are important and deal with minor beneficiaries’.

10.62 Professor Lee expressed the view that section 61, including section 61(2), should apply whether or not a contrary intention is expressed in the trust instrument.

10.63 However, the Bar Association of Queensland considered that ‘section 61 should only apply where there is no contrary intention expressed in the trust instrument’. It considered that ‘this eliminates the need for the exception and gives the creator of the trust greater flexibility’.

The Commission’s preliminary view

10.64 The Commission considers that it is extremely desirable for beneficiaries, especially minor beneficiaries, that trustees should have the power conferred by section 61 of the *Trusts Act 1973* (Qld). For that reason, the Commission is of the view that the provision of the new legislation that is based on section 61 should generally apply whether or not a contrary intention is expressed in the trust instrument. The new legislation should, however, preserve the current exception that applies in relation to section 61(2). Accordingly, if the trust instrument directs how the accumulations of the residue of the income are to be held, that direction should continue to prevail over the default provisions based on section 61(2).

APPLICATION OF CAPITAL FOR THE MAINTENANCE AND ADVANCEMENT OF A BENEFICIARY

10.65 A statutory power to pay or apply capital for ‘the advancement or benefit’ of a beneficiary was first included in the English *Trustee Act 1925*. Section 32 of that Act was based on the form of advancement clause commonly included in trust instruments, which was designed to enable trustees:⁴⁰

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.

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Pilkington v Inland Revenue Commissioners [1964] AC 612, 633 (Viscount Radcliffe; Lords Reid, Jenkins, Hodson and Devlin agreeing).

10.66 In Queensland, a statutory power of advancement is conferred by section 62 of the *Trusts Act 1973* (Qld). That section 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.

10.67 A statutory power to apply capital for the advancement of a beneficiary is also included in the trustee legislation of the other Australian jurisdictions and New Zealand.⁴¹

10.68 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.⁴²

10.69 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'.⁴³

10.70 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 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.⁴⁴ However, if another person is entitled to any prior life or other interest in the trust property, the trustee can apply the capital only if that person consents in writing or if the court so orders.⁴⁵

Monetary limit

10.71 Section 62(1) of the *Trusts Act 1973* (Qld) imposes a limit on the amount that may be applied of \$2000 or one-half of the capital, whichever is the greater.⁴⁶ In most cases, the effective limit will be one-half of the capital. The reference to

⁴¹ *Trustee Act 1925* (ACT) s 44; *Trustee Act 1925* (NSW) s 44; *Trustee Act* (NT) s 24A; *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.

⁴² [1964] AC 612, 634–5 (Viscount Radcliffe; Lords Reid, Jenkins, Hodson and Devlin agreeing).

⁴³ *Roper-Curzon v Roper-Curzon* (1871) LR 11 Eq 452, 453 (Lord Romilly MR).

⁴⁴ *Trusts Act 1973* (Qld) s 62(2)–(3).

⁴⁵ *Trusts Act 1973* (Qld) s 62(5). However, the consent of any person interested under a discretionary trust is not required: *Re Beckett's Settlement* [1940] Ch 279.

⁴⁶ The same limitation applies in the Northern Territory, Victoria and Western Australia: *Trustee Act* (NT) s 24A(1); *Trustee Act 1958* (Vic) s 38(1); *Trustees Act 1962* (WA) s 59(a). As in Queensland, there is provision in the Northern Territory and Victoria for a trustee to pay or apply a greater amount with the consent of the court.

'\$2000' would be relevant as the 'cap' only if the beneficiary's share was less than \$4000. The reference to that amount reflects the age of the provision. When it was introduced in 1973, the inclusion of that specific amount would in many cases have enlarged the amount that could be applied.

10.72 Section 62(1) also allows a larger amount than one-half of the capital to be applied with the consent of the court.

10.73 In the ACT, New South Wales, South Australia and Tasmania, the application of capital must not exceed one-half of the value of the person's share in the trust property.⁴⁷ In New South Wales, the power is subject to the further restriction that, if a beneficiary is a minor, the trustee cannot exercise the power to apply capital if the beneficiary's share of the trust property exceeds \$4000.⁴⁸ In that case, the trustees would be limited to their power to apply income.

10.74 In New Zealand, if the value of that share or interest exceeds \$15 000, the total amount paid or applied must not exceed half of that person's interest in the trust property. If the value is \$15 000 or less, the amount must not exceed \$7500.⁴⁹ The Law Commission of New Zealand has recently made the preliminary proposal that the current monetary limit should be removed.⁵⁰

10.75 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.⁵¹

Discussion Paper

10.76 In the Discussion Paper, the Commission sought submissions on whether section 62 of the *Trusts Act 1973* (Qld) should continue to provide a limit on the amount that may be advanced and, if so, how that limit should be expressed.⁵²

Consultation

10.77 A legal practitioner who practises in trusts and succession law considered that the legislation should impose a limit of half the beneficiary's share.

10.78 However, the Public Trustee and the Bar Association of Queensland both favoured a limit framed in terms of a specified monetary amount or half the estate, whichever is the greater. The Public Trustee commented that a limit that is framed

⁴⁷ *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).

⁴⁸ *Trustee Act 1925* (NSW) s 44(1A).

⁴⁹ *Trustee Act 1956* (NZ) s 41(a), which also permits the advancement of a greater amount with the consent of the court.

⁵⁰ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 80 (Proposal P13(b)).

⁵¹ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [10.26]–[10.28].

⁵² *Trusts Discussion Paper* (2012) 439.

in this way is of assistance for modest trusts, and suggested that an amount of, say, \$10 000 or \$15 000 would seem appropriate as the monetary component of that limit.

10.79 The Bar Association of Queensland observed that it is difficult to set a limit that is appropriate for all trusts, but suggested that the limit of \$2000 in the current provision might be increased to \$100 000:

Assuming a limit is to be maintained, it is difficult to envision one that takes account of all circumstances. For example, where the amount of capital is small, it may be appropriate to permit the trustee to advance it all (where appropriate) without the need for the intervention of the Court. In the converse, where there is a large capital sum, advancing more than one-half may not be prudent. Therefore, it would be appropriate to maintain a cap on the advancement but to increase the current limit of \$2,000 to (say) \$100,000.

10.80 In contrast, the Queensland Law Society and Professor Lee considered that the legislation should not impose any limit on the amount of capital that may be advanced.

The Commission's preliminary view

10.81 In the case of a smaller trust, a beneficiary might be most advantaged by having the whole of the capital able to be applied for his or her maintenance and advancement. However, in a larger trust, a power that is unlimited in terms of the amount that may be advanced would confer a very significant power, especially given the breadth of the expression 'maintenance, education, advancement or benefit'.

10.82 The Commission is, therefore, of the view that the new legislation should continue to impose a limit on the amount of the capital that may be applied for a beneficiary's maintenance, education, advancement or benefit. It is also of the view that the limit should continue to be framed in terms of a specific amount or half the capital, whichever is the greater.

10.83 However, instead of the current reference in section 62 of the *Trusts Act 1973* (Qld) to an amount of not more than \$2000 or half the capital, whichever is the greater, the new legislation should impose a limit of \$100 000 or half the capital, whichever is the greater. The advantage of including the specific amount of \$100 000, and not simply providing a limit of half the capital, is that it allows a greater amount to be applied in the case of a smaller trust. For example, if a trust fund has a value of \$50 000, the Commission's recommendation would allow the trustees to apply the whole of the capital. However, if the limit were expressed as 'half the capital', the trustees would be restricted to applying \$25 000.

The effect of a contrary intention

10.84 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.⁵³ Accordingly, a

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Trusts Act 1973 (Qld) s 60.

trust instrument cannot exclude a trustee's power to apply capital of \$2000 or half the capital, whichever is the greater, in accordance with section 62.

10.85 However, the section does not prevent a trustee from applying a greater amount of capital for that purpose if authorised by the trust instrument. Section 4(2) of the Act provides that nothing in the Act precludes a settlor from conferring on a trustee 'any powers additional to or larger than those conferred by this Act'. Section 4(4) further provides that the powers conferred on a trustee by or under the Act, which would include the power under section 62, 'are in addition to the powers given by ... the instrument (if any) creating the trust'.

10.86 In the other Australian jurisdictions, New Zealand and England, the statutory power to apply capital for advancement is subject to a contrary intention in the trust instrument.⁵⁴ These jurisdictions give effect to a settlor's wishes as to whether, or the circumstances in which, an advance of capital may be made.

10.87 In jurisdictions where the statutory power of advancement can be excluded, there is the potential for uncertainty where the trust instrument confers a power in more limited terms than the legislation. Ford and Lee note that careful drafting is required to avoid uncertainty about whether the statutory power has been excluded or modified.⁵⁵

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; ... per Lord Evershed MR.

Discussion Paper

10.88 In the Discussion Paper, the Commission sought submissions on whether section 62 of the *Trusts Act 1973* (Qld) should continue to apply whether or not a contrary intention is expressed in the trust instrument.⁵⁶

⁵⁴ *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 1898* (Tas) ss 29, 64(2); *Trustee Act 1958* (Vic) ss 2(3), 38; *Trustees Act 1962* (WA) ss 5(2)–(3), 59; *Trustee Act 1956* (NZ) ss 2(4)–(5)(a), 41; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, ss 32, 69(2). Under the Tasmanian provision, the statutory power may not be exercised if the trust instrument 'expressly forbids' the trustee to exercise the power.

⁵⁵ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 25 January 2013) [12.12550].

⁵⁶ *Trusts Discussion Paper* (2012) 439.

Consultation

10.89 The Queensland Law Society, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that section 62 should continue to apply whether or not a contrary intention is expressed in the trust instrument. Professor Lee commented that this power 'has always been broadly construed even against the trust instrument' and that there is 'no case for providing that it should be subject to the terms of the trust instrument'.

10.90 However, the Bar Association of Queensland considered that section 62 should not apply if there is a contrary intention in the trust instrument as it would then give effect to the settlor's wishes.

The Commission's preliminary view

10.91 In the Commission's view, the new legislation should continue to provide that the power to apply capital for the maintenance, education, advancement or benefit of a beneficiary applies whether or not a contrary intention is expressed in the trust instrument. As with the power to apply income for this purpose, the Commission considers that it is extremely desirable for beneficiaries that trustees should have this power.

10.92 In addition, by providing that the statutory power is not affected by a contrary intention in the trust instrument, the Queensland provision avoids the uncertainty that has arisen in other jurisdictions where the conferral of a specific power of advancement in the trust instrument has been held to limit the statutory power.⁵⁷

CONDITIONAL ADVANCES OF INCOME AND CAPITAL

10.93 Section 63 of the *Trusts Act 1973* (Qld) authorises trustees, when exercising their powers of maintenance and advancement under section 61 or 62 of the Act, to impose conditions, 'whether as to repayment, payment of interest, giving security, or otherwise' and, subsequently, to waive the condition or release any obligation undertaken or any security given by reason of the condition. It was based on the similar provisions in Western Australia and New Zealand.⁵⁸

10.94 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.

10.95 Section 63(3) further clarifies that a trustee is not under an 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.

⁵⁷ See [10.87] above.

⁵⁸ *Trusts and Settled Land Report* (1971) 48. See *Trustees Act 1962* (WA) s 60; *Trustee Act 1956* (NZ) s 41A.

10.96 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.

10.97 It has been suggested that the inclusion of a statutory power to impose conditions could prevent considerable loss of sums advanced.⁵⁹

As the law stands, *In re Pauling's Settlement Trusts*⁶⁰ underlines that if moneys paid out are frittered away instead of being applied properly for the object described to the trustees, trustees can only refuse to make any further payments. We doubt whether such a response is appropriate in all cases; much depends upon the nature of a subsequent request for funds. But, on a more general basis, we think that trustees who pay or apply capital moneys to or for persons who do not have fully vested interests should be able to impose conditions in suitable circumstances. (note added)

Discussion Paper

10.98 In the Discussion Paper, the Commission outlined the effect of section 63, but did not seek submissions on any particular aspect of that provision.⁶¹

The Commission's preliminary view

10.99 The Commission is of the view that the new legislation should include a provision to the effect of section 63 of the *Trusts Act 1973* (Qld). The provision is a useful adjunct to the powers of maintenance and advancement that are conferred by sections 61 and 62 of the Act, and which will continue to be exercisable under the new legislation.

PROTECTIVE TRUSTS

10.100 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 mortgage or alienate his or her interest.⁶² On the happening of that event, the beneficiary's interest ends, and the property is held by the trustee on a discretionary trust.⁶³ Protective trusts are used as a vehicle for a settlor to protect

⁵⁹ 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. Both agencies recommended the introduction of provisions in similar terms to s 63 of the *Trusts Act 1973* (Qld): Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, Draft Bill: An Act to revise the *Trustee Act*, cl 51; British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004), Proposed *Trustee Act*, cl 48.

⁶⁰ [1964] Ch 303.

⁶¹ *Trusts Discussion Paper* (2012) [10.59] ff.

⁶² GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.115]. See also *Re Sartoris's Estate* [1892] 1 Ch 11; *Re Richardson's Will Trusts* [1958] Ch 504; *McQuade v Morgan* (1927) 39 CLR 222.

⁶³ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.115].

the trust property from dissipation by a spendthrift beneficiary.⁶⁴

10.101 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'.⁶⁵

Purpose and utility of statutory provisions for protective trusts

10.102 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. That provision enabled 'wills and settlements to be shortened by substituting a reference to "protective trusts" in place of the usual lengthy clause' that was frequently found in those instruments.⁶⁶ Provisions in relation to protective trusts 'avoid the need for setting out lengthy and complicated provisions in the trust instrument'.⁶⁷

10.103 However, it has been suggested that discretionary trusts are now preferred to protective trusts, with the latter being described as old-fashioned and having significant disadvantages.⁶⁸

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, note omitted)

⁶⁴ Ibid. See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2009) [61.6440].

⁶⁵ Similar provision is made in the trustee legislation of most of the other Australian jurisdictions, New Zealand and England: *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.

⁶⁶ R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 118.

⁶⁷ Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 54. See also *Re Wilcox* [1978] Tas SR 82, 83–4 (Green CJ).

⁶⁸ 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].

The effect of the Bankruptcy Act 1966 (Cth)

10.104 Under the general law, a protective trust is not considered to be a fraud on the bankruptcy laws.⁶⁹

10.105 However, the position under the general law has been modified by section 302B(1) of the *Bankruptcy Act 1966* (Cth), which 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.

10.106 Dal Pont has suggested that, although there could be no objection to an interest granted 'until bankruptcy' under the general law, 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'.⁷⁰

Discussion Paper

10.107 In the Discussion Paper, the Commission sought submissions on whether the *Trusts Act 1973* (Qld) should continue to make provision in section 64 for protective trusts or, alternatively, whether section 64 should be omitted.⁷¹

Consultation

10.108 The Queensland Law Society and a legal practitioner who practises in trusts and succession law submitted that section 64 should be omitted. They each considered that protective trusts have been largely displaced by discretionary trusts, and that section 64 performs no substantial function but merely simplifies the task of drafters. The Public Trustee commented that there is no particular utility in the retention of the provision beyond its convenience as a drafting device.

10.109 Professor Lee expressed a similar view, noting that the current practice 'is to use the discretionary trust which is more versatile'. He was also of the view that section 302B of the *Bankruptcy Act 1966* (Cth) 'essentially serves to oust a role for protective trusts premised on bankruptcy as a determining event', and suggested that the retention of section 64 'would send a wrong message to the creators of trusts and to trustees'.

⁶⁹ G Bigmore QC (ed), LexisNexis, *Bankruptcy Law and Practice* (at October 2008) [14.0010].

⁷⁰ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.115].

⁷¹ *Trusts Discussion Paper* (2012) 445.

10.110 However, the Bar Association of Queensland considered that discretionary trusts do not cover all of the situations in which it may be appropriate to use a protective trust, and submitted that section 64 should therefore be retained. It commented that it may be 'important to the settlor to ensure that [the] beneficiary has an interest that [is] not at the discretion of the trustee but is nonetheless protected in relevant circumstances'.

The Commission's preliminary view

10.111 As explained earlier, section 64 of the *Trusts Act 1973* (Qld) effectively provides a shorthand means for a settlor to create a protective trust. Given that discretionary trusts are now the much more common vehicle for providing flexibility in relation to distributions, statutory provisions in relation to protective trusts no longer have the same utility that they once did. For that reason, the Commission is of the view that the new legislation should not include a provision to the effect of section 64 of the *Trusts Act 1973* (Qld).

10.112 In the absence of a provision to that effect, a settlor will still be able to create a protective trust, but will simply need to make express provision in the trust instrument for the matters that are currently set out in section 64(1).

DELIVERY OF CHATTELS TO LIFE TENANTS

Background

10.113 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.⁷² 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.⁷³

10.114 Under the general law, a trustee was required to have an inventory made and signed before handing property over to a life tenant,⁷⁴ but was not under an obligation to take a security unless there was a danger that justified it.⁷⁵ As the Commission explained in its 1971 Report:⁷⁶

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

⁷² *Settled Land Act 1886* (Qld) s 64(1), (3) (repealed).

⁷³ *Settled Land Act 1886* (Qld) s 64(2) (repealed).

⁷⁴ *England v Downs* (1842) 6 Beav 269; 49 ER 829.

⁷⁵ *Foley v Burnell* (1783) 1 Bro CC 274; 28 ER 1125; *Temple v Thring* (1887) 56 LT 283; *Re Lazarus* (1898) 24 VLR 567.

⁷⁶ *Trusts and Settled Land Report* (1971) 55.

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.

Statutory power to deliver chattels to life tenants

10.115 In its 1971 Report, the Commission considered that the law in relation to chattels no longer represented modern needs.⁷⁷ 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.⁷⁸

10.116 Section 73 of the *Trusts Act 1973* (Qld) deals with 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.⁷⁹ It 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.

10.117 Section 73 was intended simply to 'state the law as it now stands' in relation to the delivery of chattels.⁸⁰

10.118 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 been further 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):⁸¹

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.

77 Ibid 54.

78 Ibid 55.

79 Western Australia and New Zealand also make express provision for the delivery of chattels in their trustee legislation: *Trustees Act 1962* (WA) s 72; *Trustee Act 1956* (NZ) s 39A.

80 *Trusts and Settled Land Report* (1971) 56.

81 WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 101.

Discussion Paper

10.119 In the Discussion Paper, the Commission sought submissions on whether there are any problems with the power conferred by section 73 of the *Trusts Act 1973* (Qld) to deliver chattels to a life tenant.⁸²

Consultation

10.120 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law commented that they do not have any issues with the power to deliver chattels that is conferred by section 73.

10.121 Professor Lee also supported the retention of section 73, but suggested that the section should also provide that the beneficiary who receives the chattels 'is not liable to waste or to account'. He explained:

Under the former law the life tenant was accountable for chattels received. There were no cars or computers then and chattels such as furniture were more durable. Today one could hardly require a life tenant to account for the use of a computer or motor vehicle and even furniture is often less durable than it was formerly. A reasonable life tenant would not waste or sell needed furniture and the remainderman would not necessarily be interested in it.

The Commission's preliminary view

10.122 The Commission considers that section 73 of the *Trusts Act 1973* (Qld) is a useful provision, and that the new legislation should include a provision to that effect.

10.123 At this stage of the review, the Commission does not recommend the enactment of a provision to the effect that a beneficiary who receives the chattels is not liable to waste or to account. Although the Commission considers that there is merit in that suggestion in so far as it applies to chattels that are of a depreciating nature, the Commission is concerned that such a provision might provide too great a protection to a life tenant in relation to chattels that may have a substantial value.

DELIVERY OF CHATTELS TO A MINOR BENEFICIARY

The general law

10.124 Under the general law, a minor is not ordinarily capable of giving a discharge for money paid to him or her.⁸³ 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

⁸² *Trusts Discussion Paper* (2012) 449.

⁸³ AH Simpson and GW Knowles, *A Treatise on the Law of Infants* (Sweet & Maxwell, 4th ed, 1926) 41.

majority.⁸⁴ Nor can the parent or guardian of a beneficiary who is a minor ordinarily give a valid receipt for the payment of a legacy.⁸⁵ There is, however, an exception where the trust or will expressly authorises payment to the parent or guardian.⁸⁶

Statutory power to deliver chattels to a minor or to a minor's guardian

10.125 Section 74 of the *Trusts Act 1973* (Qld) deals with the delivery of chattels to which a minor is beneficially entitled.

10.126 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. 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.⁸⁷

10.127 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.⁸⁸ It noted, however, that executors and trustees could not generally discharge themselves by paying a legacy to a minor's parent,⁸⁹ and considered that it would be beneficial to allow trustees to discharge their obligation by delivering chattels, such as musical instruments and books, to a minor's parents.⁹⁰

10.128 Ford and Lee similarly 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'.⁹¹ They note that 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.⁹²

10.129 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

⁸⁴ 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).

⁸⁵ 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; 26 ER 1161.

⁸⁶ *Cooper v Thornton* (1790) 3 Bro CC 96; 29 ER 430.

⁸⁷ Similar provision is also made in the trustee legislation of Western Australia and New Zealand: *Trustees Act 1962* (WA) s 73; *Trustee Act 1956* (NZ) s 39B.

⁸⁸ *Trusts and Settled Land Report* (1971) 56.

⁸⁹ Ibid 57.

⁹⁰ Ibid.

⁹¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [16.240].

⁹² Ibid.

trustee for the minor beneficiary, the trustee may appoint trustees of the legacy and could appoint the minor's parents.⁹³

Discussion Paper

10.130 In the Discussion Paper, the Commission sought submissions on whether there are any problems with the power conferred by section 74 of the *Trusts Act 1973* (Qld) to deliver chattels to a beneficiary who is a minor or to the guardian of the beneficiary.⁹⁴

Consultation

Delivery of chattels to a minor beneficiary

10.131 The Queensland Law Society, the Bar Association of Queensland, Professor Lee, and a legal practitioner who practises in trusts and succession law commented that they did not have any issues with the power that is conferred by section 74.

10.132 The Public Trustee considered that the provision does not require substantive amendment, but suggested that section 74(1) should use the same language as section 61 of the Act, and provide for delivery to a minor's parent or guardian and, if section 61 is so amended, to a person with whom a minor is residing.

Payment of pecuniary legacies

10.133 The legal practitioner suggested that section 74 could be extended to allow trustees to hand over 'relatively minor pecuniary legacies' to parents and guardians, although he acknowledged the problem in defining what is 'minor'. He noted that most well drafted wills contain a specific power allowing trustees to hand over pecuniary legacies in their discretion to parents or guardians of a minor. The Queensland Law Society also suggested that section 74 could be amended in this way.

The Commission's preliminary view

10.134 The Commission considers that section 74 of the *Trusts Act 1973* (Qld) is a useful provision, and that the new legislation should include a provision to that effect.

10.135 However, the Commission does not consider that it is necessary or desirable to extend the provision so as to apply to pecuniary legacies. As explained above, once the administration of a testator's estate has been completed, the personal representative will become a trustee and, if no other trustee is appointed, will hold the legacy on trust for the minor beneficiary. As a result, the personal

⁹³ AA Preece, *Lee's Manual of Queensland Succession Law* (Lawbook, 6th ed, 2007) [9.210].

⁹⁴ *Trusts Discussion Paper* (2012) 449.

representative, in the new capacity of trustee, may appoint another person, such as the minor's parent, to take his or her place as trustee (assuming that the parent is willing to accept the appointment). In the Commission's view, that procedure facilitates the discharge of the personal representative and is also more likely to make the parent aware of the capacity in which he or she is accepting the legacy.

POWER TO APPROPRIATE TRUST PROPERTY TO BENEFICIARIES

The general law

10.136 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'.⁹⁵ It amounts, in effect, 'to a sale of assets by the trustee to a beneficiary in or towards satisfaction of his share'⁹⁶ and a set-off of the price against the beneficiary's share in the estate.⁹⁷ A power of appropriation may be conferred on trustees 'expressly or by implication by the trust instrument or by statute'.⁹⁸

10.137 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.⁹⁹ 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'.¹⁰⁰

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.

⁹⁵ *Long v Comptroller of Stamps* [1964] VR 796, 801 (Adam J).

⁹⁶ *Ibid* 802.

⁹⁷ *Re Lepine* [1892] 1 Ch 210, 219 (Fry LJ); *Re Beverly* [1901] 1 Ch 681, 685 (Buckley J).

⁹⁸ *Long v Comptroller of Stamps* [1964] VR 796, 800 (Adam J).

⁹⁹ *Re Lepine* [1892] 1 Ch 210, 219 (Fry LJ); *Re Beverly* [1901] 1 Ch 681, 685 (Buckley J); *Wigley v Crozier* (1909) 9 CLR 425, 438 (Griffith CJ).

¹⁰⁰ *Re Beverly* [1901] 1 Ch 681, 685 (Buckley J).

10.138 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.¹⁰¹

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. ...'

10.139 This would enable the rest of the estate to be distributed and so prevent the distribution from being delayed indefinitely.¹⁰²

10.140 A validly made appropriation was 'final and conclusive and binding on all parties',¹⁰³ at the value of the property at the time of the appropriation,¹⁰⁴ and the trustee was not liable for any subsequent inequality or loss.¹⁰⁵

10.141 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.¹⁰⁶ The consent of the other beneficiaries was not required, although an appropriation had to be made 'fairly and impartially',¹⁰⁷ with consideration for the interests of the other beneficiaries.¹⁰⁸ In *Re Lepine*, the English Court of Appeal upheld the validity of an appropriation of property to a residuary beneficiary, rejecting the argument that the appropriation had not been properly made because the trustee had not obtained the consent of the other residuary beneficiaries. Lindley LJ stated:¹⁰⁹

It is said that the executor cannot make an agreement with one legatee of one-sixth without the consent of all the persons entitled to the other five-sixths. But why? If the assets are amply sufficient to satisfy the other five-sixths, why cannot one legatee at once say, 'I will not trouble you to turn my share into cash; give me something instead of it which I will take. Of course, it must be a fair transaction. ...'

101 *Harbin v Masterman* [1896] 1 Ch 351, 355 (Stirling J), affd on appeal at 362.

102 *Harbin v Masterman* [1896] 1 Ch 351, 362 (Lindley LJ); HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [16.200].

103 *Re Waters* [1889] WN 39, 39 (Kay J). A provision to this effect is also made in a number of jurisdictions: see *Trustee Act 1925* (ACT) s 46(4); *Trustee Act 1925* (NSW) s 46(4); *Administration and Probate Act* (NT) s 81(9); *Administration and Probate Act 1935* (Tas) s 40(4); *Trustee Act 1958* (Vic) s 31(4)(a); *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 41(4).

104 *Re Gollin's Declaration of Trust* [1969] 3 All ER 1591; *Re Chirside* [1974] VR 160.

105 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.

106 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.

107 *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).

108 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2069].

109 [1892] 1 Ch 210, 215–16.

...

I cannot accede to the proposition that the executor in any way failed to discharge his duty to that legatee or to the other legatees, provided, as I said before, he did not give any legatee more than his share. That is the whole of this transaction.

10.142 A number of limiting rules were also applied in relation to the power of appropriation, including that:

- the appropriation of securities was valid only if the securities were both authorised and sufficient at the date of the appropriation;¹¹⁰
- a trustee or personal representative could appropriate towards his or her own legacy or share,¹¹¹ provided the appropriated property had 'a definitely ascertainable or market value and is not appropriated at his [or her] own figure';¹¹² and
- there was no power to make an appropriation in respect of a contingent legacy which does not carry the intermediate income.¹¹³

Powers of appropriation under section 33(1)

10.143 In Queensland, trustees' statutory powers of appropriation are found in section 33(1)(l)–(m) of the *Trusts Act 1973* (Qld). They also apply to personal representatives.¹¹⁴

10.144 These provisions were modelled on provisions in virtually the same terms in Western Australia, which were in turn based on provisions in New Zealand.¹¹⁵ 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.¹¹⁶ In addition, the administration of estates legislation in

110 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.

111 *Re Richardson* [1896] 1 Ch 512; *Re Gamble* (1915) 32 WN (NSW) 121, 122 (Street J).

112 R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 293.

113 *Ibid* 296; *Re Hall* [1903] 2 Ch 226.

114 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').

115 *Trustees Act 1962* (WA) s 30(1)(k)–(l), (3); *Trustee Act 1956* (NZ) s 15(1)(j)–(k). See *Trusts and Settled Land Report* (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).

116 *Trustee Act 1925* (ACT) s 46; *Trustee Act 1925* (NSW) s 46; *Trustee Act 1958* (Vic) s 31.

the Northern Territory and Tasmania includes a statutory power of appropriation for personal representatives.¹¹⁷

10.145 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'.¹¹⁸ The provisions deal separately with appropriations for legacies and annuities.

10.146 The provisions in section 33 of the *Trusts Act 1973* (Qld) apply whether or not a contrary intention is expressed in the trust instrument.¹¹⁹ In contrast, the equivalent provisions in the other jurisdictions apply subject to the trust instrument.¹²⁰ 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'.¹²¹

Section 33(1)(l): Appropriation in satisfaction of a legacy or share

10.147 Section 33(1)(l) and (2) 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.

Notice and consent requirements

10.148 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.

10.149 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.

10.150 To this extent, the provisions largely reflect the general law.

10.151 With respect to consent and notice, however, the provisions modify the usual rules that would otherwise apply.

¹¹⁷ *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. 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.

¹¹⁸ *Trusts and Settled Land Report* (1971) 36.

¹¹⁹ *Trusts Act 1973* (Qld) s 31(1).

¹²⁰ *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).

¹²¹ *Trustee Act 1958* (Vic) s 31(14).

10.152 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.

10.153 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.

10.154 Those provisions are mirrored in Western Australia and, to some extent, in New Zealand.¹²²

10.155 In contrast, the provisions in the ACT, New South Wales and Victoria impose the following consent (but not notice) requirements:¹²³

- 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
- 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.

Requirement in section 33(2) for beneficiaries to approve the appropriation

10.156 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:

- (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.

10.157 The purpose of this provision appears to be that, if a trustee is also a beneficiary and is proposing to make an appropriation to another of the beneficiaries, the trustee does not have to give a notice to himself or herself.

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Trustees Act 1962 (WA) s 30(1)(k)(ii), (3); *Trustee Act 1956* (NZ) s 15(1)(j).

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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).

However, if the trustee is intending to make an appropriation to himself or herself, the approval of the other beneficiaries (or the court) must be obtained in order for the appropriation to be effective.

Service provisions

10.158 Section 33(3)–(4) deals with the service of notices given under section 33(1)(l):

- (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.

Discussion Paper

10.159 In the Discussion Paper, the Commission suggested that there might 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. It commented that, 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.¹²⁴

10.160 The Commission also suggested that, as a drafting matter, it might be considered unnecessary to continue to include the detailed service provisions in section 33(3)–(4), given the provisions of the *Acts Interpretation Act 1954* (Qld) that deal generally with the service of documents.¹²⁵

10.161 The Commission sought submissions on whether the power of appropriation in section 33(1)(l), (2)–(4) of the *Trusts Act 1973* (Qld) should be simplified or otherwise changed.¹²⁶

Consultation

10.162 The Queensland Law Society and a legal practitioner who practises in trusts and succession law expressed the view that the power of appropriation in section 33(1)(l), (2)–(4) of the *Trusts Act 1973* (Qld) should be simplified.

¹²⁴ *Trusts Discussion Paper* (2012) [10.118]–[10.119].

¹²⁵ *Ibid* [10.120], referring to *Acts Interpretation Act 1954* (Qld) pt 10.

¹²⁶ *Ibid* 455.

Notice and consent requirements

10.163 Professor Lee was generally of the view that there is no need to include a statutory power of appropriation in future legislation. However, he considered that, if a statutory power of appropriation is retained, the requirement in section 33(1)(l)(ii) for the trustee to give notice to the other beneficiaries of an intended appropriation should be omitted because it ‘unnecessarily impedes the administration of a deceased estate’. He suggested, instead, that the legislation should provide that the appropriation must not be made without the consent in writing of the person to whom the appropriation is to be made or, if that person does not have the capacity to consent, by a person who is authorised by law to consent or to make decisions on that person’s behalf.

10.164 A legal practitioner who practises in trusts and succession law was also of the view that the statutory power of appropriation should require the trustee to obtain the consent of the beneficiary to whom the appropriation is to be made. However, he also considered that the legislation should retain the current requirement for the trustee to give notice to the other beneficiaries.

10.165 The Queensland Law Society also addressed the issue of consent:

We propose the consent of the beneficiaries should be obtained as opposed to notice given.

10.166 However, the Public Trustee favoured the retention of the current requirement to give notice of the appropriation:

There is merit in retaining the remaining provisions of section 33(1)(l) — it may not be only the beneficiary to whom the appropriation is directed (transfer to be made) that ought consent, other beneficiaries might have an interest in the appropriation. Notice is a sufficient mechanism in circumstances where other beneficiaries who might be interested (in the broadest sense) are not called upon to consent — and therefore have an opportunity to refuse consent for anterior reasons but rather must take some form of substantive action to prevent the appropriation.

Requirement in section 33(2) for beneficiaries to approve the appropriation

10.167 Professor Lee considered that section 33(2) ‘in requiring the consent of other beneficiaries might again constitute an unnecessary and costly impediment to finalizing the distribution of an estate’.

10.168 Similarly, the Bar Association of Queensland submitted that section 33(2) should be amended to remove the limitation in that subsection:

The Bar Association thinks it is important to retain the notice provisions but unnecessary to have approval of all beneficiaries if the trustee would otherwise be entitled to notice.

Service provisions

10.169 Professor Lee suggested that section 33(3)–(4), which deals with service of the relevant notices, should not be included in the legislation.

10.170 The Public Trustee considered that the service provisions that apply to appropriations under section 33(1)(l) should be simplified in view of the fact that the *Acts Interpretation Act 1954* (Qld) makes adequate provision for the service of documents.

Effect of an appropriation

10.171 Professor Lee suggested that the legislation should provide that an appropriation made under the section binds 'all persons who are or may become interested in the estate or property'. He noted that a similar provision is included in section 31(4)(a) of the *Trustee Act 1958* (Vic).¹²⁷

The relationship between the statutory power of appropriation and a power of appropriation conferred by the trust instrument

10.172 The Registrar of Titles suggested that the legislation should clarify the relationship between the statutory power of appropriation and a power of appropriation that is conferred by the trust instrument without the restrictions to which section 33(1)(l) is subject:

The section provides a trustee with a power of appropriation subject to certain restrictions. Whilst it is accepted that this power cannot be removed or reduced by the trust deed (due to the operation of section 31(1) of the *Trusts Act*), it is arguable that the power can be enlarged by the trust deed — for example, by a provision within the deed [providing] a general power of appropriation with no restrictions.

... if it is intended that the restrictions in section 33(1)(l) of the *Trusts Act* apply notwithstanding any provision of the trust deed (whether or not such provision can be said to reduce or enlarge the powers of the trustee), the same should be clarified within the provision.

The Commission's preliminary view

Notice and consent requirements

10.173 In the Commission's view, the new legislation should include a provision to the general effect of section 33(1)(l) of the *Trusts Act 1973* (Qld), except that it should also require that the beneficiary to whom the appropriation is to be made consents to the appropriation. In that respect, the provision should reflect the general law.

10.174 The Commission is also of the view that the new legislation should preserve the current requirement for the trustee to give notice to all of the persons who are interested in the appropriation. The Commission accepts that a similar notice requirement does not apply under the general law, but considers that it is nevertheless desirable for such persons to be aware of an impending appropriation. Although, in a strict sense, those persons do not have an interest in the

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Similar provision is also made in a number of other jurisdictions: see [10.140], n 103 above.

appropriation,¹²⁸ they nevertheless have an interest in whether the appropriation occurs at a fair value.

Requirement in section 33(2) for beneficiaries to approve the appropriation

10.175 The new legislation should include a provision to the general effect of section 33(2) to deal with the situation where a trustee is also a beneficiary. The provision should continue to provide that a trustee is not required to give a notice of intended appropriation to himself or herself, but should provide more clearly that an appropriation that a trustee makes to himself or herself does not take effect until it is approved by all of the other beneficiaries or by the court.

10.176 Given that an appropriation by a trustee to himself or herself is effectively a purchase of the trust asset, the Commission considers that it is in the interest of all the beneficiaries to retain these approval requirements.

Service provisions

10.177 Section 33(3)–(4) of the *Trusts Act 1973* (Qld) largely duplicates the service provisions contained in section 39 and 39A(1) of the *Acts Interpretation Act 1954* (Qld). The only part of section 33(3) that is not covered by those provisions is section 33(3)(b), which provides that a notice may be served in such other manner as may be directed by the court.

10.178 In the Commission's view, the new legislation should not include provisions to the effect of section 33(3)–(4) of the *Trusts Act 1973* (Qld), but should provide instead that any notice may be served in a manner permitted by the *Acts Interpretation Act 1954* (Qld) or in such other manner as may be directed by the court.

The effect of an appropriation

10.179 The Commission is of the view that the new legislation should provide that the appropriation is binding on all persons who are, or may be, interested in the property or estate. A provision to that effect would reflect the general law and would be consistent with the position under the trustee legislation of most other Australian jurisdictions.¹²⁹

The relationship between the statutory power of appropriation and a power of appropriation conferred by the trust instrument

10.180 In the Commission's view, the new legislation should clarify the relationship between the statutory power of appropriation and a power of appropriation conferred by the trust instrument. Although section 4(2) of the *Trusts Act 1973* (Qld) provides that nothing in the Act precludes a settlor from conferring on a trustee powers that are additional to those conferred by the Act, the potential for uncertainty arises in relation to whether the specific requirements (for instance,

¹²⁸ See *Re Lepine* [1892] 1 Ch 210, 215–16 (Lindley LJ) at [10.141] above.

¹²⁹ See [10.140], n 103 above.

to give notice) that apply to the exercise of the statutory power of appropriation also apply to a power conferred by the trust instrument.¹³⁰

10.181 The new legislation should therefore provide that nothing in the new provisions in relation to appropriation affects any power of appropriation conferred by the trust instrument.

Section 33(1)(m): Appropriation for payment of annuity

10.182 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; ...

10.183 Section 33(5) further provides for the trustee to notify the registrar in the case of a distribution of land following such an appropriation:¹³¹

- (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.

10.184 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.

10.185 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

¹³⁰ In this regard, see s 4(3) of the *Trusts Act 1973* (Qld).

¹³¹ 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).

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.¹³²

10.186 Apart from the provisions in Western Australia and New Zealand, which mirror the Queensland provision,¹³³ 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,¹³⁴ 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:¹³⁵

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.

Discussion Paper

10.187 In the Discussion Paper, the Commission sought submissions on whether there are 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

Consultation

10.188 A legal practitioner who practises in trusts and succession law suggested that section 33(1)(m) and (5) of the *Trusts Act 1973* (Qld) reduces testamentary freedom by allowing the trustee to set aside and appropriate property for the payment of an annuity when the trust instrument provides for the whole estate to be charged with the annuity. He commented, however, that a properly drafted will would provide a specific power of appropriation to the trustees and that the appropriation is binding on the annuitant and the residuary beneficiaries.

10.189 Professor Lee expressed the general view that, in light of the existing case law, a legislative provision like section 33(1)(m) is unnecessary. However, he considered that, if it were retained, it should be in a separate section.

10.190 The Public Trustee noted that he had 'not found any substantive problems with the operations of section 33(1)(m) and (5) in practice', while the Queensland Law Society commented that it did not have a position on this issue.

132 *Trusts and Settled Land Report* (1971) 36.

133 *Trustees Act 1962* (WA) s 30(1)(l); *Trustee Act 1956* (NZ) s 15(1)(k).

134 See [10.155] above.

135 *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.

136 *Trusts Discussion Paper* (2012) 456.

The Commission's preliminary view

10.191 In the Commission's view, the new legislation should include provisions to the general effect of section 33(1)(m) and (5) of the *Trusts Act 1973* (Qld) to allow a trustee to set aside, and appropriate out of the trust property, a sum sufficient at the time of the appropriation to pay the annuity.

PRELIMINARY RECOMMENDATIONS***Power to apply income for the maintenance and advancement of a beneficiary***

10-1 The new legislation should include a provision to the general effect of section 61 of the *Trusts Act 1973* (Qld), except that:

- (a) the provision based on section 61(1) of the Act should:
 - (i) be expressed to apply where property is held on trust for a minor 'for any interest, whether vested or contingent, and whether absolute or liable to be divested'; and
 - (ii) allow the trustee to pay the income not only to a parent or guardian of a minor, but also to a person who exercises parental responsibility in relation to a minor;
- (b) the provision based on section 61(2) of the Act should omit the references to:
 - (i) a minor who marries before attaining the age of majority; and
 - (ii) entailed interests (in section 61(2)(a)(ii));
- (c) instead of a provision to the effect of section 61(4) of the Act, the provision in relation to contingent interests should be framed more generally so as to ensure that a beneficiary's interest in the trust property carries the intermediate income if it is not otherwise specifically disposed of; and
- (d) the provision should generally be expressed in a more modern and simplified drafting style.

Power to apply capital for the maintenance and advancement of a beneficiary

10-2 The new legislation should include a provision to the effect of section 62 of the *Trusts Act 1973* (Qld), except that the maximum amount that may be advanced should be increased to \$100 000 or half the capital, whichever is the greater.

Conditional advances

10-3 The new legislation should include a provision to the effect of section 63 of the *Trusts Act 1973* (Qld).

Protective trusts

10-4 The new legislation should not include a provision to the effect of section 64 of the *Trusts Act 1973* (Qld).

Delivery of chattels to life tenants and minors

10-5 The new legislation should include provisions to the effect of sections 73 and 74 of the *Trusts Act 1973* (Qld).

Appropriation in satisfaction of a legacy or share

10-6 The new legislation should include provisions to the effect of section 33(1)(l) and (2) of the *Trusts Act 1973* (Qld), except that:

- (a) the provision based on section 33(1)(l) of the Act should also provide that the appropriation requires the consent of the beneficiary to whom the appropriation is to be made; and
- (b) the provision based on section 33(2) of the Act should state more clearly that, where a trustee is also a beneficiary, an appropriation by the trustee to himself or herself does not take effect until it is approved by all of the other beneficiaries or by the court.

10-7 The new legislation should not include provisions to the effect of section 33(3)–(4) of the *Trusts Act 1973* (Qld), but should provide instead that any notice given under the provision referred to in Recommendation 10-6 may be served in a manner permitted by the *Acts Interpretation Act 1954* (Qld) or in such other manner as may be directed by the court.

10-8 The new legislation should provide that the appropriation is binding on all persons who are, or may be, interested in the property or estate.

10-9 The new legislation should provide that nothing in the new provisions in relation to appropriation affects any power of appropriation conferred by the trust instrument.

Appropriation for payment of annuity

10-10 The new legislation should include provisions to the general effect of section 33(1)(m) and (5) of the *Trusts Act 1973* (Qld).

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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, as well as provisions found in other parts of the Act that also deal with the issue of indemnity and protection.³

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 46, 54(1), 55, 66–72, 75–78, 112. Sections 73 and 74 are considered in Chapter 10.

PROTECTION OF TRUSTEES BY MEANS OF ADVERTISEMENTS

Background

11.4 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.⁴ 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.⁵

11.5 It has been said that, before 1859, 'no executor could safely distribute the assets of his testator except under the direction of this Court'.⁶ This 'involved great expense, and frequently great delay',⁷ as it required a decree from the court in an administration suit. The court's procedure for dealing with unknown claimants involved the publication of advertisements by the Master 'in the quarters where creditors and next of kin are most likely to be found', calling upon creditors and next of kin to make their claims within a stated reasonable time.⁸

11.6 Compliance with that 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', who could claim against any fund that might still be in court or against the persons among whom the estate had been distributed and whose title remained defeasible.⁹

11.7 In 1859, *Lord St Leonards' Act* 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.¹⁰ The effect of section 29 of that Act was to give a 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'.¹¹

11.8 The statutory protection 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

⁴ RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (Butterworths, 1996) [18.9.4].

⁵ 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).

⁶ *Clegg v Rowland* (1866) LR 3 Eq 368, 371 (Malins V-C).

⁷ *Ibid* 371–2.

⁸ *David v Frowd* (1833) 1 My & K 200, 208; 39 ER 657, 660 (Leach MR).

⁹ GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1960–1962) 5 *University of Western Australia Law Review* 257, 264.

¹⁰ *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.

¹¹ GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1960–1962) 5 *University of Western Australia Law Review* 257, 265.

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.¹²

11.9 However, mere compliance with the requirements of section 29 did not guarantee protection from liability. It 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.¹³

11.10 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. Similar provision is made in all other Australian jurisdictions, as well as in New Zealand and England.¹⁴

The manner in which notice is to be given

11.11 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.

11.12 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'.¹⁵ Depending on the circumstances of the case, it may therefore 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 localities in which notice is given are referable to the localities in which claims are likely to arise.

¹² See *Wood v Weightman* (1872) LR 13 Eq 434.

¹³ *Re Land Credit Co of Ireland* (1872) 21 WR 135, 135 (Lord Romilly MR).

¹⁴ *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.

¹⁵ For a discussion of the notices that are required to be given in an administration action see [11.5], [11.8] above. A similar requirement applies in the ACT, the Northern Territory, South Australia and Victoria: *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).

11.13 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.

11.14 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.¹⁶ 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),¹⁷ thus enabling the applicant to avoid incurring two sets of advertising costs in Queensland.

11.15 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).¹⁸ 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).¹⁹

11.16 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).

11.17 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, and commented that 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 had recently occurred in Victoria. It considered that such a facility would provide a central, reliable means for the searching of a notice of intention to apply for a grant.²⁰

11.18 Consistent with that view, the National Committee recommended that the provision of the model legislation that was to be based on section 67(1) of the

¹⁶ *Uniform Civil Procedure Rules 1999* (Qld) r 598(1).

¹⁷ *Uniform Civil Procedure Rules 1999* (Qld) r 599.

¹⁸ *Uniform Civil Procedure Rules 1999* (Qld) r 599(4) additionally provides that a notice of intention to apply for a grant must also be published in a publication approved by the Chief Justice under a practice direction. The publication approved for r 599(4) is the *Queensland Law Reporter*. see Supreme Court of Queensland, *Practice Direction No 19 of 1999 — Approval of Publication*, 21 June 1999.

¹⁹ 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.

²⁰ *Administration of Estates Report* (2009) vol 1, [8.26].

Trusts Act 1973 (Qld) should provide for notices of intended distribution to be published:²¹

- 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.

11.19 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.²² At the time of the National Committee's Report, Victoria was the only Australian jurisdiction with that facility. Since 21 January 2013, that facility has also been available in New South Wales, and publishing a notice of intended application for a grant on the Court's Online Registry website is now the sole means of meeting the advertising requirements under the *Supreme Court Rules 1970* (NSW).²³

Discussion Paper

11.20 In the Discussion Paper, the Commission noted that 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. It considered, however, that, if 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. It observed that such a change would ensure the continuation of the current practice of incorporating a section 67 notice into an applicant's notice of intention to apply for a grant.²⁴

11.21 The Commission suggested, however, that it would still be necessary 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.

11.22 The Commission sought submissions on whether it would 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.²⁵

²¹ Ibid vol 2, [21.138], Rec 21-1(b). The National Committee also recommended that the provision should require the giving of such other notices as would be directed by the Supreme Court to be given in an administration action.

²² *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).

²³ *Supreme Court Rules 1970* (NSW) pt 78 rr 3(1), 4(1).

²⁴ *Trusts Discussion Paper* (2012) [11.97].

²⁵ Ibid 481.

11.23 It also sought submissions on whether section 67(1) of the *Trusts Act 1973* (Qld) should be amended to provide that it is sufficient for a notice of intended distribution to be advertised in either of the following ways:²⁶

- in a newspaper circulating throughout Queensland and sold at least once a week; or
- on a dedicated, publicly searchable section of the website of the Supreme Court of Queensland.

Consultation

Development of advertising facility on Supreme Court website

11.24 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law considered that it would 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. The Queensland Law Society commented that a notice published on the court website was more likely to reach creditors and claimants interested in the distribution of an estate.

11.25 The Bar Association of Queensland commented that such a facility would be highly desirable if the system was reliable and consistent. It observed:

While advertising in newspapers probably still is efficacious for some sections of the community, to provide for newspaper advertising alone ignores the community wide move to specialised internet sites providing specific information.

Legislative requirement for giving notice

11.26 The Queensland Law Society considered that section 67(1) should be amended to permit a notice of intended distribution to be published in either a newspaper circulating throughout Queensland and sold at least once a week or on the Supreme Court's website. It noted that, while this proposal provides simplicity and certainty in relation to the newspapers that may be advertised in, the removal of the existing option to publish a notice in a local newspaper that has been approved by the Chief Justice involved the loss of a lower cost option. The Queensland Law Society further submitted that the advertising options in the *Trusts Act 1973* (Qld) should remain identical to those in rule 599(3) of the *Uniform Civil Procedure Rules 1999* (Qld) by making the same amendments to each or, alternatively, 'linking the two in some appropriate fashion'.

11.27 The Bar Association of Queensland considered that section 67(1) should be amended to require the notice to be published in a newspaper circulating throughout Queensland and sold at least once a week *and* on the Supreme Court's website. In its view, advertising in a newspaper continues to be relevant 'especially amongst older persons and in the regions'.

26

Ibid 482.

11.28 The Bar Association of Queensland also suggested that it might be wise for the legislation to be in general terms, equivalent to the current section 67(1)(b) of the *Trusts Act 1973* (Qld), ‘thereby allowing the Chief Justice to specify the relevant site because the precise form and nature of the site might require reconsideration by the Chief Justice from time to time’.

11.29 The Public Trustee considered that it should be sufficient for the purpose of section 67(1) that the notice of intended distribution be published only on the website contemplated.

11.30 Professor Lee expressed the view that section 67 should be omitted from the trusts legislation and dealt with in the rules of court. However, he considered that, if the provision is retained, it should be amended to allow for advertisements by both an online facility and newspapers (including free newspapers).

The Commission’s preliminary view

11.31 The Commission considers that section 67 of the *Trusts Act 1973* (Qld) is a beneficial provision and that the new legislation should include a provision to similar effect.

11.32 The Commission has some concerns, however, about the effectiveness of notices published in particular newspapers, and how likely it is that those notices will come to the attention of interested persons, bearing in mind that the protection given to trustees and personal representatives by provisions like section 67 is premised on the opportunity that interested persons have been given to make their claims. While this is not a new concern,²⁷ it has become more of an issue with the decline in newspaper circulation in recent years.

11.33 The difficulty is in finding an alternative that is more accessible and reliable and that will continue to meet community needs in terms of how people are most likely to access information.

11.34 Ideally, the Commission considers that it would be desirable for the Supreme Court to develop an online, searchable facility for the publication of notices of intention to apply for a grant (including notices that incorporate a notice of intended distribution under section 67 of the *Trusts Act 1973* (Qld)).

11.35 Although such a facility is not presently available, the Commission notes that electronic access is now available to certain parts of the *Queensland Law Reporter*, including a free, publicly accessible online database of probate notices placed in that publication since 1 January 2012.²⁸ As noted earlier, the *Queensland Law Reporter* is an approved publication for notices of intention to apply for a grant (which may incorporate a notice under section 67 of the *Trusts Act 1973* (Qld)).²⁹

²⁷ See, eg, *Administration of Estates Report* (2009) [8.19], quoting Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.37].

²⁸ The Incorporated Council of Law Reporting for the State of Queensland, *Probate Notice Database*, Queensland Reporter <<http://www.queenslandreports.com.au/databases/probate-notice-database>>.

²⁹ See n 18 above.

11.36 Section 67 applies, however, not only to deceased estates, but also to inter vivos trusts, which would ordinarily have no connection to applications for a grant or to any other proceeding in the Supreme Court.

11.37 Taking these considerations into account, the Commission considers that the new provision should still allow for notice to be given by way of an advertisement published in a newspaper. However, in order to restrict the number of newspapers that an interested person would need to monitor, the provision should refer to a notice published in a newspaper circulating throughout Queensland and sold at least once a week.

11.38 As an alternative, and in anticipation of an online facility becoming available in the future, the provision should also provide that notice may be given on a dedicated, publicly searchable website that is approved for that purpose by regulation.

Period of time for submitting claim

11.39 Under section 67(1), the notice of intended distribution must give claimants a minimum of six weeks in which to submit their claims. As explained in the Discussion Paper, different minimum periods are provided for in the other Australian jurisdictions. The shortest minimum period is one month,³⁰ and the longest is 'not less than four months nor more than eight months'.³¹ Three jurisdictions provide for a minimum period of two months.³²

11.40 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.³³

Discussion Paper

11.41 In the Discussion Paper, the Commission endorsed the recommendation of the National Committee for Uniform Succession Laws and proposed that 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.³⁴

Consultation

11.42 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law

³⁰ *Trustee Act 1925* (NSW) s 60(1), *Civil Procedure Act 2005* (NSW) s 17, Form 114; *Trustee Act 1898* (Tas) s 25A(4)(b)(i) (if the notice is published only in that State); *Trustees Act 1962* (WA) s 63(3).

³¹ *Trustee Act 1898* (Tas) s 25A(4)(b)(iii) (if the notice is published other than in Tasmania, another Australian jurisdiction or New Zealand).

³² *Trustee Act 1925* (ACT) s 60(3); *Administration and Probate Act* (NT) s 96, *Supreme Court Rules* (NT) r 88.88, Form 88ZF; *Trustee Act 1958* (Vic) s 33(1)(a).

³³ *Administration of Estates Report* (2009) vol 2, [21.151], Rec 21-1(c).

³⁴ *Trusts Discussion Paper* (2012) [11.102], 482.

agreed with the Commission's proposal. Both the Bar Association of Queensland and the Public Trustee considered that the change should be made for the reason of uniformity. The legal practitioner noted that 'it is no practical burden on estate administration'.

The Commission's preliminary view

11.43 In the Commission's view, the new legislation should increase the minimum period of time in which a creditor, beneficiary or another person may submit a claim to the trustee from six weeks to two months. This change will promote greater consistency with the other Australian jurisdictions and implement the recommendation of the National Committee for Uniform Succession Laws in relation to this issue.

Scope of protection

11.44 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, to send particulars of the person's claim within the given period. 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. The trustee 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.³⁵

11.45 The provision does not protect a trustee in respect of a claim of which he or she has notice at the time of distribution.³⁶ 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.³⁷ 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'.³⁸

11.46 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.

11.47 The National Committee for Uniform Succession Laws recommended that the model provision based on section 67(3) of the *Trusts Act 1973* (Qld) should incorporate a reference, similar to that found in section 55 of the *Administration and*

³⁵ *Trusts Act 1973* (Qld) s 67(1), (3).

³⁶ *Nowell v Palmer* (1993) 32 NSWLR 574, 582 (Handley JA). See also [11.9] above and the discussion of s 69 of the *Trusts Act 1973* (Qld) at [11.74] ff below.

³⁷ [2012] Ch 1, 28 (Elias LJ; Dyson and Arden LJJ agreeing).

³⁸ *Ibid* 29.

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.³⁹

Discussion Paper

11.48 In the Discussion Paper, the Commission endorsed the recommendation of the National Committee for Uniform Succession Laws and proposed that section 67 of the *Trusts Act 1973* (Qld) should be amended to refer to claims, whether formal or not, of which the [trustee or] personal representative has notice, and whether or not as a result of a claim being submitted in response to the published notice.⁴⁰

Consultation

11.49 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law agreed with the Commission's proposal. The Queensland Law Society considered that the proposed change was not strictly necessary, but would nevertheless make the position clear. The Bar Association of Queensland also considered that this amendment was not necessary but should be made for the sake of uniformity.

The Commission's preliminary view

11.50 The Commission confirms its earlier view that the provision in the new legislation based on section 67(3) of the Act should refer to claims, whether formal or not, of which the trustee has notice, and whether or not as the result of a claim being submitted in response to the published notice.

THE BARRING OF CLAIMS

11.51 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'.⁴¹ That may involve setting aside a 'sum sufficient to meet any claims'.⁴² However, the situation becomes more complicated if the claim is for an unliquidated sum or is speculative in nature. In that situation, it may be difficult for the trustee to decide whether to compromise the claim, and a trustee who wishes to complete his or her duties and distribute 'might be tempted to compromise on terms disadvantageous to the trust'.⁴³

³⁹ *Administration of Estates Report* (2009) vol 2, [21.153], Rec 21-1(d).

⁴⁰ *Trusts Discussion Paper* (2012) [11.107], 484.

⁴¹ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 2nd ed, 1990) [1630].

⁴² *Ibid.*

⁴³ *Ibid.*

11.52 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.

11.53 Section 68 of the *Trusts Act 1973* (Qld) provides a mechanism by which trustees can require a person who has or may have a claim to or against the trust property or against the trustee personally to pursue his or her claim, failing which the claim is barred.⁴⁴ It provides that a trustee may serve on the claimant or potential claimant a notice calling on the claimant to take legal proceedings within six months to enforce the claim.⁴⁵ At the expiration of that period, the trustee may apply to the court for an order, where the claimant has not commenced proceedings to enforce the claim, either extending the period or barring the claim or enabling the trust property to be dealt with without regard to the claim.⁴⁶

11.54 Similar provisions are found in the other Australian jurisdictions, although the provisions in some of the jurisdictions have a shorter notice period, and those in the ACT, New South Wales and Victoria apply only to executors and administrators rather than to trustees generally.⁴⁷ These provisions were introduced to complement the provisions for giving notice of intended distribution.⁴⁸

11.55 Section 68 is not limited to claims made in response to a notice of intended distribution (under section 67), but applies in relation to a claim that has been made or that the trustee 'has reason to believe may be made'.⁴⁹

11.56 A trustee may use this procedure in relation to the claims of creditors, beneficiaries and next of kin.⁵⁰ However, the procedure cannot be used to bar:

- a claim 'in respect of which any insurance is on foot' (section 68(1)),⁵¹

⁴⁴ 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.

⁴⁵ *Trusts Act 1973* (Qld) s 68(1).

⁴⁶ *Trusts Act 1973* (Qld) s 68(2)–(3).

⁴⁷ *Administration and Probate Act 1929* (ACT) s 65 (6 months); *Probate and Administration Act 1898* (NSW) s 93 (3 months); *Trustee Act* (NT) s 22(2), *Administration and Probate Act* (NT) s 97 (6 months); *Trustee Act 1936* (SA) s 29(2) (6 months); *Trustee Act 1898* (Tas) s 25A(5)–(6) (6 months); *Administration and Probate Act 1958* (Vic) s 30 (3 months); *Trustees Act 1962* (WA) s 64 (3 months). For a detailed discussion of these provisions, see *Administration of Estates Report* (2009) vol 2, [22.62] ff.

⁴⁸ See *Trusts Act 1973* (Qld) s 67, discussed earlier in this chapter.

⁴⁹ 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).

⁵⁰ *Trusts Act 1973* (Qld) s 68(5).

⁵¹ Ford and Lee have explained that this exception 'is intended for the case of motor accident claims of a kind required by law to be insured': HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [16.340].

- 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));⁵² or
- a family provision claim (section 68(5)).

11.57 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

11.58 Section 68 of the *Trusts Act 1973* (Qld) applies where a trustee ‘wishes to reject’ a claim to which the section applies.⁵³

11.59 The National Committee for Uniform Succession Laws recommended the inclusion of a model provision for the barring of claims based on section 68 of the *Trusts Act 1973* (Qld).⁵⁴ However, it recommended that the model provision should be expressed to apply where a trustee (or personal representative) ‘does not accept a claim’.⁵⁵ 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’.⁵⁶

Discussion Paper

11.60 In the Discussion Paper, the Commission endorsed the recommendation of the National Committee for Uniform Succession Laws and proposed that 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.⁵⁷

Consultation

11.61 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law agreed that 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

⁵² 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).

⁵³ *Trusts Act 1973* (Qld) s 68(1).

⁵⁴ *Administration of Estates Report* (2009) vol 2, [22.96]–[22.98].

⁵⁵ *Ibid* [22.100], Rec 22-6(b).

⁵⁶ *Ibid*.

⁵⁷ *Trusts Discussion Paper* (2012) [11.118], 487.

section applies. The Public Trustee noted that, in his experience, there are many circumstances in which 'a claim is asserted with insufficient information for the trustee to determine whether or not to accept that claim'.

The Commission's preliminary view

11.62 The new legislation should include a provision to the effect of section 68 of the *Trusts Act 1973* (Qld). The Commission confirms its earlier view that the new provision should be expressed to apply where a trustee 'does not accept a claim' to which the provision applies.

The court's powers

11.63 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).⁵⁸ 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'.⁵⁹

11.64 Section 68(3)(a) enables the court to make an order 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.⁶⁰

11.65 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.⁶¹ In exercising its discretion, the court will take into account:⁶²

- 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.

11.66 The counterparts to section 68 in most of the other Australian jurisdictions enable the court to make an order barring the claim against the trustee (or against

⁵⁸ *Trusts Act 1973* (Qld) s 68(2).

⁵⁹ *Ludwig v Public Trustee* (2006) 68 NSWLR 69, 77 (Campbell J).

⁶⁰ 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: *Trusts Act 1973* (Qld) s 68(3)(b).

⁶¹ *Re the Will of McNeill* (Unreported, Supreme Court of Queensland, Master Weld, 26 February 1982) 2–3.

⁶² *Ibid* 3–4.

the executor or administrator).⁶³ This would allow the trustee, executor or administrator to distribute the estate without regard to the claim, but would not prevent a claimant from bringing proceedings against a person to whom any part of the estate or trust property is distributed.⁶⁴

11.67 Because section 68(3)(a) enables the court to make an order 'barring the claim', as an alternative to an order enabling the trust property to be dealt with without regard to the claim, it 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 provision 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'.⁶⁵

11.68 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.⁶⁶ 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:⁶⁷

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.

Discussion Paper

11.69 In the Discussion Paper, the Commission expressed the view that there should not be any doubt about the scope of the court's powers under section 68(3)(a). It endorsed the National Committee's recommendation and proposed that 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'.⁶⁸

⁶³ 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).

⁶⁴ See *Trusts Act 1973* (Qld) s 67(4)(a). See also *Administration of Estates Report* (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.

⁶⁵ *Administration and Probate Act 1958* (Vic) s 30(3)(b).

⁶⁶ *Administration of Estates Report* (2009) vol 2, [22.101].

⁶⁷ *Ibid.* See also Rec 22-6(c).

⁶⁸ *Trusts Discussion Paper* (2012) [11.125], 489.

Consultation

11.70 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law agreed that 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'. The Public Trustee commented that there is 'a need to provide the Court with the power to make an order barring claims for all purposes, which will be engaged in appropriate circumstances'.

11.71 However, the legal practitioner queried why the trustees should have to apply to the court while the creditor 'is sitting on his/her hands', and why the period allowed for the claimant to bring proceedings should be as long as six months, rather than, for example, two months.

The Commission's preliminary view

11.72 The Commission confirms its earlier view that the new provision based on section 68(3)(a) of the *Trusts Act 1973* (Qld) should 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'.

11.73 The Commission does not consider it appropriate to reduce the period of time allowed to the claimant to bring proceedings. The Commission considers that the initial six months, which may be extended by the court, strikes an appropriate balance between facilitating the distribution of the trust or estate and the fairness to claimants in having an adequate time within which to commence proceedings.

PROTECTION IN RELATION TO NOTICE WHEN A PERSON IS TRUSTEE OF MORE THAN ONE TRUST

11.74 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.

11.75 Similar provision is made in most of the other Australian jurisdictions and in New Zealand and England.⁶⁹

Discussion Paper

11.76 In the Discussion Paper, the Commission outlined the effect of section 69, but did not seek submissions on any particular aspects of the provision.⁷⁰

⁶⁹ *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; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 28.

⁷⁰ *Trusts Discussion Paper* (2012) [11.126] ff.

The Commission's preliminary view

11.77 The Commission is of the view that the new legislation should include a provision to the effect of section 69 of the *Trusts Act 1973* (Qld). As explained in the Discussion Paper, the clarification it provides is especially important in relation to the protection from liability that is available by means of advertisements for claims under section 67 of the Act. It is also particularly important for professional trustees who act with respect to multiple, separate trusts.

EXONERATION OF TRUSTEES IN RESPECT OF CERTAIN POWERS OF ATTORNEY

11.78 Under the general law, trustees were under a duty to pay or transfer the trust property to the correct beneficiaries.⁷¹ 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.⁷² However, the trustee would need to 'look well to the genuineness of the authority',⁷³ for if the payment was made to the wrong party, the trustee would be liable for the loss.⁷⁴ The duty to pay the correct beneficiaries was 'absolute' in the sense that neither honest mistake by the trustee⁷⁵ nor inducement by forgery⁷⁶ was an excuse.⁷⁷ 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 principal or otherwise, or had been forged.

11.79 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.

11.80 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', 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'.

11.81 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.

⁷¹ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1735].

⁷² R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 259.

⁷³ *Ibid.*

⁷⁴ *Ashby v Blackwell* (1765) Amb 504, 505; 27 ER 326, 327 (Lord Northington LC).

⁷⁵ *Hilliard v Fulford* (1876) 4 Ch D 389; *Re Hulkes* (1886) 33 Ch D 552.

⁷⁶ *Ashby v Blackwell* (1765) Amb 504; 27 ER 326; *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840.

⁷⁷ See generally JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1735].

11.82 Similar provision is made in the trustee legislation of most of the other Australian jurisdictions, and in New Zealand.⁷⁸

11.83 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.⁷⁹ They do not address the circumstance where a trustee relies on a power of attorney that has been forged.⁸⁰

Whether section 70 is necessary in light of the powers of attorney legislation

11.84 Prior to the introduction of the *Powers of Attorney Act 1971* (UK), a provision in the same terms as section 70 had been included in section 29 of the English *Trustee Act 1925*. That section was repealed and 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.⁸¹

11.85 Similar protection is conferred under Queensland's powers of attorney legislation.⁸² 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.

11.86 Of particular relevance is section 99(2) of that Act. It applies to transactions with an 'attorney' purporting to use a power that is invalid. 'Attorney' is defined for that provision to mean an attorney under a general power of attorney made under that Act, an enduring document,⁸³ or a power of attorney made otherwise than under that Act, whether before or after its commencement.⁸⁴ Section 99(2) provides 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'. 'Invalidity' is defined in the Act, and includes the circumstances in which the document has been revoked.⁸⁵

⁷⁸ *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.

⁷⁹ 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.

⁸⁰ See Law Reform Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 67.

⁸¹ *Powers of Attorney Act 1971* (UK) c 27, s 5.

⁸² See *Powers of Attorney Act 1998* (Qld) ss 98–99.

⁸³ 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').

⁸⁴ *Powers of Attorney Act 1998* (Qld) s 99(4).

⁸⁵ *Powers of Attorney Act 1998* (Qld) s 96 defines 'invalidity', of a power under a document, to mean invalidity because (a) the document was made in another State and does not comply with the other State's requirements; (b) the power is not exercisable at the time it is purportedly exercised; or (c) the document has been revoked. That section also defines 'know', of a power's invalidity, to include:

11.87 The *Powers of Attorney Act 1998* (Qld) sets out a number of circumstances in which a power of attorney is revoked (and, therefore, 'invalid' for the purposes of section 99),⁸⁶ including, for example:

- where the principal:⁸⁷
 - revokes the power or dies;
 - in the case of a general power of attorney, becomes a person with impaired capacity; or
 - in the case of an enduring power of attorney, makes a later inconsistent document, or (in certain circumstances)⁸⁸ marries or divorces; or
- where the attorney:⁸⁹
 - resigns, becomes a person with impaired capacity, becomes bankrupt or insolvent or takes advantage of the laws of bankruptcy as a debtor, or dies; or
 - in the case of an enduring power of attorney, becomes a paid carer, health provider or service provider for the principal.

11.88 Although those provisions are silent as to the effect of the principal's bankruptcy, the attorney would be deprived of the power to deal with the principal's property in those circumstances by virtue of the bankruptcy laws, and the attorney's power would be 'invalid' within the meaning of the *Powers of Attorney Act 1998* (Qld).⁹⁰

11.89 The circumstances of invalidity in section 70(1) of the *Trusts Act 1973* (Qld) are more limited and do not reflect all the circumstances in which a power of

-
- (a) know of the happening of an event that invalidates the power; or

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.

86 *Powers of Attorney Act 1998* (Qld) ch 2 pt 3 (revoking a power of attorney other than an enduring power of attorney), ch 3 pt 5 (revoking an enduring document). The provisions in ch 2 pt 3 of the Act do not limit the events by which, or circumstances in which, a power of attorney is revoked by operation of law: s 15.

87 *Powers of Attorney Act 1998* (Qld) ss 17–19, 47, 49–53.

88 If a principal marries after making an enduring document, the enduring document is revoked to the extent it gives power to someone other than the principal's husband or wife, unless there is a contrary intention in the document; and, if a principal divorces after making an enduring document, the enduring document is revoked to the extent it gives power to the divorced spouse: *Powers of Attorney Act 1998* (Qld) ss 52–53.

89 *Powers of Attorney Act 1998* (Qld) ss 21–24, 55–59A.

90 On the bankruptcy of a principal, the principal's property would vest in the Official Trustee: *Bankruptcy Act 1966* (Cth) s 58(1)(a). 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 *Powers of Attorney Act 1998* (Qld) s 96, set out at n 85 above.

attorney may be revoked. In particular, the section refers only to circumstances affecting the principal.

11.90 Further, the protection afforded by section 99(2) of the *Powers of Attorney Act 1998* (Qld) 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.

Discussion Paper

11.91 In the Discussion Paper, the Commission noted the suggestion by some commentators 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).⁹¹ It also noted that the British Columbia Law Institute has recently recommended the omission of the equivalent provision in that province's trustee legislation on the basis that the same result is achieved by the general protections given in its *Power of Attorney Act*.⁹²

11.92 The Commission suggested that 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, and 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.⁹³

11.93 The Commission therefore sought submissions on whether section 70 of the *Trusts Act 1973* (Qld) should 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).⁹⁴

Consultation

11.94 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and Professor Lee each submitted that section 70 of the *Trusts Act 1973* (Qld) should be omitted.

11.95 The Queensland Law Society considered that 'the section should be omitted so that the expanded provisions contained in the *Powers of Attorney Act 1998* afford protection to trustees as well as offering consistency and simplicity'. The Bar Association of Queensland expressed the view that '[n]o particular characteristic of trustees' dealing with persons acting under a power of attorney

⁹¹ *Trusts Discussion Paper* (2012) [11.144], citing HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [81.6940].

⁹² *Ibid*, citing British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 111.

⁹³ *Ibid*.

⁹⁴ *Ibid* 496.

seems to justify a separate statutory regime for trustees'. Professor Lee similarly commented that:

The law on powers of attorney should apply equally to all including trustees. Section 70 was necessary when it was first enacted but we now have more comprehensive power of attorney legislation.

11.96 The Public Trustee also commented that the protection is adequately provided for in section 99 of the *Powers of Attorney Act 1998* (Qld).

11.97 On the other hand, a legal practitioner who practises in trusts and succession law expressed the view that section 70 should be retained because the power of attorney might have been made pursuant to the law of a foreign country.

The Commission's preliminary view

11.98 In light of the general protection conferred on third parties by section 99 of the *Powers of Attorney Act 1998* (Qld), the Commission is of the view that it is unnecessary for the new legislation to include a provision to the effect of section 70 of the *Trusts Act 1973* (Qld). The omission of section 70 would ensure that a trustee has the same protection as any other third party who relies on a power of attorney that, without his or her knowledge, is invalid.

11.99 With respect to the concern raised by one of the submissions about powers of attorney executed in another jurisdiction, the Commission notes that section 99 of the *Powers of Attorney Act 1998* (Qld) expressly applies to an attorney under 'a power of attorney *made otherwise than under that Act*, whether before or after its commencement'.⁹⁵

LIABILITY OF TRUSTEES FOR CERTAIN LOSSES

11.100 Section 71 of the *Trusts Act 1973* (Qld) provides an indemnity to trustees in relation to certain losses to the trust estate:

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.

11.101 Section 71 has its origins in section 31 of the *Law of Property and Trustees Relief Amendment Act 1859* ('*Lord St Leonards' Act*'),⁹⁶ which gave statutory force to the indemnity clause that was commonly included in trust

⁹⁵ See [11.86] above.

⁹⁶ Section 31 of *Lord St Leonards' Act* is set out in *Trusts Discussion Paper* (2012) [11.6].

instruments.⁹⁷ The standard indemnity clause was said to be merely declaratory of the existing rules of equity⁹⁸ and not to otherwise enlarge the protection of trustees from liability.⁹⁹ 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’.¹⁰⁰

11.102 Apart from the reference in section 71 to ‘default’ (instead of ‘wilful default’), section 71 is expressed in virtually the same terms and in the same dense drafting style of that original provision.

11.103 A similar provision is included in the trustee legislation of most of the other Australian jurisdictions, except that the provisions in the ACT and New South Wales refer to the trustee’s ‘wilful neglect or default’,¹⁰¹ while the provisions in the Northern Territory, Tasmania, Victoria and Western Australia refer to the trustee’s ‘wilful default’.¹⁰² As explained later, the expression ‘wilful default’ has been given a narrow meaning in England, which has been the subject of much criticism.¹⁰³

11.104 In South Australia, the issue of trustee liability is addressed more generally.¹⁰⁴

11.105 In England the counterpart to section 71 (section 30(1) of the *Trustee Act 1925*) has now been repealed and replaced by a new, more limited, provision in the *Trustee Act 2000* (UK), which deals only with the liability of a trustee for the default of an agent.¹⁰⁵ As a result, the English 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.

Overview of section 71

11.106 This part of the chapter gives an overview of a trustee’s liability in relation to the various matters covered by section 71:

⁹⁷ *Re Brier* (1884) 26 Ch D 238, 243 (Earl of Selborne LC; Cotton and Fry LJJ agreeing).

⁹⁸ 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.

⁹⁹ 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.

¹⁰⁰ R Cozens-Hardy Home, *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.

¹⁰¹ *Trustee Act 1925* (ACT) s 59(2); *Trustee Act 1925* (NSW) s 59(2).

¹⁰² *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).

¹⁰³ See [11.123] ff below.

¹⁰⁴ See *Trustee Act 1936* (SA) s 35.

¹⁰⁵ *Trustee Act 2000* (UK) c 29, s 23 (replacing *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 30(1), which was in virtually the same terms as s 31 of *Lord St Leonards’ Act*). See [11.126] ff below.

- 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 an agent with whom trust money or securities are deposited (including a comparison with a trustee's liability under section 54(1) for a loss caused by an agent);
- 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.

Liability for joining in receipts for the sake of conformity

11.107 At law, where trustees joined in giving a receipt, they were, prima facie, all considered to have received the money.¹⁰⁶ However, in equity, a trustee could be exonerated from that inference by showing that the money, which was acknowledged to have been received by all of the trustees, was in fact received by the other trustee or trustees, and that the trustee joined in giving the receipt only for conformity.¹⁰⁷ The equitable rule arose because:¹⁰⁸

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.

11.108 Although a trustee is not chargeable simply by reason of allowing a co-trustee to receive trust moneys, a trustee will become liable for the misapplication of the money if, in breach of his or her duty, the trustee allows a co-trustee to retain the money for longer than the circumstances require or if the trustee fails to see that the money is applied for the purposes of the trust.¹⁰⁹

11.109 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'.¹¹⁰ In this

¹⁰⁶ *Brice v Stokes* (1805) 11 Ves Jun 319, 324; 32 ER 1111, 1113 (Lord Eldon LC).

¹⁰⁷ *Ibid.*

¹⁰⁸ R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 195.

¹⁰⁹ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 87, citing *Brice v Stokes* (1805) 11 Ves Jun 319; 32 ER 1111; *Thompson v Finch* (1856) 22 Beav 316; 52 ER 1130.

¹¹⁰ See, eg, the approved form of transfer (Form 1) under the *Land Title Act 1994* (Qld), which 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.

respect, the provision is declaratory of the general law.¹¹¹

Liability for the default of another trustee

11.110 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’.¹¹²

11.111 Section 71 of the *Trusts Act 1973* (Qld) gives effect to this position by providing that a trustee is ‘answerable and accountable only for the trustee’s own acts, receipts, neglects or defaults, and not for those of any other trustee, ... unless the ... loss occurs through the trustee’s own default’.

11.112 However, the section ‘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’.¹¹³ In that regard, 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.¹¹⁴

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.

11.113 If co-trustees are each guilty of a breach of trust, they will be jointly and severally liable.¹¹⁵

111 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.

112 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.

113 FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 93.

114 G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 422.

115 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].

Liability for the default of an agent with whom trust money or securities are deposited

11.114 Section 71 of the *Trusts Act 1973* (Qld) also provides that a trustee is not answerable and accountable for the acts, receipts, neglects or defaults 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.

11.115 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.

Liability under the general law

11.116 As explained in Chapter 4, a trustee may under the general law employ 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’.¹¹⁶ 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’,¹¹⁷ for example, by leaving trust money or securities in the hands of the agent for longer than was reasonably necessary.¹¹⁸

11.117 A trustee must still exercise discretion in selecting an agent,¹¹⁹ and should employ the agent to do only those acts that are within the usual scope of business of the agent.¹²⁰ A trustee is also ‘under an obligation to be diligent in seeing that a duty given to an agent has been properly performed’.¹²¹

Queensland provisions

11.118 The effect of section 71 is that a trustee is not answerable and accountable for the acts or defaults of an agent unless the loss occurs through the trustee’s own ‘default’.

11.119 In contrast, section 54(1), which gives trustees a general statutory power to employ agents, provides that a trustee is not responsible for the default of an agent employed in ‘good faith and without negligence’.

11.120 As noted earlier, both provisions use different language from their former counterparts in the English *Trustee Act 1925*. The former section 30(1) of that Act referred to ‘wilful default’ rather than ‘default’, and the former section 23(1) gave protection where the agent has been employed ‘in good faith’, rather than ‘in good

¹¹⁶ See *Speight v Gaunt* (1883) 9 App Cas 1, discussed in Chapter 4.

¹¹⁷ Ibid.

¹¹⁸ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 87–8.

¹¹⁹ *Re Weall* (1889) 42 Ch D 674, 677–8 (Kekewich J).

¹²⁰ *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).

¹²¹ *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).

faith and without negligence'. 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.¹²² That jurisdiction had included the additional requirement for the appointment to be made without negligence to ensure that a trustee would not avoid liability 'for an honest but foolish appointment'.¹²³

England

11.121 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.¹²⁴ However, because section 30(1) was also applicable, that being a case of trust funds deposited with an agent, Maugham J held that:¹²⁵

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.

11.122 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:¹²⁶

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)

11.123 That decision has been criticised for adopting too narrow a definition of 'wilful default',¹²⁷ in contrast to decisions in which wilful default has been held to be constituted by an 'ordinary want of prudence'.¹²⁸

11.124 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

122 *Trusts and Settled Land Report* (1971) 43.

123 See Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 41.

124 [1931] 1 Ch 572, 581.

125 *Ibid* 582.

126 *Ibid* 584.

127 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].

128 See, eg, *Re Chapman* [1896] 2 Ch 763, 775 (Lindley LJ), quoted at [11.134] below. See also *Dalrymple v Melville* (1932) 32 (NSW) 596.

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'.¹²⁹

11.125 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*,¹³⁰ and instead introduced quite detailed provisions in relation to the appointment of agents, including the appointment of agents to exercise the 'delegable functions' of the trustees.¹³¹

11.126 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 4, 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.¹³²

11.127 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 22.¹³³

Canada

11.128 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.¹³⁴ The Alberta Law Reform Institute considered that, although this approach reflected the general law, it was desirable for the Act to be 'explicit on this point':¹³⁵

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.

¹²⁹ 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]. Similar comment was made by Pettit: see PH Pettit, *Equity and the Law of Trusts* (Butterworths, 8th ed, 1997) 433–4.

¹³⁰ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II paras 23–24, sch 4 pt II.

¹³¹ These provisions are considered in Chapter 4.

¹³² See [4.67] ff above for a discussion of the review requirements and the trustee's duty of care.

¹³³ *Trustee Act 2000* (UK) c 29, s 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.

¹³⁴ See *Trusts Discussion Paper* (2012) [11.40]–[11.41].

¹³⁵ Alberta Law Reform Institute, *Trustee Investment Powers*, Report No 80 (2000) [226].

Liability in respect of financial institutions

11.129 Section 71 of the *Trusts Act 1973* (Qld) also applies where trust money has been deposited with a financial institution.¹³⁶ A trustee is not answerable and accountable for any insufficiency, deficiency or loss of the money unless it occurs through the trustee's own 'default'.

11.130 Under the general law, a trustee was justified in 'depositing moneys for temporary purposes in the hands of bankers of good credit',¹³⁷ provided that the trustee did not improperly omit to invest the funds and did not mix them with other moneys.¹³⁸ In these circumstances, a trustee was not liable if the trust money was lost as a result of the failure of the bank.¹³⁹ However, where executors left money on deposit with a bank, in breach of their duty under the will to invest the funds with all convenient speed, they were held liable for the loss of the money when the bank failed.¹⁴⁰

11.131 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.

11.132 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.

Liability for the insufficiency or deficiency of securities, or for any other loss

11.133 The final part of section 71 of the *Trusts Act 1973* (Qld) provides that a trustee is not answerable and accountable for the 'insufficiency or deficiency of any securities, nor for any other loss',¹⁴¹ unless the insufficiency, deficiency or loss occurs through the trustee's own default'.

¹³⁶ *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'.

¹³⁷ 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.

¹³⁸ *Wilks v Groom* (1856) 3 Dr 584, 592; 61 ER 1026, 1029 (Kindersley V-C). See also *Re Marcon's Estate* [1871] WN 148.

¹³⁹ See *Wilks v Groom* (1856) 3 Dr 584; 61 ER 1026; *Re Marcon's Estate* [1871] WN 148.

¹⁴⁰ *Moyle v Moyle* (1831) 2 Russ & M 710; 39 ER 565.

¹⁴¹ In *Re Vickery* [1931] 1 Ch D 572, Maugham J held (at 582) that the similar reference to 'any loss' in s 30(1) of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19 did not protect trustees generally from any loss caused to the trust, but was confined to:

11.134 This part of section 71 is again declaratory of the general law. As stated by Lindley LJ in *Re Chapman*, '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'.¹⁴² 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.¹⁴³

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.

11.135 The provision does not, however, protect a trustee if the investment, when made, was not authorised and proper.¹⁴⁴

Discussion Paper

11.136 In the Discussion Paper, the Commission observed that, although section 71 of the *Trusts Act 1973* (Qld) is largely declaratory of the general law, it may nevertheless be desirable for the legislation to continue to include a provision to that effect on the basis that it would make the law more accessible.¹⁴⁵

11.137 In so far as section 71 applies to a trustee's liability for a loss occasioned by an agent, the Commission noted that a trustee is protected under that section if the loss does not occur through the trustee's default, while section 54(1) of the Act protects a trustee if the agent was employed 'in good faith and without negligence'. The Commission observed that, because neither section 71 nor section 54(1) would protect a trustee who had failed to act with prudence, those provisions have not produced the same difficulties as their English counterparts.¹⁴⁶

11.138 Nevertheless, the Commission suggested that it would be desirable for the legislation 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.¹⁴⁷

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)

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 s 61 of the English legislation to relieve a trustee from liability for a breach of trust. The equivalent Queensland provision, s 76 of the *Trusts Act 1973* (Qld), is considered later in this chapter.

142 [1896] 2 Ch 763, 775.

143 Ibid 776.

144 FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 94.

145 *Trusts Discussion Paper* (2012) [11.17], [11.55].

146 Ibid [11.42].

147 Ibid [11.43].

11.139 In relation to the first part of section 71, the Commission sought submissions on whether the legislation should provide 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.¹⁴⁸

11.140 More generally, the Commission sought submissions on whether the legislation should provide that a trustee is not liable for a relevant loss unless it occurs through the trustee's own default or whether the protection should be expressed in some other way.¹⁴⁹

Consultation

Liability for joining in receipts for the sake of conformity

11.141 This issue was addressed by the Queensland Law Society, the Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law. All of these respondents submitted that the *Trusts Act 1973* (Qld) should 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.

11.142 The Queensland Law Society considered that the provision should continue to be expressed in the same terms as the first clause of section 71 of the *Trusts Act 1973* (Qld) because it is 'declaratory of the general law as it stands'. Similarly, Professor Lee submitted that the existing provision in section 71 should be retained as 'there is an archive of case law' and it 'gives trustees good guidance'. The Bar Association of Queensland also preferred the existing formulation in section 71 to the 'broader' provision in section 35(1) of the *Trustee Act 1936* (SA):

The narrower provision [in section 71] ought to be maintained to give clear and precise statutory effect to what appears to the Bar Association to be an appropriate general law principle. ... the broader provision [in section 35(1) of the *Trustee Act 1936* (SA)] seems to unnecessarily interfere with and duplicate to some extent, broader duties.

11.143 On the other hand, the Public Trustee considered that 'a more general expression of this position, reflective of the equitable rule referred to in the discussion paper neatly describes that which would be preferable'. The legal practitioner also preferred section 35(1) of the *Trustee Act 1936* (SA).

Liability for the default of another trustee

11.144 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and Professor Lee considered that it is 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. Each of those respondents also expressed the view that

¹⁴⁸ Ibid 462.

¹⁴⁹ Ibid 468, 469, 470, 472.

the provision should state that a trustee is not liable for the loss unless it occurs through the trustee's own default. The Queensland Law Society commented that 'section 71 in this aspect is declaratory of the general law' and that it saw 'no reason to change or express this in any other way'.

Liability for the default of an agent with whom trust money or securities are deposited

11.145 The Bar Association of Queensland, the Public Trustee and Professor Lee each expressed the view that a trustee should be protected from liability in respect of the acts or defaults of the agent if the loss does not occur through the trustee's own default. In this regard, both the Public Trustee and Professor Lee were content with the current provision in section 71 of the *Trusts Act 1973* (Qld). The Public Trustee agreed with the comments noted in the Discussion Paper that the provisions dealing with liability for an agent should be standardised and should refer to 'default', rather than 'good faith' or 'wilful default', which give insufficient protection to beneficiaries.

11.146 On balance, the Bar Association also preferred the concept of 'default':

There is merit in retaining express protection for the trustee in respect of acts by agents. The trustee is not an insurer of the trust fund.

There is also merit in identifying the circumstances in which that protection ought to be provided by reference to the general statutory duty to be included in any revised legislation, otherwise in respect of the proposed form in Question 11.2(a). However, on balance, the Bar Association considers that the concept of default is broader and more flexible and can pick up breaches of other duties, such as complying with the terms of the trust.

11.147 On the other hand, the Queensland Law Society considered that the legislation should 'apply a "prudence" test to the employment and supervision of agents'.

11.148 A legal practitioner who practises in trusts and succession law expressed the view that a trustee should be protected from liability in both of the suggested circumstances, that is, if the trustee exercises the care, skill and diligence of a prudent person in employing and supervising the agent, and if the loss does not occur through the trustee's own default.

Liability in respect of financial institutions

11.149 The Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that it is 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. Those respondents further considered that the provision should state that a trustee is not liable for the loss unless it occurs through the trustee's own default.

11.150 The Public Trustee expressed the view that he 'is content with the description currently appearing in section 71'. Professor Lee was also of the view

that section 71 should be retained as it is and noted that ‘the general principles of trustees’ liability should remain’. The Bar Association of Queensland commented that ‘there is merit in retaining express protection for the trustee in respect of acts by agents’ and noted that ‘the trustee is not an insurer of the trust fund’. For that reason, it considered that it is desirable to include an express provision stating when a trustee is not answerable or accountable for the loss of money or securities deposited with a financial institution, and that default should be the standard imposed.

11.151 However, the Queensland Law Society expressed the view that ‘it is no longer necessary to include this section dealing with financial institutions’. It considered that ‘section 22 of the *Trusts Act* covers investment with a financial institution adequately’.

Liability for the insufficiency or deficiency of securities, or for any other loss

11.152 The Bar Association of Queensland, the Public Trustee and Professor Lee expressed the view that the legislation should continue to provide that a trustee is not answerable or accountable for the insufficiency or deficiency of any securities, or for any other loss, unless the insufficiency, deficiency or loss occurs through the trustee’s own default. The Public Trustee observed:

Certainly that provision should and is subject to the application (or breach) of the prudent person rule. It might be however that there are circumstances where there is an insufficiency or deficiency which do not constitute a breach of that rule and for which the trustee should not be liable.

11.153 In contrast, the Queensland Law Society suggested that this provision is no longer necessary in light of the duty of care imposed by section 22 of the Act.

The Commission’s preliminary view

11.154 The Commission is of the view that the new legislation should include a provision to the general effect of section 71 of the *Trusts Act 1973* (Qld). Although that section is declaratory of the general law, the Commission considers that the inclusion of a provision setting out the circumstances in which a trustee is liable for various losses makes the law more accessible.

11.155 The Commission also considers that the current requirement in section 71 that the relevant loss has occurred without the trustee’s ‘default’ is an appropriately narrow test for affording protection to a trustee in respect of the various losses of trust property, and is to be preferred over the equivalent provisions in the other Australian jurisdictions that make a trustee liable only where he or she is guilty of ‘wilful default’.¹⁵⁰

11.156 Although the Commission endorses the general approach of section 71 in this respect, it may be that the draft legislation reflects the concept of a loss that occurs through the ‘trustee’s own default’ more generally as a loss that arises from a trustee’s breach of duty.

¹⁵⁰

See [11.103] above.

11.157 As foreshadowed in the Discussion Paper, the Commission considers that the new legislation should provide only one test for determining a trustee's liability for a loss occasioned by an agent. Accordingly, the provision based on section 54(1) should not include that part of section 54(1) that provides that a trustee is not responsible for the default of an agent who is employed in good faith and without negligence. The general liability of a trustee for the default of an agent should instead be brought within the scope of the new provision based on section 71 of the *Trusts Act 1973* (Qld).

REIMBURSEMENT OF TRUSTEE OUT OF TRUST PROPERTY

11.158 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. It 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'.¹⁵¹

11.159 Similar provision is made in all other Australian jurisdictions and in New Zealand.¹⁵² In England, section 31 of the *Trustee Act 2000* (UK) also 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'.

11.160 These provisions reflect the long-standing rule of equity that 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.¹⁵³

Discussion Paper

11.161 In the Discussion Paper, the Commission outlined the effect of section 72, but did not seek submissions on any particular aspects of that provision.¹⁵⁴

The Commission's preliminary view

11.162 The Commission is of the view that the new legislation should include a provision to the general effect of section 72 of the *Trusts Act 1973* (Qld). Although that provision is declaratory of the general law, the Commission considers that it provides useful guidance to trustees.

¹⁵¹ *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).

¹⁵² *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).

¹⁵³ See, eg, *National Trustees Executors and Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268, 274 (Starke J), 277 (Williams J); *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 441, 442 (McPherson JA).

¹⁵⁴ *Trusts Discussion Paper* (2012) [11.64] ff.

PROTECTION AGAINST LIABILITY IN RESPECT OF RENTS AND COVENANTS

11.163 Section 66 of the *Trusts Act 1973* (Qld) deals with contingent liabilities in respect of leaseholds.

11.164 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.¹⁵⁵ 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.¹⁵⁶

11.165 In addition, a personal representative might become *personally* liable — as where he or she enters into possession of the leasehold premises, becoming liable on the basis of privity of estate as an assignee of the lease.¹⁵⁷

11.166 As explained earlier in this chapter, trustees and personal representatives have a right of indemnity out of the trust or estate assets for all costs, expenses and liabilities properly incurred in the administration of the estate. In view of that right of indemnity,¹⁵⁸ the earlier practice of the courts was to have a fund from the estate set apart 'to provide for the possible event of a future breach of any of the covenants contained in a lease held by the deceased'.¹⁵⁹ The fund would be released when there was no longer any possibility of any claim being brought.¹⁶⁰ However, this had the unsatisfactory effect of withholding part of the estate from the beneficiaries, in some cases for very long periods.¹⁶¹

¹⁵⁵ *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]. In contrast, 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 generally *Trusts Discussion Paper* (2012) [11.67] ff.

¹⁵⁶ 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].

¹⁵⁷ *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.

¹⁵⁸ *King v Malcott* (1852) 9 Hare 692, 695; 68 ER 691, 692 (Turner V-C); *Re Nixon* [1904] 1 Ch 638, 646 (Byrne J); *Re Lewis* [1939] 1 Ch 232, 236–7 (Simonds J).

¹⁵⁹ *Hardy v Fothergill* (1888) 13 App Cas 350, 370 (Lord Magnaghten). This applied where the property comprised in the lease did not of itself furnish sufficient security: *Dodson v Sammell* (1861) 1 Dr & Sm 575, 577; 62 ER 498, 498–9 (Kindersley V-C). 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).

¹⁶⁰ *Re Lewis* [1939] 1 Ch 232, 236–7 (Simonds J).

¹⁶¹ *Dodson v Sammell* (1861) 1 Dr & Sm 575, 578; 62 ER 498, 499 (Kindersley V-C). See also *Re Nixon* [1904] 1 Ch 638, 647 (Byrne J). In *Re Lewis* [1939] 1 Ch 232, for example, the funds had been held in court for almost 50 years.

The effect of setting apart a fund to answer future breaches of covenant is to throw a great burthen upon the residuary legatee, for, instead of receiving his residue in the ordinary course, he would be kept out of a portion of it, possibly out of the whole, as long as any leaseholds of the testator were outstanding, for any period of time, however long. This is a very great evil to the residuary legatee, and should not be inflicted upon him unless absolutely necessary.

11.167 Provision was later made in *Lord St Leonards' Act* to relieve personal representatives from the need to set aside an indemnity fund in respect of unknown future liabilities under leasehold covenants where the personal representative was liable in his or her representative capacity.¹⁶²

11.168 In cases where the personal representative had become personally liable, rather than in his or her representative capacity only,¹⁶³ the decree of the court in an administration action was sufficient protection.¹⁶⁴

Section 66

11.169 Section 66 of the *Trusts Act 1973* (Qld) enables the estate to be distributed without having to obtain an order for distribution from the court and without setting apart an indemnity fund for unascertained or contingent future liabilities that may arise under a lease, such as for a possible future breach by the tenant of a covenant to repair the premises.¹⁶⁵

Its effect is to enable an executor or administrator (or trustee) after paying, performing and observing the rent, covenants and agreements up to date and making provision for future claims of a fixed or ascertained amount, to sell or transfer the property, and distribute the other assets, without providing for future breach of covenant or other liability. The object is to facilitate the distribution of the other assets. (notes omitted)

11.170 Similar provisions are found in most of the other Australian jurisdictions, as well as New Zealand and England.¹⁶⁶

11.171 In order to obtain the protection afforded by section 66, a personal representative or a trustee must have:¹⁶⁷

- satisfied all liabilities under the lease that may have accrued and have been claimed up to the date of the conveyance of the leasehold; and

¹⁶² *Law of Property and Trustees Relief Amendment Act 1859*, 22 & 23 Vict, c 35, ss 27–28.

¹⁶³ *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.

¹⁶⁴ *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).

¹⁶⁵ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) [94.01], discussing the New South Wales equivalent to s 66.

¹⁶⁶ *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; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 26.

¹⁶⁷ *Trusts Act 1973* (Qld) s 66(1).

- 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 agreed to lay out on the property.

11.172 If those conditions are satisfied, the personal representative or trustee may convey the leasehold to a purchaser, legatee, devisee or other person entitled to call for a conveyance,¹⁶⁸ 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.¹⁶⁹

11.173 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,¹⁷⁰ but that the protection given to the personal representative or trustee does not prejudice the right of the lessor to follow the assets of the deceased or the trust property into the hands of the distributees.¹⁷¹

11.174 Section 66 applies if a personal representative or trustee is 'for any reason' liable for the relevant rents, covenants or agreements. As such, the provision is not limited in its application to the liability that attaches to a personal representative in his or her representative capacity, but is 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.¹⁷² This contrasts with the provisions in most of the other jurisdictions, which apply if a personal representative or trustee is liable 'as such',¹⁷³ so that the protection does not extend to any additional personal liability of the personal representative or trustee.¹⁷⁴

11.175 Section 66 applies both to personal representatives and to trustees.¹⁷⁵ This ensures that the protection applies to a trustee who, having originally been a personal representative in relation to the estate, has completed his or her functions

168 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: see *Trusts Discussion Paper* (2012) [11.163]–[11.167], citing, for example, HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 1983) [1639]; *Trusts and Settled Land Report* (1971) 50; *Re Lawley* [1911] 2 Ch 530, 533 (Swinfen Eady J).

169 *Trusts Act 1973* (Qld) s 66(1)(d).

170 *Trusts Act 1973* (Qld) s 66(1)(e).

171 *Trusts Act 1973* (Qld) s 66(2).

172 *Trusts and Settled Land Report* (1971) 50. See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [16.420].

173 *Administration and Probate Act 1929* (ACT) s 66(1); *Probate and Administration Act 1898* (NSW) s 94(1)(a); *Administration and Probate Act* (NT) s 98(1); *Trustee Act 1936* (SA) s 30(1), (2)(b); *Trustee Act 1958* (Vic) s 32(1); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 26(1). Contra *Trustees Act 1962* (WA) s 62(2); *Trustee Act 1956* (NZ) s 34(2).

174 See *Re Owers* [1941] 1 Ch 389, 391 (Simonds J).

175 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).

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.¹⁷⁶

11.176 Section 66, and its counterparts in most of the other jurisdictions, are intended to operate invariably.¹⁷⁷

11.177 The object of these provisions is to facilitate the conveyance of the leasehold and the distribution of the rest of the estate.¹⁷⁸

A more general provision

11.178 The trustee legislation in Ontario includes provisions in similar terms to section 66 of the *Trusts Act 1973* (Qld) which apply to personal representatives.¹⁷⁹ In its report on the administration of estates, the Ontario Law Reform Commission noted that these 'complex provisions respond to a narrow problem'.¹⁸⁰ That 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'.¹⁸¹

11.179 Accordingly, the Ontario Law Reform Commission 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:¹⁸²

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.

11.180 In making that proposal, it acknowledged that it was 'accepting that considerations of contract ought to defer to the policy in favour of the ease of administration of estates'.¹⁸³ Its proposal has not been implemented.

¹⁷⁶ 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].

¹⁷⁷ *Trusts Act 1973* (Qld) ss 65, 66(2); *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).

¹⁷⁸ 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).

¹⁷⁹ *Trustee Act*, RSO 1990, c T23, ss 51-52.

¹⁸⁰ Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 100.

¹⁸¹ *Ibid* 101.

¹⁸² *Ibid* 102.

Discussion Paper

11.181 In the Discussion Paper, the Commission expressed the view that, although the provision proposed by the Ontario Law Reform Commission is obviously much shorter than section 66, it would not be suitable for adoption in Queensland.¹⁸⁴

11.182 It observed that the proposed 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.¹⁸⁵

11.183 The Commission further observed that, since 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.¹⁸⁶

Consultation

11.184 Although the Commission did not seek submissions in relation to section 66 of the *Trusts Act 1973* (Qld), two respondents addressed it in their submissions.

11.185 The Bar Association of Queensland agreed that the provision proposed by the Ontario Law Reform Commission would not be suitable for adoption in Queensland in the place of section 66 of the *Trusts Act 1973* (Qld), for the reasons set out in the Discussion Paper.

11.186 Professor Lee considered that the legislation should continue to include a provision to the general effect of section 66, but that the provision should be redrafted in simplified terms. He commented that the purpose of section 66 is to relieve the trustee 'of the anxiety of an uncertain future liability'.

The Commission's preliminary view

11.187 The Commission accepts that section 66 of the Act is a lengthy and densely drafted provision, reflecting its origins in English trustee legislation of the late 1850s. It remains of the view, however, that the more generally worded provision proposed by the Ontario Law Reform Commission would confer an unjustifiably broad protection on trustees and should not be adopted.

11.188 In the Commission's view, the new legislation should include a provision that gives trustees a similar protection to section 66 of the *Trusts Act 1973* (Qld).

183 *Ibid.*

184 *Trusts Discussion Paper* (2012) [11.171].

185 *Ibid.*

186 *Ibid.*

However, the new provision should be expressed in a more simplified and modern drafting style and, in view of the abolition of rentcharges by the *Property Law Act 1974* (Qld), should omit the references to rentcharges that appear in the current provision.¹⁸⁷

RELIEF FROM LIABILITY IN RESPECT OF CALLS MADE AFTER TRANSFER OF SHARES

Potential future liability of personal representative

11.189 In certain circumstances, a personal representative who has distributed or transferred partly paid shares can subsequently become subject to a liability in respect of the unpaid part of those shares.

11.190 The *Corporations Act 2001* (Cth) provides that, in the winding up of a company (other than a no liability company), the members and past members of the company are liable to contribute to paying the company's debts and liabilities, as well as the costs, charges and expenses of the winding up.¹⁸⁸ The maximum amount of their liability is the amount, if any, that is unpaid on the shares in respect of which they are liable as a present or past member.¹⁸⁹

11.191 A person who is liable, whether as a present or past member, to contribute to the property of the company in the event that it is wound up is known as a 'contributory'.¹⁹⁰

11.192 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'.¹⁹¹

Statutory relief from continuing liability

11.193 In order to avoid personal liability in respect of calls made after partly paid shares had been transferred, it was formerly the practice for personal representatives to reserve part of the estate for the payment of any possible future calls on shares, or to require an indemnity from the beneficiary upon distribution or

¹⁸⁷ A 'rent charge' is the right to an annual sum payable out of land, but without any conferral of tenure in the land: see LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at January 2011) (definition of 'rentcharge'): Rent charges are rare in Australia and in Queensland, s 176 of the *Property Law Act 1974* (Qld) provides that, after the commencement of that Act, a rent charge cannot be created. See the discussion in Queensland Law Reform Commission, *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 99–100.

¹⁸⁸ See *Corporations Act 2001* (Cth) ss 514–515.

¹⁸⁹ *Corporations Act 2001* (Cth) s 516. The liability of a past member is also subject to further limitations. A past member is not liable in respect of a debt or liability of the company contracted *after* the past member ceased to be a member: s 520. Further, a past member need not contribute if he, she or it ceased to be a member a year or more before the winding up and, ordinarily need not contribute unless it appears to the court that the existing members are unable to satisfy the contributions that they are liable to make under the Act: ss 521–522.

¹⁹⁰ *Corporations Act 2001* (Cth) s 9 (definition of 'contributory' para (a)(i)).

¹⁹¹ *Corporations Act 2001* (Cth) s 528(a).

transfer, or to apply to the court for protection against such liability.¹⁹² Statutory provisions in a number of jurisdictions now overcome the difficulties faced by personal representatives in distributing estates that include partly paid shares.¹⁹³

11.194 In Queensland, 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.

11.195 Section 75 enables a personal representative to distribute the assets of the deceased estate as soon as he or she has procured the registration of some other person as the holder of the partly paid shares, and to do so without having to reserve a separate fund to meet any possible future calls. It therefore relieves a personal representative who has transferred the shares from the liability that might accrue in a winding up of the company.¹⁹⁴

11.196 However, the provision 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.

11.197 Similar provision is made in the ACT, New South Wales, South Australia, Victoria and Western Australia.¹⁹⁵

Scope of section 75

11.198 Section 75 of the *Trusts Act 1973* (Qld) applies to a 'personal representative of a deceased person'. The provisions in Victoria and Western

¹⁹² 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.

¹⁹³ Victoria, *Parliamentary Debates*, Legislative Assembly, 18 December 1901, 3708 (Sir Samuel Gillott). See also *Re Blackwood* [1908] VLR 517, 522 (Cussen J).

¹⁹⁴ *Re Blackwood* [1908] VLR 517.

¹⁹⁵ *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.

Australia are also expressed to apply to a 'personal representative of a deceased person'.¹⁹⁶

11.199 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'.¹⁹⁷ 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.

Discussion Paper

11.200 In the Discussion Paper, the Commission observed that the application of section 75 to a testamentary trustee might 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.¹⁹⁸

11.201 The Commission therefore sought submissions on whether section 75 of the *Trusts Act 1973* (Qld) should be amended so that it also applies to the trustee of the will or estate of a deceased person.¹⁹⁹

Consultation

11.202 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law expressed the view that section 75 should be amended so that it also applies to the trustee of the will or estate of a deceased person.

11.203 Professor Lee also considered that the section should be extended to apply to trustees, but suggested that it not be limited to testamentary trustees.

The Commission's preliminary view

11.204 The Commission is of the view that, subject to a slight change to enlarge the scope of the provision, the new legislation should continue to include a provision to the general effect of section 75 of the *Trusts Act 1973* (Qld). Where the estate of a deceased person includes partly paid shares, a personal representative who has transferred or distributed the shares may nevertheless become subject to a subsequent liability under the *Corporations Act 2001* (Cth) in the event that the company is wound up. The protection given by section 75 enables the personal representative, once he or she has transferred or distributed the shares, to distribute the balance of the estate without retaining a fund to meet any potential liability that might subsequently accrue in respect of the unpaid part of the shares. It therefore facilitates the efficient administration of deceased estates.

¹⁹⁶ *Trustee Act 1958* (Vic) s 34; *Trustees Act 1962* (WA) s 74.

¹⁹⁷ *Trustee Act 1925* (ACT) s 61A; *Trustee Act 1925* (NSW) s 61A.

¹⁹⁸ *Trusts Discussion Paper* (2012) [11.184].

¹⁹⁹ *Ibid* 505.

11.205 Section 75 currently applies to personal representatives and not more widely to trustees. Where the partly paid shares are subject to a testamentary trust, and are later distributed according to the terms of that trust, the distribution will at that stage be made by a trustee in that capacity, rather than by a personal representative (even if the personal representative and the trustee are one and the same). To allow for this situation, the Commission considers it appropriate for the new provision to apply not only to a personal representative but also to the trustee of the will or estate of a deceased person.

11.206 However, because the purpose of giving this statutory protection is to facilitate the efficient administration of deceased estates, the Commission is of the view that it would not be appropriate to extend the protection to trustees generally. If trustees of inter vivos trusts choose to invest in partly paid shares, their liability in the event of the winding up of the company should be the same as any other present or past member of the company.

POWER OF COURT TO RELIEVE TRUSTEE FROM PERSONAL LIABILITY

11.207 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:

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.

11.208 A provision in similar terms is also included in the trustee legislation of the other Australian jurisdictions, New Zealand and England.²⁰⁰

11.209 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 the severity of the law against trustees'.²⁰¹ 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.²⁰²

11.210 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'

²⁰⁰ *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.

²⁰¹ United Kingdom, *Parliamentary Debates*, House of Lords, 20 July 1896, vol 43, col 117–8 (The Lord Chancellor).

²⁰² *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).

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'.²⁰³ However, the section does not enable the court to relieve a trustee of liability for a future breach of trust.²⁰⁴

Conditions for relief

Section 76

11.211 In order for relief to be granted under section 76, 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.²⁰⁵

11.212 The court has a wide discretion. Whether a trustee has acted honestly and reasonably is a question of fact to be determined in the circumstances of each case. No general rules or principles can be laid down.²⁰⁶ 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.²⁰⁷

11.213 Generally, 'honesty' requires the trustee to have acted in good faith and for the welfare of the trust.²⁰⁸ 'Reasonable' means 'reasonable as trustees'.²⁰⁹ Whether or not a trustee sought and acted on legal advice will be relevant to the reasonableness of the trustee's conduct, but reliance on such advice will not automatically entitle a trustee to relief.²¹⁰

11.214 The fact that a trustee has acted gratuitously is a relevant factor to be taken into account.²¹¹ Conversely, the High Court has stated that a professional

203 *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].

204 *Re Tollemache* [1903] 1 Ch 457; *Re Rosenthal* [1972] 1 WLR 1273.

205 *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).

206 *Re Turner* [1897] 1 Ch 536, 542 (Byrne J); *McMahon v Cooper* (1904) 4 SR (NSW) 433, 438 (AH Simpson CJ in Eq).

207 *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.

208 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).

209 *Re Grindey* [1898] 2 Ch 593, 601 (Chitty J).

210 *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).

211 *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).

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'.²¹²

11.215 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.²¹³ It has been held that 'fairly', in this context, means fair to the trustee 'and to the other people who may be affected'.²¹⁴

11.216 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.²¹⁵ A failure to obtain the directions of the court has also been held as going to whether the trustee has acted reasonably,²¹⁶ especially where a large estate is at stake.²¹⁷

Corporations Act 2001 (Cth)

11.217 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 predecessors also have their origins in the English *Judicial Trustees Act 1896*.²¹⁸

11.218 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'. It does not expressly require that the person had acted 'reasonably'.²¹⁹

²¹² *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).

²¹³ 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).

²¹⁴ *Marsden v Regan* [1954] 1 WLR 423, 434 (Evershed MR).

²¹⁵ *Trusts Act 1973* (Qld) ss 96–97 are considered in Chapter 12.

²¹⁶ See, eg, *Re Gee* [1948] Ch 284, 297 (Harman J).

²¹⁷ *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 165 (Starke, Dixon and Williams JJ).

²¹⁸ *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).

²¹⁹ Previously, under the *Companies Act 1961* (Qld) s 365, it had been necessary for it to appear that the person had acted honestly and reasonably, but the latter requirement was omitted with the introduction of the *Companies (Queensland) Code 1981*, s 535. 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': see WE Paterson, HH Ednie and HAJ Ford, *A Guide to the National Scheme and Revised Companies Bill 1980* (Butterworths, 1980) [1121].

11.219 Nevertheless, in *ASIC v Vines*, Austin J noted that the courts have continued to treat ‘reasonableness’ as a factor relevant to whether an officer ‘ought fairly to be excused’ under that provision and that honesty alone is not sufficient for relief.²²⁰ His Honour suggested that there may be a ‘conceptual dilemma’ in finding that a person has acted both negligently and reasonably:²²¹

[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.

11.220 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 1318.²²² 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.²²³

Discussion Paper

11.221 In the Discussion Paper, the Commission sought submissions on whether section 76 of the *Trusts Act 1973* (Qld) should be generally retained in its current form or, alternatively, whether it should be amended so that it is not necessary for it to appear to the court that:²²⁴

- the trustee has acted reasonably;
- 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.

Consultation

11.222 The Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law expressed the view that section 76 should be retained in its current form. The Public Trustee considered that, in particular, the requirement for the trustee to have acted reasonably is appropriate.

²²⁰ (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.

²²¹ (2005) 65 NSWLR 281, 290. As to the statutory duty of care imposed on directors and officers of corporations, see now *Corporations Act 2001* (Cth) s 180(1).

²²² (2005) 65 NSWLR 281, 291.

²²³ *Ibid.*

²²⁴ *Trusts Discussion Paper* (2012) 518.

11.223 However, the Queensland Law Society submitted that section 76 of the *Trusts Act 1973* (Qld) should be amended so that it is not necessary for it to appear to the court that the trustee has acted reasonably, or that 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. It considered that this would provide ‘uniformity of approach without any real limitation on what the court is able to consider when determining whether to relieve a trustee from personal liability’.

11.224 The Bar Association of Queensland also expressed the view that, ‘although the differences between s 76 *Trusts Act* and s 1318 *Corporations Act* seem unlikely to lead to different conclusions on equivalent facts ... s 76 ought to be varied in the two respects contemplated’:

- (a) As to the former, the considerations in [the Discussion Paper]²²⁵ suggest that the omission of an express requirement for reasonableness would be wise.
- (b) As to the latter, trustees are increasingly aware (since the *Macedonian case*)²²⁶ of their entitlement to approach the Court for assistance and Courts are increasingly willing to dispense advice. However, many situations can arise where trustees do not think of obtaining assistance, or act in haste, or do not seek legal advice. Such situations are more likely to be the ones where relief under s 76 is appropriate. (notes added)

The Commission’s preliminary view

11.225 In the Commission’s view, the new legislation should include a provision to the effect of section 76 of the *Trusts Act 1973* (Qld). In particular, the new provision should continue to require the court to be satisfied that the trustee acted reasonably (and not just honestly) and that the trustee ought fairly to be excused for omitting to obtain the directions of the court.

11.226 Although these are likely to be factors that the court would, in any event, take into account in considering whether the trustee ought fairly to be excused for the breach of trust, the Commission considers it appropriate that the provision should continue to make express reference to these factors.

POWER OF COURT TO MAKE BENEFICIARY INDEMNIFY FOR BREACH OF TRUST

11.227 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.

²²⁵ See [11.218]–[11.220] above.

²²⁶ See *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, discussed in Chapter 12.

11.228 The provision reflected the position under the general law allowing the court to require the beneficiary to indemnify the trustee if the beneficiary instigated or requested the breach.²²⁷ It also extends the court's power by allowing it to impound any part of the beneficiary's interest in the trust property where the beneficiary consented in writing to the breach.²²⁸

11.229 Similar provision is made in the other Australian jurisdictions, as well as in New Zealand and England.²²⁹

Discussion Paper

11.230 In the Discussion Paper, the Commission outlined the effect of section 77, but did not seek submissions on any particular aspects of the provision.²³⁰

Consultation

11.231 Professor Lee commented that section 77 should be retained in its current terms.

The Commission's preliminary view

11.232 The court has had the wider powers conferred by section 77 of the *Trusts Act 1973* (Qld) since a provision in the same terms was first introduced by the *Trustees and Executors Act 1897* (Qld).²³¹ The Commission is of the view that the court should retain those powers, and that the new legislation should therefore include a provision to the effect of section 77.

ABOLITION OF RULE IN *ALLHUSEN v WHITTELL*

11.233 The rule in *Allhusen v Whittell*²³² 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.²³³ 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

²²⁷ See *Raby v Ridehalgh* (1855) 7 De GM & G 104; 44 ER 41; *Mara v Browne* [1895] 2 Ch 69, 92 (North J). See also RE Megarry and PV Baker, *Snell's Principles of Equity* (Sweet & Maxwell, 26th ed, 1966) 306.

²²⁸ See *Fletcher v Collis* [1905] 2 Ch 34–5 (Romer LJ).

²²⁹ *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.

²³⁰ *Trusts Discussion Paper* (2012) [11.185] ff.

²³¹ *Trustees and Executors Act 1897* (Qld) s 44.

²³² (1867) LR 4 Eq 295.

²³³ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.150].

remains after debts and legacies have been paid).²³⁴ 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'.²³⁵

11.234 In *Princess Anne of Hesse v Field*, the Supreme Court of New South Wales further observed that:²³⁶

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 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.

11.235 The rule is 'disliked because it obliges trustees to make quite complex arithmetical calculations, which are generally of insignificant advantage to the estate'.²³⁷

11.236 In Queensland, as in most of the other Australian jurisdictions and New Zealand, the rule in *Allhusen and Whittell* has been abolished by statute and replaced by rules that are more favourable to the income beneficiary.²³⁸ Ford and Lee have described the effect of these provisions as follows:²³⁹

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.

234 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].

235 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [11.3020].

236 [1963] NSW 998, 1017 (Jacobs J).

237 *Trusts and Settled Land Report* (1971) 58.

238 *Trusts Act 1973* (Qld) s 78. See also *Administration and Probate Act 1929* (ACT) s 41D; *Probate and Administration Act 1898* (NSW) s 46D; *Administration and Probate Act* (NT) s 58; *Trustee Act 1958* (Vic) s 74; *Trustees Act 1962* (WA) s 104; *Trustee Act 1956* (NZ) s 84.

239 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [11.3040].

Section 78

11.237 Section 78 of the *Trusts Act 1973* (Qld) replaces the rule in *Allhusen v Whittell* with different apportionment rules. Section 78(1) ensures that the debts and liabilities of the estate, together with the funeral, testamentary and administration expenses and any legacies, are paid out of capital. 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,²⁴⁰ with the result that ‘these will continue to be paid out of income in priority over capital’.²⁴¹

11.238 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.

11.239 Importantly, section 78(4) provides that, if income is produced pending the application of any assets in or towards payment of the debts, liabilities, funeral, testamentary and administration expenses, that income is deemed to be income of the residuary estate of the deceased,²⁴² thereby removing the equitable duty to apportion that income between the income and capital accounts. For example, if, during the administration period, dividends are paid on shares that are ultimately sold to pay the debts and administration expenses of the estate, section 78(4) makes it clear that those dividends will be.²⁴³

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.

11.240 Section 78 is complemented by section 114, which provides that 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’.

Whether section 78 should be omitted

11.241 The rule in *Allhusen v Whittell* has long applied in England, although it is said that, in practice, it has been ‘excluded as a matter of course in well-drafted wills’.²⁴⁴

²⁴⁰ Similar provision is made in Western Australia: *Trustees Act 1962* (WA) s 104(2).

²⁴¹ Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 90.

²⁴² Ibid. Similar provision is made in the ACT, New South Wales, the Northern Territory, Victoria, Western Australia and New Zealand: *Administration and Probate Act 1929* (ACT) s 41D(5); *Probate and Administration Act 1898* (NSW) s 46D(3); *Administration and Probate Act* (NT) s 58(5); *Trustee Act 1958* (Vic) s 74(3); *Trustees Act 1962* (WA) s 104(4); *Trustee Act 1956* (NZ) s 84(3).

²⁴³ *Princess Anne of Hesse v Field* [1963] NSW 998, 1018 (Jacobs J).

²⁴⁴ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Consultation Paper No 175 (2004) [3.53].

11.242 However, the Law Commission of England and Wales has recently recommended the abolition of the rule. 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'.²⁴⁵ 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.²⁴⁶

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,²⁴⁷ and in particular would inevitably give rise to unwelcome tax consequences. (note added)

11.243 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.²⁴⁸

11.244 This recommendation is reflected in section 1(2)(d) of the *Trusts (Capital and Income) Act 2013* (UK), which will commence on 1 October 2013.²⁴⁹ The Act provides that the following rule does not apply to a trust created or arising after the relevant section comes into force:

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); ...

11.245 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.²⁵⁰ 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*.²⁵¹

245 Ibid.

246 Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [6.61].

247 The Law Commission's proposed power of allocation is discussed in Chapter 5.

248 Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [6.54]–[6.65]. A similar recommendation had earlier been made by the Trust Law Committee: see Trust Law Committee (UK), *Consultation Paper on Capital and Income of Trusts* (1999) [6.15].

249 *Trusts (Capital and Income) Act 2013 (Commencement No 1) Order 2013* (UK) SI 2013/676, art 4(a).

250 Scottish Law Commission, *Apportionment of Trust Receipts and Outgoings*, Discussion Paper No 124 (2003) [2.33], [2.42].

251 Ibid [2.41], [2.42].

Discussion Paper

11.246 In the Discussion Paper, the Commission noted that 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).²⁵² Given the complexity of section 78, the Commission sought submissions on whether the provision should be omitted.²⁵³

Consultation

11.247 Professor Lee and the Public Trustee expressed the view that section 78 of the *Trusts Act 1973* (Qld) should be omitted. In this respect, the Public Trustee noted that section 78 is 'rarely engaged' and that 'the less administratively burdensome approach for trustees accompanying the omission of section 78 would be desirable'.

11.248 The Bar Association of Queensland also suggested that section 78 could be omitted, although it expressed some caution with this approach:

It seems unlikely that [section 78] would fall to be applied very often, especially in circumstances where the cost of properly considering and applying the section are proportional to the amount involved. If that is correct, s 78 seems an unnecessary provision and ought to be omitted.

However, care must be taken to ensure that any repeal of s 78 does not give rise to a question over whether the equitable rule could be re-enlivened.

11.249 However, the Queensland Law Society and a legal practitioner who practises in trusts and succession law expressed the view that section 78 should be retained. The Queensland Law Society observed that:

If s 78 was to be omitted, then the rule in *Allhusen v Whittell* would no longer be abolished by statute in Queensland, and the complex calculations required by that rule would need to be made unless the will of the deceased had been drafted to remove that requirement, which will have not generally been the case at least since s 78 was introduced.

11.250 It therefore expressed the view that section 78 should not be omitted 'in its effect, as the abolition of the rule is preferred and is the present approach of all similar jurisdictions'. It did, however, suggest that the provision should be simplified:

It is acknowledged that s 78 is quite complex in its drafting, as it provides an alternative method to the rule in *Allhusen v Whittell*. The section could be amended to abolish the rule without providing any alternative method as ... in the UK, or preferably by redrafting to simplify a standard alternative.

11.251 The legal practitioner similarly noted that, if the rule is not statutorily abolished, it would still apply. He commented that, as a practitioner, he had had occasion to use section 78 and had found it to be a useful provision.

²⁵² *Trusts Discussion Paper* (2012) [11.213].

²⁵³ *Ibid* 512.

The Commission's preliminary view

11.252 The Commission acknowledges that, as it is presently drafted, section 78 of the *Trusts Act 1973* (Qld) is a complex provision.

11.253 However, the Commission considers that, if section 78 were simply omitted, the equitable rule in *Allhusen v Whittell* would be revived, requiring personal representatives to make difficult and complex adjustments in the estates to which that rule applies, for a relatively small advantage to the beneficiaries.

11.254 On the other hand, if the legislation were to state simply that the rule in *Allhusen v Whittell* is abolished, without replacing it with a different rule, as is presently done by section 78 (and section 78(4) in particular), the general duty to act impartially as between different classes of beneficiaries would still apply, again requiring the personal representative to effect some form of apportionment.

11.255 On balance, therefore, the Commission is of the view that the new legislation should include a provision to the general effect of section 78, but in a simplified and modernised drafting style.

References to succession duty and estate duty

11.256 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.

11.257 A similar provision is still included in Victoria and Western Australia,²⁵⁴ but not in the ACT, New South Wales, the Northern Territory or New Zealand.

11.258 Succession duty was abolished in Queensland from 1 January 1977.²⁵⁵ However, despite the repeal of the *Succession and Probate Duties Act 1892* (Qld),²⁵⁶ the Act continues to apply to the estate of a person who died before 1 January 1977.²⁵⁷ Commonwealth estate duty was abolished from 1 July 1979.²⁵⁸

Discussion Paper

11.259 In the Discussion Paper, the Commission observed that, where a testator's will creates a life interest in the family home, it is not uncommon for the administration of the testator's estate to be delayed until after the life tenant has died and the family home is sold. Although this can substantially extend the period of administration, the Commission considered that, given the length of time since

²⁵⁴ *Trustee Act 1958* (Vic) s 74(4); *Trustees Act 1962* (WA) s 104(5).

²⁵⁵ *Succession and Gift Duties Abolition Act 1976* (Qld) s 4.

²⁵⁶ *Statute Law Revision Act 1995* (Qld) s 5(1), sch 6.

²⁵⁷ *Statute Law Revision Act 1995* (Qld) s 5(4), sch 10.

²⁵⁸ *Estate Duty Assessment Amendment Act 1978* (Cth) s 4.

succession duty and estate duty were abolished, it would now be extremely rare for there to be any estates with outstanding duty.²⁵⁹

11.260 The Commission therefore sought submissions on whether, if section 78 of the *Trusts Act 1973* (Qld) is retained, it should be amended to omit the definition of ‘administration expenses’ in section 78(5).²⁶⁰

Consultation

11.261 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law expressed the view that, if section 78 of the *Trusts Act 1973* (Qld) is retained, it should be amended to omit the definition of ‘administration expenses’ in section 78(5). The Queensland Law Society commented that, ‘if the section is retained either in its present or some altered form, then it is agreed that estates where succession or estate duty are still payable will be rare, and the need for this specific definition is no longer required’.

The Commission’s preliminary view

11.262 For the reasons outlined in the Discussion Paper, the Commission is of the view that the provision based on section 78 of the Act should not include the definition of ‘administration expenses’ that presently appears in section 78(5).

PROTECTION OF PURCHASERS AND MORTGAGEES

11.263 Section 46 of the *Trusts Act 1973* (Qld) is a protective provision for purchasers and mortgagees who deal with trustees. It 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.

11.264 Similar provision is made in several of the other Australian jurisdictions.²⁶¹

11.265 These provisions overcome the more limited protection that was available under the general law²⁶² and relieve purchasers and mortgagees from the obligation to make the inquiries that might otherwise be expected.²⁶³

²⁵⁹ *Trusts Discussion Paper* (2012) [11.218].

²⁶⁰ *Ibid* 513.

²⁶¹ *Trustee Act 1925* (ACT) s 39; *Trustee Act 1925* (NSW) s 39; *Trustee Act 1958* (Vic) s 21; *Trustees Act 1962* (WA) s 44. See also *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 17 and, in slightly different terms, *Trustee Act 1956* (NZ) s 22.

²⁶² 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.

²⁶³ *Trusts and Settled Land Report* (1971) 40.

Discussion Paper

11.266 In the Discussion Paper, the Commission outlined the effect of section 46, but did not seek submissions on any particular aspects of the provision.²⁶⁴ The Commission expressed the view that section 46 is a beneficial provision, which should be retained.

Consultation

11.267 Two respondents, the Bar Association of Queensland and a legal practitioner who practises in trusts and succession law, submitted that section 46 should be retained.

The Commission's preliminary view

11.268 The Commission remains of the view that section 46 of the *Trusts Act 1973* (Qld) is a beneficial provision for purchasers and mortgagees who deal with trustees. Accordingly, the new legislation should include a provision to the same effect.

PROTECTION OF FINANCIAL INSTITUTIONS

11.269 Section 55 of the *Trusts Act 1973* (Qld) gives certain protections to financial institutions acting on the authority of trustee clients.

11.270 The section applies where a trust has two or more trustees and the 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.

11.271 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.²⁶⁵ However, this protection does not apply after the financial

²⁶⁴ *Trusts Discussion Paper* (2012) [11.239] ff.

²⁶⁵ *Trusts Act 1973* (Qld) s 55(1).

institution has received written notice of the revocation of the authority.²⁶⁶

11.272 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).

11.273 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.

11.274 Similar provision is made in the trustee legislation of the ACT, New South Wales, Victoria, Western Australia and New Zealand.²⁶⁷ In the Northern Territory 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.²⁶⁸

11.275 There is no equivalent provision in England.

Whether section 55 should be retained

11.276 Before the enactment of section 55 of the *Trusts Act 1973* (Qld), section 6 of the *Trustees and Executors Acts Amendment Act 1906* (Qld) gave trustees the power, by written notice, to authorise a bank to honour cheques and other instruments drawn on the trust's bank account by any one or more of the trustees.

11.277 In its 1971 Report, the Commission was equivocal about whether to include 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, and considered that the likely 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).²⁶⁹

11.278 The Commission considered that the advantage of the provision 'is that it may relieve the minds of bankers'. On the other hand, it considered that its disadvantage 'is that it is probably unnecessary, having regard to the breadth of the general power trustees are now given to employ agents'.²⁷⁰ Ultimately, the

²⁶⁶ *Trusts Act 1973* (Qld) s 55(2). 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).

²⁶⁷ *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.

²⁶⁸ *Trustee Act* (NT) sch 3 (*Trustee Act 1907* s 5); *Trustee Act 1936* (SA) s 19.

²⁶⁹ *Trusts and Settled Land Report* (1971) 43.

²⁷⁰ *Ibid* 44.

Commission decided to include the provision:²⁷¹

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.

Discussion Paper

11.279 In the Discussion Paper, the Commission sought submissions on whether section 55 of the *Trusts Act 1973* (Qld) should be retained or omitted.²⁷²

Consultation

11.280 The Bar Association of Queensland, Professor Lee and a legal practitioner who practises in trusts law expressed the view that section 55 should be retained. The legal practitioner considered that, in particular, the provision made in section 55(4) in relation to imprest accounts continued to be relevant. The Bar Association of Queensland observed that, although section 55 might be unnecessary, 'banks can in some cases be very sensitive about dealing with trustees'. On balance, it considered that 'it will not do any harm, and possibly some good, to retain section 55 *Trusts Act*, but it ought to include sole trustees in its scope of operation'.

11.281 However, the Queensland Law Society and the Public Trustee both considered that section 55 should be omitted.

The Commission's preliminary view

11.282 In the Commission's view, the main purpose of section 55 of the *Trusts Act 1973* (Qld) is to give financial institutions an assurance that, where a trust has two or more trustees, the trustees can authorise one or more of their number to draw cheques on, and make withdrawals from, any account in the name of the trustees and endorse cheques payable to the trustees.

11.283 In Chapter 4, the Commission has recommended that the provision of the new legislation that deals with the appointment of agents should provide expressly that the power to appoint an agent includes, where there are two or more trustees, the power to appoint one or more of the trustees as an agent. In view of that recommendation, the Commission considers that it is no longer necessary to include a provision to the effect of section 55 of the *Trusts Act 1973* (Qld).

INDEMNITY

11.284 Section 112 of the *Trusts Act 1973* (Qld) provides that the Act, and every order purporting to be made under it, is a complete indemnity for any acts done pursuant thereto. It further provides 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.

²⁷¹ Ibid.

²⁷² *Trusts Discussion Paper* (2012) 523.

11.285 Similar provision is also made in the trustee legislation of the other Australian jurisdictions, New Zealand and England.²⁷³

11.286 In England, the provision dates back as far as the *Trustee Act 1830*, and it has been suggested that the statutory indemnity was particularly relevant to transfers of stocks and shares that were directed by the court under vesting orders.²⁷⁴ It might be queried, however, whether the provision is strictly necessary or whether it was introduced more to give ‘comfort’ to banks that were giving effect to such orders.²⁷⁵

11.287 At common law, it is well established that:

- an order of a superior court of record is valid and binding and has effect unless and until it is set aside;²⁷⁶ and
- acts done according to the exigency of a judicial order, afterwards reversed, are protected; those acts being acts done in the execution of justice, which are compulsive.²⁷⁷

11.288 However, unlike an order made by a superior court of record, a judicial order of an inferior court made without jurisdiction ‘has no legal force as an order of that court’ and ‘may be challenged collaterally in a subsequent proceeding in which reliance is sought to be placed on it’.²⁷⁸

Discussion Paper

11.289 In the Discussion Paper, the Commission outlined the effect of section 112,²⁷⁹ but did not seek submissions on any particular aspect of the provision.

The Commission’s preliminary view

11.290 The Commission is of the view that the new legislation should include a provision to the general effect of section 112 of the *Trusts Act 1973* (Qld). Although

²⁷³ *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.

²⁷⁴ *Trusts Discussion Paper* (2012) [11.267], citing FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 161.

²⁷⁵ See, eg, *Re Shortridge* [1895] 1 Ch 278 and *Re Spurling* [1909] 1 Ch 199, where the Bank of England expressed concerns about, respectively, transferring bank annuities to trustees appointed by the committee of a person with the power to appoint new trustees, and paying dividends to a receiver appointed under the *Lunacy Act 1890*, 53 & 54, c 5, even though that Act included a provision in similar terms to s 112 of the *Trusts Act 1973* (Qld).

²⁷⁶ *New South Wales v Kable* [2013] HCA 26, [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [56]–[57] (Gageler J); *Kable v New South Wales* (2012) 293 ALR 719, 723 (Allsop P); *Re Macks*; *Ex parte Saint* (2000) 204 CLR 158, 184 (Gaudron J); *Cameron v Cole* (1944) 68 CLR 571, 590 (Rich J).

²⁷⁷ *Kable v New South Wales* (2012) 293 ALR 719, 728, 733–4 (Allsop P); *MacIntosh v Lobel* (1993) 30 NSWLR 441, 459 (Kirby P); *Commissioner for Railways (NSW) v Cavanaugh* (1935) 53 CLR 220, 225 (Rich, Dixon, Evatt and McTiernan JJ). See also *Dr Drury’s Case* (1610) 8 Co Rep 141b, 143a; 77 ER 688, 691.

²⁷⁸ *New South Wales v Kable* [2013] HCA 26, [56] (Gageler J).

²⁷⁹ *Trusts Discussion Paper* (2012) [11.261] ff.

the provision may not strictly be necessary as far as the Supreme Court is concerned, the Commission has recommended in Chapter 15 that jurisdiction under the new legislation should also be conferred on the District Court (where the trust property does not exceed in amount or value the monetary jurisdiction of that court). The inclusion of such a provision would ensure that there is no doubt as to the effect of acts done in compliance with an order of that court.

PRELIMINARY RECOMMENDATIONS

Protection of trustees by means of advertisements

11-1 The new legislation should include a provision to the effect of section 67 of the *Trusts Act 1973* (Qld), except that:

- (a) the provision based on section 67(1) should refer to a notice given:
 - (i) in a newspaper circulating throughout Queensland and sold at least once a week; or
 - (ii) on a dedicated, publicly searchable website that is approved for that purpose by regulation;
- (b) the minimum time allowed under the provision based on section 67(1) for submitting a claim should be increased from six weeks to two months; and
- (c) the provision based on section 67(3) should refer to claims, whether formal or not, of which the trustee has notice, and whether or not as the result of a claim being submitted in response to the published notice.

Barring of claims

11-2 The new legislation should include a provision to the effect of section 68 of the *Trusts Act 1973* (Qld), except that:

- (a) the provision based on section 68(1) should be expressed to apply where a trustee 'does not accept a claim' to which the provision applies;
- (b) the provision based on section 68(3)(a) should clarify that the court's power to make an order barring the claim includes the power to make an order that the claim is barred 'for all purposes'; and
- (c) the provision based on section 68(5) should refer to a claim made under 'the *Succession Act 1981*, part 4'.

Protection in relation to notice when a person is trustee of more than one trust

- 11-3 The new legislation should include a provision to the effect of section 69 of the *Trusts Act 1973* (Qld).

Exoneration of trustees in respect of certain powers of attorney

- 11-4 The new legislation should not include a provision to the effect of section 70 of the *Trusts Act 1973* (Qld).

Liability of trustees for certain losses

- 11-5 The new legislation should include a provision to the general effect of section 71 of the *Trusts Act 1973* (Qld), although it may be that the draft legislation reflects the concept of a loss that occurs through the trustee's 'own default' more generally as a loss that arises from a trustee's breach of duty.

Reimbursement of trustee out of trust property

- 11-6 The new legislation should include a provision to the general effect of section 72 of the *Trusts Act 1973* (Qld).

Protection against liability in respect of rents and covenants

- 11-7 The new legislation should include a provision that gives trustees a similar protection to section 66 of the *Trusts Act 1973* (Qld), except that the new provision:
- (a) should be expressed in a more simplified and modern drafting style; and
 - (b) in view of the abolition of rentcharges by the *Property Law Act 1974* (Qld), should omit the references to 'rentcharges'.

Relief from liability in respect of calls made after the transfer of shares

- 11-8 The new legislation should include a provision to the general effect of section 75 of the *Trusts Act 1973* (Qld), except that the new provision should apply both to a personal representative and to the trustee of the will or estate of a deceased person.

Power of court to relieve trustee from personal liability

- 11-9 The new legislation should include a provision to the effect of section 76 of the *Trusts Act 1973* (Qld).

Power of court to make beneficiary indemnify for breach of trust

11-10 The new legislation should include a provision to the effect of section 77 of the *Trusts Act 1973* (Qld).

Abolition of rule in Allhusen v Whittell

11-11 The new legislation should include a provision to the general effect of section 78 of the *Trusts Act 1973* (Qld), except that the new provision should:

- (a) not include the definition of 'administration expenses' in section 78(5) of the Act; and
- (b) be expressed in a more simplified and modern drafting style.

Protection of purchasers and mortgagees

11-12 The new legislation should include a provision to the effect of section 46 of the *Trusts Act 1973* (Qld).

Protection of financial institutions

11-13 The new legislation should not include a provision to the effect of section 55 of the *Trusts Act 1973* (Qld).

Indemnity

11-14 The new legislation should include a provision to the general effect of section 112 of the *Trusts Act 1973* (Qld).

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INTRODUCTION

12.1 This chapter examines the provisions of the *Trusts Act 1973* (Qld), most of which are found in Part 7, dealing 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;
- authorise the remuneration of a trustee; and
- review the acts, omissions or decisions of a trustee.

12.2 These statutory powers supplement the court's inherent jurisdiction to 'supervise trustees in the administration of trusts'.²

12.3 With one exception,³ the powers conferred by Part 7 are conferred on the Supreme Court or a judge thereof.⁴

THE APPOINTMENT AND REMOVAL OF TRUSTEES

Section 80

12.4 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).

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.

² *Colston v McMullen* [2010] QSC 292, [38] (White J), citing *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 729, 734.

³ See *Trusts Act 1973* (Qld) s 86, under which the District Court also has power. In Chapter 15, the Commission has recommended that the District Court, in cases where the trust property does not exceed in amount or value the monetary limit of its jurisdiction, should have the same powers as the Supreme Court under the new legislation.

⁴ See *Trusts Act 1973* (Qld) s 5(1) (definition of 'court').

⁵ *Re Matheson* (1994) 121 ALR 605, 612–13 (Spender J). See also *Letterstedt v Broers* (1884) 9 App Cas 371; *Miller v Cameron* (1936) 54 CLR 572; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709; *Colston v McMullen* [2010] QSC 292, [38]–[40] (White J); *Pope v DRP Nominees Pty Ltd* (1999) 74 SASR 78, 89, 91 (Bleby J; Duggan and Debelle JJ agreeing).

12.5 Section 80(1) applies 'whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the court'.⁶ It empowers the court, in those circumstances, to appoint a new trustee or trustees⁷ either in substitution for, or in addition to, any existing trustee or trustees, or where there is no existing trustee.

12.6 This confers a wide power on the court, commensurate with the power of appointment and removal under the court's inherent jurisdiction.⁸ The words 'expedient' and 'inexpedient' have been given a wide meaning. 'Expedient' has been taken to mean 'advantageous or merely appropriate or suitable to the circumstances of the case', and 'conducive to, or fit or proper or suitable having regard to the interests of the beneficiaries, the security of the trust property, the efficient and satisfactory execution of the trust and a faithful and sound exercise of the powers conferred upon the trustee'.⁹

12.7 Without limiting the court's general power under section 80(1), section 80(2) lists some of the particular circumstances in which the court can make an order appointing a new trustee in place of an existing trustee, namely, where the existing trustee desires to be discharged, is convicted of a crime or misdemeanour, is a bankrupt, 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'. It is not, however, necessary to establish 'bad faith, misconduct, or breach of trust' to enliven the court's statutory power.¹⁰ The power has been used to replace trustees where, for example, hostility or disagreement between the trustee and the beneficiaries, or between co-trustees or co-directors of a corporate trustee, rendered the trustee's continuation adverse to the beneficiaries' interests or the proper administration of the trust.¹¹

12.8 In exercising either its statutory or inherent jurisdiction to remove a trustee, the court will regard the welfare of the beneficiaries as the dominant consideration. It is within the discretion of the court to remove a trustee if it is satisfied that, in the circumstances of the case, the continuation of the trustee would be detrimental to

⁶ The court will not ordinarily exercise its power to appoint a new trustee where a valid existing power to appoint trustees is vested in a person, under the trust instrument or statute, and the person is able and willing to exercise it, unless there are other circumstances rendering it expedient for the court to act (such as where the trustee and appointor had been involved in breaches of trust, or where it was necessary for the applicant to apply to the court for other purposes): see, eg, *Pope v DRP Nominees Pty Ltd* (1999) 74 SASR 78, 87–8 (Bleby J; Duggan and Debelle JJ agreeing); *Will of Tunstall* [1921] VLR 559.

⁷ But not an executor or administrator: *Trusts Act 1973* (Qld) s 80(4). But see *Succession Act 1981* (Qld) s 6(4), applied in *Williams v Williams* [2005] 1 Qd R 105, 109 (Wilson J).

⁸ See [12.12]–[12.13] below.

⁹ *Wendt v Orr* [2004] WASC 28, [250] (Commissioner Johnson QC), citing *Re Roberts* (1983) 70 FLR 158, 162 (O'Leary J); *Porteous v Rinehart* (1998) 19 WAR 495, 507 (White J); *Pope v DRP Nominees Pty Ltd* (1999) 74 SASR 78, 86 (Bleby J; Duggan and Debelle JJ agreeing). See also *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASC 146, [173] (Murphy JA and Hall J).

¹⁰ *Elovalis v Elovalis* [2008] WASC 141, [40] (Martin CJ; Buss JA and Newnes AJA agreeing).

¹¹ See, eg, *JLS Carriers Pty Ltd v Graham* (Unreported, Supreme Court of Queensland, Jones J, 27 April 1998); *Re Whitehouse* [1982] Qd R 196 (Macrossan J); *Smith v Smith* [2006] WASC 166 (Murray J).

the interests of the beneficiaries.¹² The court will not lightly exercise the power to remove a trustee,¹³ and the determination of whether or not it is proper to remove a trustee will depend on the particular circumstances involved.¹⁴ In *Re Whitehouse*, Macrossan J explained:¹⁵

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 [the] trust has given the trust estate'. At p 387 he continued:

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.

12.9 Section 80(3) provides that an order of appointment and any consequential vesting order or conveyance will not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under a power in the trust instrument would have operated.

12.10 Section 81 provides that a trustee who is appointed by the court has 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 creating the trust.

12.11 Similar provisions are included in the trustee legislation of the other Australian jurisdictions, and in New Zealand and England.¹⁶

When the court may exercise its power under section 80

12.12 The court's jurisdiction under section 80(1) is limited to the circumstances in which it is expedient to appoint a trustee and it is 'inexpedient, difficult or impracticable to do so without the assistance of the court'. The same formulation is

¹² *Letterstedt v Broers* (1884) 9 App Cas 371, 386–7; *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).

¹³ *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [49] (Wilson J). See also *Miller v Cameron* (1936) 54 CLR 572, 580–1 (Dixon J).

¹⁴ The court has recognised, for example, that there is no strict rule that a bankrupt trustee must be removed from office: *Miller v Cameron* (1936) 54 CLR 572, 575 (Latham CJ), 579 (Starke J), 580–1 (Dixon J); *Re Matheson* (1994) 121 ALR 605, 614 (Spender J).

¹⁵ [1982] Qd R 196, 205–6, quoted with approval in *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [49] (Wilson J).

¹⁶ *Trustee Act 1925* (ACT) s 70; *Trustee Act 1925* (NSW) s 70; *Trustee Act* (NT) ss 27, 40; *Trustee Act 1936* (SA) ss 36, 43; *Trustee Act 1898* (Tas) ss 32, 43; *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, ss 41, 43.

used in most of the other jurisdictions,¹⁷ and, as noted above, it is a test of wide import:¹⁸

The words 'expedient' and 'inexpedient' used in [the statute] are words of wide meaning. 'Expedient' may mean advantageous or merely appropriate or suitable to the circumstances of the case. 'Inexpedient' of course has the opposite meaning.

12.13 The statutory power also reflects the policy by which the court is guided in exercising its inherent jurisdiction:¹⁹

The legislative test and the test the court applies in exercising its inherent jurisdiction are expressed in different terms. Section 70 [of the *Trustee Act 1925* (NSW)] applies wherever it is expedient to appoint a new trustee or new trustees and it is inexpedient, difficult or impracticable to do so without the assistance of the court: s 70(2).²⁰ On the other hand, the question that must be asked when the court exercises its inherent jurisdiction is what is in the best interests of the beneficiaries and the administration of the trust. As Dixon J (with whom Evatt and McTiernan JJ agreed) explained in *Miller v Cameron* (1936) 54 CLR 572 at 580–1:

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.

...

Although the legislative test and the test identified by Dixon J appear to be expressed in different terms, the difference is more apparent than real. The question of what is expedient cannot be answered in the abstract. It must be answered having regard to the particular objects that are sought to be achieved by the exercise of power. In the case of s 70, those objects are the objects referred to by Dixon J: see *Re Estate of Roberts* (1983) 20 NTR 13 at 17 per O'Leary J; *Porteous v Rinehardt* (1998) 19 WAR 495 at 507 per White J. There is no practical differences between what is expedient to attain those objectives and what the court should, in the exercise of its inherent power, do to attain them. (note added)

¹⁷ See *Trustee Act 1925* (NSW) s 70(2); *Trustee Act* (NT) s 27(1); *Trustee Act 1898* (Tas) s 32(1); *Trustee Act 1958* (Vic) s 48(1); *Trustees Act 1962* (WA) s 77(1); *Trustee Act 1956* (NZ) s 51(1); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 41(1). The equivalent provisions in the ACT and South Australia instead provide that the court may make an order removing, replacing or appointing a trustee if it is satisfied that the order is desirable in the interests of the persons who are to benefit from the trust or to advance the (charitable) purposes of the trust: see *Trustee Act 1925* (ACT) s 70(3); *Trustee Act 1936* (SA) s 36(1a).

¹⁸ *Pope v DRP Nominees Pty Ltd* (1999) 74 SASR 78, 86 (Bleby J; Duggan and Debelle JJ agreeing). See also the cases cited at n 9 above.

¹⁹ *Crowle Foundation v NSW Trustee and Guardian* [2010] NSWSC 647, [33]–[34] (Ball J), cited with approval in *Notaras v Notaras* [2012] NSWSC 947, [11] (Rein J). See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 7 November 2012) [8280].

²⁰ *Trustee Act 1925* (NSW) s 70 is in virtually the same terms as *Trusts Act 1973* (Qld) s 80.

12.14 As explained earlier, the court will not ordinarily exercise its statutory power to appoint a new trustee where a person has a valid power to appoint trustees and is able and willing to exercise it, unless there are other circumstances rendering it expedient for the court to act.²¹

Consultation

12.15 In the Discussion Paper, the Commission sought submissions on whether there is any need to modify any of the existing statutory powers conferred on the court.²² In response to this question, the Bar Association of Queensland submitted that it may be useful to remove the limitation on the court's power in section 80(1) to appoint trustees only where it is inexpedient, difficult or impracticable to do so without the court's assistance, noting that there 'seems to be no reason in principle ... to limit the court's statutory jurisdiction'.

The Commission's preliminary view

12.16 The Commission is of the view that it is appropriate for the new legislation to include a provision to the general effect of section 80 of the *Trusts Act 1973* (Qld) conferring a statutory power on the court to appoint and remove trustees. At present, section 80 confers a power to appoint a new trustee in substitution for, or in addition to, an existing trustee or where there is no existing trustee, but not a power to remove a trustee without the concurrent appointment of another trustee. Orders for the removal of a trustee (without the trustee's replacement) are made in the exercise of the court's inherent jurisdiction. In the Commission's view, the new legislation should confer a statutory power on the court to remove a trustee without appointing a replacement. The Commission has made a similar recommendation in Chapter 3 in relation to the removal of a trustee without recourse to the court.

12.17 The Commission also considers that the power should continue to be exercisable whenever it is expedient to appoint or remove a trustee and it is inexpedient, difficult or impracticable to do so without the court's assistance. In the Commission's view, this confers a wide power on the court, consistent with its power under its inherent jurisdiction. Without being too restrictive, it also appropriately reflects the general policy that resort should not ordinarily be made to the court if the appointment of a new trustee can be made out of court and it would not otherwise be inexpedient to make the appointment without the court's assistance.

12.18 The Commission also considers that the new legislation should include a provision to the general effect of section 81 of the Act to confirm that a trustee appointed by the court has the same powers, authorities and discretions as if the trustee had been originally appointed by the trust instrument.

21 See n 6 above.

22 *Trusts Discussion Paper* (2012) 578.

Whether the Act should empower the court to disqualify a person from acting as a trustee of other trusts

12.19 As explained above, section 80 permits the court to remove a trustee and replace that trustee with a new trustee or trustees. The court may also remove a trustee in its inherent jurisdiction in appropriate circumstances.

12.20 The *Trusts Act 1973* (Qld) does not presently empower the court to go further by disqualifying a person who is removed as a trustee from acting as a trustee of *other* trusts. Neither is any such provision made in the trustee legislation of the other jurisdictions. However, some provision is made in federal legislation dealing with directors of corporations (including licensed trustee companies) and trustees of superannuation entities.

12.21 As was explained in Chapter 3, Part 2D.6 of the *Corporations Act 2001* (Cth) provides that the court may disqualify a person from managing corporations in a number of circumstances,²³ including where the person:²⁴

- has been declared by the court to have contravened certain civil penalty provisions of the Act, for example, the statutory duty of care imposed on directors and officers of a corporation,²⁵ or the statutory duties of officers and employees of a licensed trustee company;²⁶
- within the last seven years, has been an officer of two or more corporations when they have failed and the court is satisfied that the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; or
- at least twice, has been an officer of a body corporate that has contravened the *Corporations Act 2001* (Cth) while the person was an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention.²⁷

12.22 The court must be satisfied that the disqualification is justified and, for that purpose, may have regard to the person's conduct in relation to the management, business or property of any corporation, and any other matters the court considers appropriate.²⁸

12.23 A disqualified person ceases to be a director of a company, unless given permission to manage the particular corporation, and commits an offence if, among

²³ *Corporations Act 2001* (Cth) ss 206C–206EAA. A person may also be disqualified automatically or by the Australian Securities and Investments Commission ('ASIC') in certain circumstances: ss 206B, 206F. See s 58AA for the meaning of 'court'.

²⁴ *Corporations Act 2001* (Cth) ss 206C(1)(a), 206D(1), 206E(1)(a)(i) under which the person may be disqualified, upon the application of ASIC.

²⁵ *Corporations Act 2001* (Cth) ss 1317E(1)(a), 180(1).

²⁶ *Corporations Act 2001* (Cth) ss 1317E(1)(ja)–(jaa), 601UAA(1)–(2), 601UAB(1)–(2).

²⁷ See *Corporations Act 2001* (Cth) s 9 for the meaning of 'body corporate'.

²⁸ *Corporations Act 2001* (Cth) ss 206C(1)(b), (2), 206D(1)(b)(ii), (3), 206E(1)(b), (2).

other things, the person participates in making decisions that affect the business of the corporation.²⁹

12.24 Provision is also made in Part 15, Division 3 of the *Superannuation Industry (Supervision) Act 1993* (Cth) for the court to disqualify a person from acting as the trustee of a superannuation entity, or a class of superannuation entities.³⁰ The court may disqualify the person, if satisfied that the disqualification is justified, in a number of circumstances, including where:³¹

- the person has contravened the *Superannuation Industry (Supervision) Act 1993* (Cth) on one or more occasions and the nature or seriousness of the contravention, or the number of contraventions, provides grounds for disqualifying the person; or
- the person is otherwise not a fit and proper person to be a trustee of a superannuation entity.

12.25 A person who is disqualified by the court from being or acting as a trustee of a superannuation entity commits an offence if, among other things, the person knows that he or she is disqualified and acts as a trustee of a superannuation entity.³²

Consultation

12.26 In the Discussion Paper, the Commission sought submissions on whether there is a need for the *Trusts Act 1973* (Qld) to confer any additional statutory powers on the court that it does not already have under the Act.³³ In response to this question, Professor Lee suggested the inclusion of a provision empowering the court to disqualify a person from acting as a trustee of *any* trust for a stated period in any case where the court has removed the person as trustee for breach of trust, if the court thinks that the breach warrants the disqualification:

We disqualify all sorts of people from practising their professions including solicitors, accountants, medical practitioners and even sports persons; but not trustees who may have dissipated a trust fund and caused significant personal loss to beneficiaries.

²⁹ *Corporations Act 2001* (Cth) s 206A(1)–(2).

³⁰ *Superannuation Industry (Supervision) Act 1993* (Cth) s 126H(1)–(2)(a), under which the person may be disqualified, upon the application of the Australian Prudential Regulation Authority to the Federal Court, for the period the court considers appropriate. The court may also disqualify a person from being a responsible officer of a body corporate that is a trustee, investment manager or custodian or a superannuation entity: s 126H(1)–(2)(b). The Commissioner of Taxation may also disqualify a person in certain circumstances: see s 126A.

³¹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 126H(1), (3)–(5). See also *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 13.19A. In deciding whether the disqualification is justified, the court may have regard to the person's conduct in relation to the management, business or property of any corporation, and any other matters the court considers relevant: s 126H(7). As soon as practicable after the court disqualifies a person, particulars of the disqualification are to be given to the superannuation entity or body corporate concerned and published in the Gazette: s 126H(8).

³² *Superannuation Industry (Supervision) Act 1993* (Cth) s 126K(1)–(2).

³³ *Trusts Discussion Paper* (2012) 578.

...

The disqualification should be in the context of litigation that has resulted in the court's discharging a trustee. The usual reason for discharging a trustee is that the trustee's continuing to act might constitute a danger to the trust fund. A decision in addition to disqualify the trustee would be the result of a very serious breach of trust indeed.

The Commission's preliminary view

12.27 In the Commission's view, there may be circumstances in which a person's misconduct as a trustee of a particular trust has been so serious that the person should not only be removed as trustee of that trust but should be disqualified from being appointed as a trustee of any other trust for a particular time. The Commission considers, therefore, that the new legislation should include a provision empowering the court, where it has removed a person as a trustee of a trust, to make an order that the person cannot be appointed as a trustee in respect of any trust for the period stated in the order.

12.28 The Commission considers that such an order would be justified only in exceptional circumstances and ought not to be made lightly. The court's jurisdiction to make a disqualification order should, therefore, be limited. In the Commission's view, the court should be required to be satisfied that the person has committed one or more breaches of trust and that the nature and seriousness of those breaches is such that the person is unfit to act as a trustee and ought to be disqualified from being appointed as a trustee of any trust for a particular period.

12.29 As with other orders of the court made under the *Trusts Act 1973* (Qld), an order disqualifying a person from being appointed as a trustee of any trust could be appealed to the Court of Appeal, within 28 days after the date of the order.³⁴

12.30 It may sometimes happen that the person who is the subject of the disqualification order may also be, at the time of the making of the order, a trustee of another existing trust. In the Commission's view, the court should be empowered to make an order, if it considers it appropriate in the circumstances, to remove the disqualified person as a trustee of that other trust. Potentially, the court could make an additional order of this nature at the same time as it makes the disqualification order, if the court is aware of the nature and circumstances of the other trust, and the views of the beneficiaries and any other trustees of that trust. It would otherwise be open to those beneficiaries or trustees to make an application at a later time to have the trustee removed as trustee of that other trust.

34

See *Supreme Court of Queensland Act 1991* (Qld) s 62(1); *Uniform Civil Procedure Rules 1999* (Qld) r 748. If such an order were to be made by the District Court, the order could be appealed to the Court of Appeal only with leave: *District Court of Queensland Act 1967* (Qld) s 118(3). In Chapter 15, the Commission has proposed that provision should be made to clarify that the District Court, within its monetary jurisdiction, has the same powers as the Supreme Court to deal with trusts under the new legislation.

THE APPOINTMENT OR REMOVAL OF OTHER PERSONS HOLDING AN OFFICE UNDER THE TRUST INSTRUMENT ('PROTECTORS')

Nature and powers of 'protectors'

12.31 It is sometimes the practice for a trust instrument to create an office — distinct from that of the trustee — in respect of which the person appointed to that office from time to time is vested with particular powers (but not vested with legal title to the trust property). Such an office is variously described, for example, as that of a 'protector', a 'guardian', a 'principal' or an 'appointor',³⁵ and may involve any of a wide range of powers, depending on the settlor's purpose in creating the office. Ordinarily, where a trust instrument creates such an office, it additionally provides a mechanism for the appointment of successors or replacements.³⁶

12.32 The role of such an office-holder (referred to here as a 'protector') is usefully summarised in *Underhill and Hayton: Law Relating to Trusts and Trustees*.³⁷

A trust instrument sometimes provides for a 'protector' in its definition clause and goes on to confer some powers and rights on such protector to enable the protector to play a role in the life of the trust. The protector can then be regarded as holding an office, just as a trustee holds an office. The same office can be fulfilled by a 'committee' or 'board' or 'guardian' or 'company P Co Ltd', which could be independent of, or be controlled by, the settlor. The rights and powers of the protector that create the nature of his role will depend upon the terms of the trust instrument. The protector may have negative powers, as where his consent is requisite before the trustees carry out certain transactions, or have positive overriding powers enabling him to direct the trustees in certain matters or to appoint or remove trustees. Because the protector merely has powers vested in him and not trust property he is not a trustee. (note omitted)

12.33 The possible range of powers given to such a person is 'open-ended'³⁸ and varies in practice:³⁹

Protectors fundamentally derive their powers from the terms of the trust instrument. ... The powers which may be vested in protectors are many and varied and range from the power to appoint and remove trustees, the power of veto over distributions of capital and income, a power of veto over the appointment and removal of beneficiaries to powers to amend or vary the trust instrument or to veto such amendments and variations.

³⁵ See, eg, *Crawley v Crawley Land* [2012] QSC 294.

³⁶ A Duckworth, 'Protectors: Law and Practice' (2013) 19(1) *Trusts & Trustees* 98, 105–6. See, eg, *Re Papadimitriou* [2004] WTLR 1141, [8]–[9]; *Re Circle Trust* [2006] CILR 323, 327.

³⁷ D Hayton (ed), *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 18th ed, 2010) 47.

³⁸ D Waters QC, 'Foreward' in A Holden, *Trust Protectors* (Jordans, 2011).

³⁹ S Pryke, 'Of Protectors and Enforcers' (2010) 16(2) *Trusts & Trustees* 64, 64–5. See also the examples of powers listed in D Hayton (ed), *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 18th ed, 2010) 47–8.

12.34 As such, ‘the word “protector” is not a term of art, and it can be used to refer to different roles with different powers, duties and rights under the trust’.⁴⁰ As some commentators have explained:⁴¹

the term ‘protector’ is used in such a variety of situations and ways that, absent specific context, it signifies little more than that a person who is not the (or a) trustee has been granted a power affecting the operation of the trust.

...

In short, the ‘protector’ label has been used to cover a wide range of powers, which can differ markedly one from the other, which can be combined in a wide variety of ways, and which are generally subject to being altered by the settlor in the trust instrument.

12.35 It has been said, therefore, that, ‘because the protector is predominantly a creature of practice, it is impossible to lay down rules that will apply to every person referred to in every trust instrument as a protector’.⁴²

12.36 The use of protectors has ‘[d]eveloped principally in the offshore trust context’ and, whilst the nature of their powers has received some judicial consideration in those jurisdictions, it is ‘an evolving area of the law’.⁴³

12.37 Depending on the type of powers vested in the office, the protector may ‘wield a potentially considerable degree of influence in the trust’s administration’.⁴⁴

Appointment and removal of ‘protectors’ by the court

12.38 There is some authority in other jurisdictions such as the Cayman Islands and the Isle of Man to the effect that, if the protector’s powers are fiduciary in nature, the court has an inherent jurisdiction to review the exercise of those powers⁴⁵ and to appoint or remove a protector upon good cause being shown.⁴⁶

12.39 Some of those cases concerned protectors whose powers were to appoint or remove trustees, such powers being held in the particular circumstances to be of

⁴⁰ A Holden, *Trust Protectors* (Jordans, 2011) Preface. See also *Rawson Trust Co v Perlman* [1990] 1 Butterworths OCM 31, 50 (Smith J), quoted in M Conaglen and E Weaver, ‘Protectors as Fiduciaries: Theory and Practice’ (2012) 18(1) *Trusts & Trustees* 17, 19.

⁴¹ M Conaglen and E Weaver, ‘Protectors as Fiduciaries: Theory and Practice’ (2012) 18(1) *Trusts & Trustees* 17, 19–20.

⁴² A Holden, *Trust Protectors* (Jordans, 2011) Preface.

⁴³ Ibid.

⁴⁴ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [21.55].

⁴⁵ See *Re Circle Trust* [2006] CILR 323, 333 (Henderson J).

⁴⁶ See, eg, *Re Papadimitriou* [2004] WTLR 1141, [75] (Deemster Cain); *Re Circle Trust* [2006] CILR 323, 333 (Henderson J); *Steele v Paz*; *Rawcliffe v Steel* [1993–95] MLR 426. See generally the discussion in M Conaglen and E Weaver, ‘Protectors as Fiduciaries: Theory and Practice’ (2012) 18(1) *Trusts & Trustees* 17, 30–2.

a fiduciary nature.⁴⁷ This reflects the recognition of English and Australian courts that the power to appoint or remove trustees (conferred on an ‘appointor’) is ordinarily of a fiduciary character, such that it must be exercised in good faith for the benefit of the beneficiaries.⁴⁸ Further, the power must not be exercised in a way that would constitute a fraud on the power.⁴⁹

12.40 The question whether other powers that might be conferred on a ‘protector’ impose fiduciary or other obligations will depend on the terms of the trust instrument and the settlor’s intention,⁵⁰ and must accordingly be decided on a case-by-case basis.⁵¹

The breadth of the range of powers to which the ‘protector’ label can be applied means that the question whether a protector is, or is not, a fiduciary must be approached on a case-by-case basis, rather than on a global basis by reference to some supposed (but actually non-existent) category of ‘protectors’.

12.41 As noted above, the law on protectors’ powers and duties is still developing.

12.42 Although it has not considered the role of ‘protectors’ more generally, the Law Commission of New Zealand has made some proposals regarding persons who have the power to appoint or remove trustees (‘appointors’).⁵² It observed that there is some uncertainty about the ‘appropriate bounds’ of that role and the court’s power to appoint and remove persons in that role.⁵³ It has proposed that the legislation should:⁵⁴

- impose a ‘duty of good faith and honesty’ on a person who exercises a power to remove and appoint trustees, whether under the statute or the trust instrument; and
- provide that the court may remove and replace a person who has the power under the trust instrument to appoint trustees ‘if that person breached the

⁴⁷ Eg, *Re Papadimitriou* [2004] WTLR 1141; *Re Circle Trust* [2006] CILR 323, citing with approval *Re Osiris Trustees Ltd* [2000] WTLR 933. Those cases held that, having regard to the terms of the trust instrument and the settlor’s intention, the powers imposed a fiduciary obligation on the protector to exercise them in good faith in the interests of all the beneficiaries.

⁴⁸ See generally *Berger v Lyster Pty Ltd* [2012] VSC 95, [67]–[85] (Habersberger J), and the cases discussed there. See also, eg, *Austec Wagga Wagga Pty Ltd v Rarebreed Wagga Pty Ltd* [2012] NSWSC 343, [50]–[54] (Stevenson J). However, ‘much will depend upon the terms of the trust instrument’: *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566, 595 (Finkelstein J).

⁴⁹ See, eg, *Dwyer v Ross* (1992) 34 FCR 463, 467–8 (Davies J).

⁵⁰ See, eg, *Re Circle Trust* [2006] CILR 323, 332–3 (Henderson J).

⁵¹ M Conaglen and E Weaver, ‘Protectors as Fiduciaries: Theory and Practice’ (2012) 18(1) *Trusts & Trustees* 17, 20. See also, eg, S Pryke, ‘Of Protectors and Enforcers’ (2010) 16(2) *Trusts & Trustees* 64, 65; and GS Alexander, ‘Trust Protectors: Who Will Watch the Watchmen?’ (2006) 27 *Cardozo Law Review* 2807, 2811 in which it is stated that ‘one size won’t fit all’.

⁵² Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [6.61]–[6.70].

⁵³ Ibid [6.63].

⁵⁴ Ibid 127 (Proposal P26(1)–(2)). That Commission has also proposed that an appointor should be entitled to apply to the court for directions in the exercise of their power: Proposal P26(3).

duty of good faith, or if that person has been removed in their capacity as a trustee, or if otherwise expedient’.

12.43 It explained that:⁵⁵

This approach is based on the principle that persons with a role of authority and power within a trust structure should be subject to duties to the trust. If there are no duties imposed on the person with the power to appoint and remove a trustee and the court has no power to remove such a person, then there is no check on the exercise of this power. This could lead to abuses of power or improper administration of the trust. (note omitted)

12.44 Section 80 of the *Trusts Act 1973* (Qld) does not in its terms confer power on the court to appoint or remove ‘appointors’ or other ‘protectors’. However, as explained later in this chapter, section 8 of the Act confers a wide jurisdiction on the court to review (and give directions about) an act, omission or decision of a trustee *or other person* in the exercise of any power conferred by the Act, by law *or by the trust instrument*.

Consultation

12.45 In the Discussion Paper, the Commission sought submissions on whether there is a need for the *Trusts Act 1973* (Qld) to confer any additional statutory powers on the court that it does not already have under the Act.⁵⁶ In response to this question, the Bar Association of Queensland suggested that consideration ‘could usefully be given’ to amending section 80 to clarify that the court’s power includes the power to appoint and remove ‘principals’:

Modern Australian trust instruments (particularly family discretionary or testamentary trusts) very commonly create an office variously described as the ‘principal’ or ‘appointor’ or ‘protector’ of the trust.

The nature and incidents of the office of principal have yet to be clearly defined by the case law in this or any other jurisdiction. ...

There is some authority to the effect that a court of equity has an inherent jurisdiction to:

...

- remove and appoint a principal, on grounds analogous to those upon which it acts when removing and appointing trustees;
- review the exercise by a principal of their powers conferred by the trust instrument, particularly where those powers are fiduciary in nature. Section 8 of the *Trusts Act 1973* usefully gives the court power to review the act of any ‘other person in the exercise of any power conferred by this Act or by law or by the instrument (if any) creating the trust’, which no doubt would catch a principal.

There is, however, a dearth of Australian authority.

⁵⁵ Ibid [6.69].

⁵⁶ *Trusts Discussion Paper* (2012) 578.

Consideration therefore could usefully be given to amending section 80 of the *Trusts Act 1973* to clarify that the court's power extends to the appointment and removal of principals, however that office may be described in the particular trust instrument, in particular where their powers are fiduciary in nature. (notes omitted)

The Commission's preliminary view

12.46 The Commission notes that the *Trusts Act 1973* (Qld) contains some provisions that enable the court in certain circumstances, and in the best interests of the beneficiaries, to respond to the exercise of powers under the trust instrument by a person other than a trustee.

12.47 In particular, the court's review jurisdiction under section 8 of the *Trusts Act 1973* (Qld) is wide enough to allow the court to review and make orders about the exercise of powers conferred by the trust instrument on persons other than trustees, and would, therefore, apply with respect to an appointor or other 'protector'.

12.48 In addition, the court might use its power under section 94 of the Act to authorise a transaction or dealing by the trustee, despite a power of veto given to a particular individual under the trust instrument that would otherwise prevent the exercise of that power. As explained later in this chapter, section 94 empowers the court to give trustees additional management or administrative powers, either generally or in a particular instance, in certain circumstances.

12.49 The Commission is nevertheless of the view that the court should also be given an express power to remove a person who holds an office created by the trust instrument or to appoint a person to such an office, in the same way and in the same circumstances that the court may remove or appoint a trustee. In the Commission's view, this would provide an additional check on the exercise of powers by such persons, and would provide a clear mechanism for their removal or replacement where that course cannot be expediently done, in the best interests of the beneficiaries and the administration of the trust, without recourse to the court.

12.50 The Commission considers, therefore, that the new legislation should include a provision to the general effect that, if a trust instrument creates an office, however described, in respect of which the person appointed to that office from time to time, not being a trustee, is vested with a power or powers under the instrument, the court may make orders removing the person from that office and appointing a new person to that office. The legislation should provide that the court may make such orders in the same circumstances as the court may appoint or remove a trustee under the provision based on section 80 of the Act.

VESTING ORDERS

12.51 The *Trusts Act 1973* (Qld) includes a number of provisions that enable the court, in certain circumstances, to order the vesting of property in trustees and other persons, and, in some cases, to make other related orders or declarations.⁵⁷

⁵⁷

These vesting provisions are discussed in more detail in *Trusts Discussion Paper* (2012) ch 12.

The effect of a vesting order is to vest the property to which it relates in the persons named in the order without any conveyance, transfer or assignment.

12.52 Most of the provisions in the Act that confer the power to make vesting orders have their origins in nineteenth-century English trustee legislation.⁵⁸ 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.⁵⁹

12.53 Most of these statutory vesting provisions have counterparts in the trustee legislation of the other Australian jurisdictions, New Zealand and England.⁶⁰

Vesting orders related to the transmission of trusteeship

12.54 Sections 82 and 83 of the *Trusts Act 1973* (Qld) empower the court to order, in a wide range of circumstances, the vesting of trust property in new or continuing trustees where it is not possible to obtain the requisite participation of a trustee or a former trustee.⁶¹ The making of a vesting order in such a case ensures that 'a trust can achieve the 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 so entitled'.⁶²

12.55 The particular circumstances in which the court may make such a vesting order are listed in section 82(2). Broadly speaking, the matters listed in section 82(2) are concerned with three different kinds of situation, namely, where:⁶³

- there is a change in the composition of the trustees;
- circumstances exist that disable a trustee from acting or acting effectively; or
- a trustee is refusing to deal with the trust property in accordance with his or her duties.

12.56 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

⁵⁸ See, in particular, *Trustee Act 1850*, 13 & 14 Vict, c 60; *Trustee Extension Act 1852*, 15 & 16 Vict, c 55, ss 1–3. See now, in England, *Trustee Act 1925*, 15 & 16 Geo 5, c 19, ss 44–56.

⁵⁹ 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 8 November 2012) [8460].

⁶⁰ *Trustee Act 1925* (ACT) ss 71–74, 76–80; *Trustee Act 1925* (NSW) ss 71–72, 74, 76–80; *Trustee Act* (NT) ss 28–30, 32, 34–38, 42; *Trustee Act 1936* (SA) ss 37–41, 45; *Trustee Act 1898* (Tas) ss 33–36, 38–41, 45; *Trustee Act 1958* (Vic) ss 51–61; *Trustees Act 1962* (WA) ss 78–88; *Trustee Act 1956* (NZ) ss 52–59, 61–62; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, ss 44–53, 55.

⁶¹ 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 3.

⁶² *Re Purkiss* [1999] 3 VR 223, 228 (Warren J).

⁶³ *Trusts Act 1973* (Qld) s 82(3) provides that, where the provisions of s 82(2) are applicable, they extend 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.

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'.⁶⁴

12.57 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 direct', or releasing or disposing of 'any contingent right to such person as the court may direct'.

12.58 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.

12.59 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

12.60 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 made in these cases are used to vest the legal estate or interest in property where, in practice, it is impossible or difficult to deal with the property.

12.61 In particular, the court may make a vesting order (and, in some cases, another related order or declaration) where:

- property is affected by the contingent rights of unborn persons (section 84);
- a mortgagee of property is under a disability (section 85);
- an infant is beneficially entitled to any property of which there is no trustee (section 87);
- the court has given a judgment or made an order for the sale or mortgage of land (section 88); and

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Trusts and Settled Land Report (1971) 60.

- the court has given a judgment for the specific performance of a contract concerning any land, or the sale, partition or exchange of any land, or for the conveyance of any land (section 89).

The effect of a vesting order

12.62 Section 90 of the *Trusts Act 1973* (Qld) deals with the effect of a vesting order, and other matters ancillary to the vesting of property.

12.63 Section 90(1) states that, subject to the provisions of any other Act, 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.

12.64 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 order notified, registered or recorded.

12.65 Sometimes, a trust instrument may 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 order is made.

12.66 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 assign such rights without licence or consent'.⁶⁵ Section 90(5) ensures that a vesting order does not operate as a breach of covenant or occasion the forfeiture of any lease.

12.67 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.

Other powers related to vesting orders

12.68 The *Trusts Act 1973* (Qld) also gives the court power to make other types of orders dealing with the vesting or transfer of property. In particular, the court may:

⁶⁵

HAI Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 7 November 2012) [8430].

- in all cases where it may make a vesting order under the Act, if it is more convenient,⁶⁶ appoint a person to convey the land or release the contingent right (section 92);⁶⁷
- make declarations and give 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 (section 91); or
- exercise any of the powers conferred by the Act as to vesting orders for ‘vesting any property in any trustee of a charity or society over which the court would have jurisdiction upon action duly instituted’, whether the appointment of the trustee was by instrument under a power or by the court under its general or statutory jurisdiction (section 93).

Consultation

12.69 In the Discussion Paper, the Commission sought submissions on whether there is a need to modify any of the existing powers conferred on the court by the provisions in Part 7 of the *Trusts Act 1973* (Qld), or for the Act to confer any additional statutory powers on the court.⁶⁸ The Commission did not receive any submissions in relation to the provisions of the Act that confer vesting (and other related powers) on the court.

The Commission’s preliminary view

12.70 In the Commission’s view, the new legislation should provide for the court to make orders vesting property in trustees and other persons, and to make other related orders and declarations, as is presently the case under Part 7, Division 3 of the *Trusts Act 1973* (Qld). These types of provisions are necessary to enable the court to vest property in a wide range of circumstances in which it would be otherwise impossible or difficult to vest the legal estate or interest in the property.

12.71 As mentioned earlier, the Queensland vesting provisions have their origins in nineteenth-century English trustee legislation, and generally reflect the language and drafting style used at that time. The Commission considers that the provisions in the new legislation that confer powers to make vesting orders and other related orders and declarations should be simplified and updated in keeping with modern drafting practices.

DEALINGS WITH TRUST PROPERTY AND VARIATIONS OF TRUSTS

12.72 Sections 94 and 95 of the *Trusts Act 1973* (Qld) deal with the court’s power, in particular circumstances, to authorise trustees to undertake dealings with

⁶⁶ See, eg, *Hancox v Spittle* (1857) 3 Sm & Giff 478; 65 ER 745, discussed in *Trusts Discussion Paper* (2012) [12.59].

⁶⁷ *Trusts Act 1973* (Qld) s 92 further provides that a conveyance or release by the person in conformity with the order will have the same effect as a vesting order made under the appropriate provision of the Act.

⁶⁸ *Trusts Discussion Paper* (2012) 578.

the trust property, and to authorise arrangements between the beneficiaries to vary the terms of the trust.

Power of court to authorise dealings with trust property

12.73 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 the early 1900s, 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 variation is necessary for the benefit of the estate.⁶⁹

12.74 The exercise of the court's inherent jurisdiction is limited to cases of emergency and does not cover every case in which a particular act is desired to be done merely because it appears beneficial to the estate.⁷⁰ Nor does it extend to rearrangements of, or changes to, the beneficial interests under the trust (as distinct from rearrangements or reconstructions of the trust property itself).⁷¹

12.75 In England, section 57 of the English *Trustee Act 1925* was enacted to confer a broad statutory jurisdiction on the court 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. In Queensland, the equivalent provision is section 94 of the *Trusts Act 1973* (Qld). A similar provision is included in the trustee legislation of the other Australian jurisdictions and New Zealand.⁷²

The scope of the court's power under section 94

12.76 Section 94(1) 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:⁷³

- the court is of the opinion that a proposed disposition or transaction is:
 - expedient in the management or administration of the trust property;
 - or

⁶⁹ *Re New* [1901] 2 Ch 534, 544–5 (Romer LJ). See also the comments in *Re Downshire Settled Estates* [1953] 1 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, 227–8 (Fullagar J).

⁷⁰ *Re Tollemache* [1903] 1 Ch 955.

⁷¹ *Re Downshire Settled Estates* [1953] 1 Ch 218, 235 (Evershed MR and Romer LJ).

⁷² *Trustee Act 1925* (ACT) s 81; *Trustee Act 1925* (NSW) s 81; *Trustee Act* (NT) s 50A; *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. In the ACT, New South Wales and South Australia, the court may 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).

⁷³ Section 94(3) of the *Trusts Act 1973* (Qld) provides that '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'.

- 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.

12.77 The courts have liberally construed the test of expediency under the statutory provision. In *Riddle v Riddle*, Williams J defined ‘expedient’ as meaning ‘advantageous’, ‘desirable’, or ‘suitable to the circumstances of the case’,⁷⁴ while Dixon J described the term as meaning ‘expediency in the interests of the beneficiaries’.⁷⁵ Dixon J also said that the provision:⁷⁶

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.

12.78 The words ‘management or administration’ in section 94 have the effect of limiting the court’s jurisdiction.⁷⁷ Nonetheless, it has been held that they 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’.⁷⁸

12.79 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. The purpose of including the requirement that it must be ‘inexpedient or difficult or impracticable’ to 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.⁷⁹ The courts have held that 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.⁸⁰

⁷⁴ (1952) 85 CLR 202, 222, discussing the equivalent provision in New South Wales.

⁷⁵ Ibid 214.

⁷⁶ Ibid.

⁷⁷ *Re Craven’s Estate (No 2)* [1937] 1 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); *Re Downshire Settled Estates* [1953] 1 Ch 218, 245–8 (Evershed MR and Romer LJ); *Perpetual Trustee Co Ltd v Godsall* [1979] 2 NSWLR 785, 791 (Rath J); *Ballard v A-G (Vic)* (2010) 30 VR 413, 419–20 (Kyrou J); *Re Estate of Barns* [2011] VSC 314 (Robson J).

⁷⁸ *Ballard v A-G (Vic)* (2010) 30 VR 413, 419–20 (Kyrou J), considering the equivalent Victorian provision and quoting *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469, 500 (Bell AJA). The court has conferred a wide range of additional powers on trustees: see, eg, *Perpetual Trustee Co Ltd v Godsall* [1979] 2 NSWLR 785 (power to sell trust property); *Hornsby v Playoust* [2005] VSC 107 (power to distribute trust property in satisfaction of the interests of the beneficiaries).

⁷⁹ *Trusts and Settled Land Report* (1971) 65.

⁸⁰ *Riddle v Riddle* (1952) 85 CLR 202, 223–4 (Williams J); *Perpetual Trustees WA Ltd v A-G (WA)* (1992) 8 WAR 441, 446–7 (Wallwork J); *Stein v Sybmore Holdings Pty Ltd* (2006) 64 ATR 325, 336 (Campbell J); *Barry v Borlas Ltd* [2012] NSWSC 831, [19] (White J).

12.80 The power conferred by the provision is limited to the managerial supervision and control of trust property on behalf of beneficiaries. It does not include any modification of the beneficial interests created in that property since 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.⁸¹ However, it would also appear that the court may confer powers on the trustee under the provision if the exercise of those powers might only incidentally affect the beneficial interests in the trust property.⁸² 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.⁸³

12.81 Section 94(2) further empowers the court from time to time to 'rescind or vary any order' made under the section, or to make 'any new or further order'. Such a rescission or variation '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'.

Consultation

12.82 In the Discussion Paper, the Commission sought submissions on whether there is a need to modify any of the existing powers conferred on the court by the provisions in Part 7 of the *Trusts Act 1973* (Qld).⁸⁴

12.83 As mentioned in Chapter 7, the Bar Association of Queensland expressed the view that the new legislation should enact a provision that confers a general property power on a trustee. In conjunction with that general view, this respondent further submitted that the legislation should retain a provision to the effect of section 94 to address issues that may arise in relation to the exclusion by the trust instrument of one or more specific powers conferred by the general power.

The Commission's preliminary view

12.84 In the Commission's view, the new legislation should include a provision to the general effect of section 94 of the *Trusts Act 1973* (Qld), dealing with the court's power to authorise dealings with the trust property.

12.85 That proposed provision should also clarify that the circumstances in which a disposition or transaction cannot be effected because of an absence of power in the trust instrument extend to the situation where the trust instrument expressly prohibits or limits the exercise of that power.

81 *Re Downshire Settled Estates* [1953] 1 Ch 218, 245–8 (Evershed MR and Romer LJ), affd *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).

82 *Re Downshire Settled Estates* [1953] 1 Ch 218, 248 (Evershed MR and Romer LJ).

83 See [12.87] below.

84 *Trusts Discussion Paper* (2012) 578.

12.86 Given that the Commission has recommended in Chapter 7 that most of the specific powers conferred by the general property power should be capable of being excluded or modified by express words in the trust instrument, the inclusion of such a legislative statement would make it clear that the court has the jurisdiction to confer additional trustee powers (including management powers) in that circumstance. This approach would also have the benefit of highlighting the role of the court in the legislative scheme for the conferral of trustee powers.

Power to authorise the variation of the beneficial interests under the trust

12.87 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.⁸⁵

12.88 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.⁸⁶

12.89 In the landmark English case of *Chapman v Chapman*, the Court of Appeal⁸⁷ and the House of Lords (on appeal)⁸⁸ 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.

12.90 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 held that the jurisdiction of the 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.⁸⁹ Lord Cohen, on the other hand, considered that the question of whether the court had an inherent jurisdiction did not depend on whether rights were in dispute, but 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.⁹⁰

⁸⁵ See the discussion in Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, 389 ff.

⁸⁶ Law Reform Committee (UK), *Court's Power to Sanction Variation of Trusts*, 6th Report (1957) Cmnd 310, 3–4.

⁸⁷ *Re Downshire Settled Estates* [1953] 1 Ch 218.

⁸⁸ *Chapman v Chapman* [1954] AC 429.

⁸⁹ Ibid 444–7, 457–68, 469–71 (Lord Simonds LC, Lord Morton and Lord Asquith).

⁹⁰ Ibid 472–4, referring to the judgment of Evershed MR and Romer LJ in the Court of Appeal decision.

12.91 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 had, however, 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.⁹¹

12.92 The decision in *Chapman v Chapman* created distinctions between cases in which trusts could be varied and cases in which they could not, 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,⁹² 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 for the benefit of that beneficiary.⁹³

12.93 This provision is mirrored in section 95 of the *Trusts Act 1973* (Qld) and in the trustee legislation of South Australia, Tasmania, Victoria, Western Australia and New Zealand.⁹⁴

The nature and scope of the power under section 95

12.94 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.⁹⁵

12.95 Section 95(1) authorises the 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’.

12.96 The four categories of persons are specified in section 95(1):

- (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

⁹¹ *Re Downshire Settled Estates* [1953] 1 Ch 218, 247 (Evershed MR and Romer LJ).

⁹² Law Reform Committee (UK), *Court's Power to Sanction Variation of Trusts*, 6th Report (1957) Cmnd 310, 8–10.

⁹³ *Variation of Trusts Act 1958*, 6 & 7 Eliz 2, c 53, s 1.

⁹⁴ *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 *Trusts Act 1973* (Qld) s 95(1), (4).

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;

12.97 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’,⁹⁶ and the court’s power is not conditional on the consent of those beneficially or otherwise interested under the trust.⁹⁷ In giving approval to an arrangement, a court does not itself amend or vary the trusts. Rather, ‘the arrangement must be regarded as an arrangement made by the beneficiaries themselves’, the court having ‘merely acted on behalf of ... those beneficiaries who were not in a position to give their own consent and approval’ by approving the arrangement.⁹⁸

12.98 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.

12.99 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

12.100 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’.

12.101 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.⁹⁹

12.102 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

⁹⁶ *Re Steed’s Will Trusts* [1960] 1 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. In practice, to be effective, the arrangement must be acceptable to all of the adult, ascertained and capable beneficiaries.

⁹⁷ *Perpetual Trustees Victoria Ltd v Barns* [2012] VSCA 77, [33]–[34] (Williams AJA, Buchanan and Bongiorno JJA agreeing).

⁹⁸ *Inland Revenue Commissioners v Holmden* [1968] AC 685, 701 (Lord Reid).

⁹⁹ *Re Cohen’s Settlement Trusts* [1965] 1 WLR 1229, 1236 (Stamp J); *Re Blocksidge* [1997] 1 Qd R 234, 237–8 (Williams J).

it is sufficient that there is a benefit of a moral or social kind.¹⁰⁰ 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'.¹⁰¹

12.103 The requirement of benefit does not apply, however, in the case of:¹⁰²

- 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;¹⁰³ or
- an unascertained person whose entitlement is dependent on a future event which the court is satisfied is unlikely to occur.¹⁰⁴

Consultation

12.104 In the Discussion Paper, the Commission sought submissions on whether there is a need to modify any of the existing powers conferred on the court by the provisions in Part 7 of the *Trusts Act 1973* (Qld).¹⁰⁵ The Commission did not receive any submissions in relation to the court's power, conferred by section 95 of the Act, to authorise the variation of the beneficial interests under the trust.

The Commission's preliminary view

12.105 The Commission is of the view that the new legislation should include a provision to the general effect of section 95 of the *Trusts Act 1973* (Qld) conferring a statutory power on 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 the trust, if carrying out the arrangement would be for the benefit of that beneficiary.

JUDICIAL ADVICE AND DIRECTIONS

12.106 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:¹⁰⁶

¹⁰⁰ *Re Holt's Settlement* [1969] 1 Ch 100, 121 (Megarry J); *Re Weston's Settlements* [1969] 1 Ch 223, 245 (Lord Denning MR, Danckwerts LJ agreeing); *Re CL* [1969] 1 Ch 587, 599–600 (Cross J); *Re Remnant's Settlement Trusts* [1970] 1 Ch 560, 566 (Pennycuik J).

¹⁰¹ *Re Christmas's Settlement Trusts* [1986] 1 Qd R 372, 378 (McPherson J).

¹⁰² *Trusts Act 1973* (Qld) s 95(1A)(a)–(b).

¹⁰³ A similar exception applies under *Trustee Act 1958* (Vic) s 63A(1); *Trustees Act 1962* (WA) s 90(2); *Trustee Act 1956* (NZ) s 64A(1).

¹⁰⁴ This exception was included to counter the difficulty that the courts had in assessing the benefit of beneficiaries with remote contingent claims: *Trusts and Settled Land Report* (1971) 65–6.

¹⁰⁵ *Trusts Discussion Paper* (2012) 578.

¹⁰⁶ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2132].

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.

12.107 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.¹⁰⁷ 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.¹⁰⁸

12.108 This jurisdiction, which was originally exercised by the Court of Chancery in England, 'was intended to assist or relieve personal representatives'.¹⁰⁹ It is said that:¹¹⁰

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.

12.109 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'.¹¹¹

Historical background

12.110 Historically, the Court of Chancery could give advice or directions to a trustee or personal representative only if a suit for the general administration of the estate had been instituted.¹¹²

12.111 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.¹¹³ 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.¹¹⁴

¹⁰⁷ *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).

¹⁰⁸ *Re Atkinson* [1971] VR 612, 615 (Gillard J). That protection is dependent on making proper disclosure to the court of the relevant facts.

¹⁰⁹ GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1961) 5 *University of Western Australia Law Review* 257, 259.

¹¹⁰ *Ibid* 259–60.

¹¹¹ *Re Permanent Trustee Nominees (Canberra) Ltd* (Unreported, Supreme Court of New South Wales, Young J, 14 March 1985).

¹¹² *Re Wilson* (1885) 28 Ch D 457, 460 (Pearson J).

¹¹³ *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441, 445 (Palmer J).

¹¹⁴ *Ibid*. See also *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 634 (Young J).

12.112 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.¹¹⁵

12.113 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 responsibility, 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.

12.114 Section 30 of *Lord St Leonards' Act* was repealed in 1893,¹¹⁶ being subsumed by 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.¹¹⁷

Sections 96 and 97

12.115 Sections 96 and 97 of the *Trusts Act 1973* (Qld), and similar provisions in most other Australian jurisdictions,¹¹⁸ give a trustee the statutory right to approach the court for advice or directions.¹¹⁹ These 'judicial advice' provisions are modelled on section 30 of *Lord St Leonards' Act*.

12.116 Section 96 permits a trustee to apply to the court 'upon a written statement of facts' for directions 'concerning any property subject to a trust', or 'respecting the management or administration' of that property or '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.

12.117 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'.

¹¹⁵ *Law of Property and Trustees Relief Amendment Act 1859*, 22 & 23 Vict, c 35, s 30, set out in full in *Trusts Discussion Paper* (2012) [12.104].

¹¹⁶ *Trustee Act 1893*, 56 & 57 Vict, c 53, s 51, sch.

¹¹⁷ As to the development of general administration proceedings and partial relief: see *Administration of Estates Report* (2009) vol 2, [20.8]–[20.38].

¹¹⁸ *Trustee Act 1925* (ACT) s 63; *Trustee Act 1925* (NSW) s 63; *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 *Re Grose* [1949] SASR 55, 59–60 (Mayo J).

¹¹⁹ 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).

The nature and scope of the judicial advice provisions

12.118 Proceedings on judicial advice applications are intended to provide a 'cheap and simple process of determining questions', and are therefore of an informal nature.¹²⁰

12.119 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;¹²¹
- the issue is whether legal proceedings can and ought to be commenced or defended;¹²²
- it is desired to effect an early distribution of an estate;¹²³ and
- a trustee is unsure as to whether inquiries about next of kin should be pursued or should be continued.¹²⁴

12.120 Judicial advice provisions operate as an exception to the court's ordinary function of deciding disputes between competing litigants, and enable the court to give 'private advice' to a trustee, the function of which is to give personal protection to the trustee.¹²⁵

12.121 It is inappropriate to read in limitations on the power of the court to give advice.¹²⁶ 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.¹²⁷ Ultimately, a court will decline to provide judicial advice if the jurisdictional bar is not met.

¹²⁰ *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, 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.

¹²¹ *Re Will of Falls* (1874) 12 SCR (NSW) Eq 89; *Re The Union Trustee Co of Australia Ltd* [1936] QWN 6; *Re Barry* [1936] QWN 12.

¹²² 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.

¹²³ In these cases, it is almost always necessary to seek judicial advice: *Re Cassidy* [1979] VR 369, 373 (Lush J).

¹²⁴ *Re Cave-Brown-Cave* [1906] VLR 283 (Cussen J).

¹²⁵ *Macedonian Church Case* (2008) 237 CLR 66, 91 (Gummow ACJ, Kirby, Hayne and Heydon JJ).

¹²⁶ *Ibid* 89–90.

¹²⁷ *Ibid*; *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).

12.122 The power to give judicial advice is not limited to advice about ‘non-adversarial’ matters.¹²⁸ There are no limitations on the court’s power to give judicial advice where the trustees are involved in adversarial proceedings, including where the trustee is sued for breach of trust.¹²⁹ The existence of the proceedings, however, may affect the question of whether, and to what extent, it is appropriate to give advice to the trustee given that the purpose of the court in giving advice is not to seek to resolve the separate proceedings.

12.123 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.¹³⁰

12.124 If the trustee acts in accordance with the judicial advice then the trustee has the protection given by the statutory judicial advice provisions. 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.¹³¹ This protection may not be effective if the trustee has stated materially wrong or incomplete facts in the application for judicial advice. An order that the trustee, who is being sued in his or her capacity as trustee, is justified in defending legal proceedings and may have recourse to the trust assets to pay the costs of defending the proceedings does not necessarily mean that the trustee may not become liable to a successful plaintiff in those proceedings. A trustee may lose the right to costs if the trustee has unnecessarily applied to the court, has litigated unreasonably or has incurred unnecessary expense in the proceedings before the court.¹³²

12.125 The Law Commission of New Zealand has expressed the view that there is a need to ‘include more detail about the types of circumstances for which directions may be sought’.¹³³ It has therefore proposed that the equivalent New Zealand provision should ‘codify the case law principle that as far as possible trustees should present a proposed course of action regarding the matter on which they seek directions’,¹³⁴ but should not go further and detail all of the case law principles because it is desirable to have ‘a relatively broad power of direction and

128 *Macedonian Church Case* (2008) 237 CLR 66, 89 (Gummow ACJ, Kirby, Hayne and Heydon JJ).

129 *Ibid.*

130 See, eg, *Re Fletcher* [1947] QWN 11; *Couzens v Negri* [1981] VR 824; *Re Cave-Brown-Cave* [1906] VLR 283; *Re Ready’s Estate* [1920] St R Qd 87; *Harrison Jones and Devlin Ltd v Union Bank of Australia Ltd* (1909) 10 SR (NSW) 266; *Re The Union Trustee Co of Australia Ltd* [1936] QWN 6. See also GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.175]; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2012) [17.160], and the cases cited there. It would normally be inappropriate for the court to give advice about a matter that is substantially commercial in nature: *Re Application of Perpetual Trustee Co Limited* [2003] NSWSC 1185, [13] (Young CJ in Eq).

131 See GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.185].

132 *Ibid.*

133 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [11.11].

134 *Ibid* 205 (Proposal 43(b)).

to retain some discretion of the court as to whether [the judicial advice provision] applies in the circumstances'.¹³⁵

Decisions about commencing or defending legal proceedings

12.126 The protection that is provided by section 97 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.

12.127 In relation to a trustee who wishes to commence or defend proceedings, guidance may be drawn from the 2008 decision of the High Court in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* ('*Macedonian Church Case*').¹³⁶ In that case, the High Court explained that an application for judicial advice by a trustee sued for breach of trust is not to be seen as one which should rarely if ever succeed; instead, it should be seen as a 'standard instance' to which the judicial advice provisions can, in appropriate circumstances, apply.¹³⁷

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.

12.128 In the context of a question as to whether a trustee can commence or defend proceedings, the advice that will typically be sought is advice to the effect that the trustee would be justified in commencing or defending the proceedings (as the case may be) and in using the assets of the trust to fund the trustee's costs of the proceedings.¹³⁸ An application for judicial advice of this nature is commonly

135 Ibid [11.11].

136 (2008) 237 CLR 66. In that case (which involved an extensive history of litigation between the parties), the trustee had sought judicial advice under s 63 of the *Trustee Act 1925* (NSW) (the functional equivalent of ss 96 and 97 of the *Trusts Act 1973* (Qld)) relating to the defence of legal proceedings and whether it was entitled to an indemnity from trust property in order to fund that defence.

137 Ibid 93–4 (Gummow ACJ, Kirby, Hayne and Heydon JJ).

138 See, eg, *Salmi v Sinivuori* [2008] QSC 321, [11]–[13] (Lyons J); *Public Trustee of Queensland v MacPherson* [2011] QSC 169 (McMeekin J).

referred to as a '*Re Beddoe* application'.¹³⁹

12.129 As explained by Lyons J in *Salmi v Sinivuori*, a *Re Beddoe* order is essentially a pre-emptive order to determine the indemnity rights of a trustee:¹⁴⁰

What a *Re Beddoe* order determines is clearly a potential issue between the trustee and the beneficiaries as to whether the costs of the main action should be recoverable by the trustee as expenses of the trust. It is clearly not a predetermination as to the issue of costs as between the trustee and the other party to the main action. A trustee thereby protects his right of indemnity out of the trust assets in respect of the costs, charges and expenses he incurs litigating, including any costs which he may be ordered to pay to another party to the litigation by obtaining the authority to litigate.

12.130 An application for a *Re Beddoe* order is made separately from the litigation in which the trustee is engaged and before a different judge. It is usually supported by advice from a qualified lawyer as to the prospects of success as well as a costs estimate and evidence as to the value of the estate.¹⁴¹

Advice as to litigation where the trustee is being sued

12.131 In the *Macedonian Church Case*, the High Court generally explained that the legislative scheme is 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 provision empowering the court to excuse breaches of trust) afterwards, but rather seek judicial advice (under the judicial advice provisions) first.¹⁴² The High Court subsequently went on to state that, in the context of judicial advice applications about whether to commence or defending legal proceedings:¹⁴³

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.

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This takes its name from the decision of *Re Beddoe* [1893] 1 Ch 547, in which the English Court of Appeal held that a trustee who had unreasonably defended proceedings was not entitled to be indemnified in respect of the costs of the proceedings. In that case, the Court commented that a trustee who 'is doubtful as to the wisdom of prosecuting or defending a lawsuit' may seek the Court's opinion, and that a trustee who commences or defends an action without the sanction of the Court may be at risk as regards the costs of those proceedings, even if he or she acts on counsel's opinion: 557 (Lindley LJ), 562 (Bowen LJ). See also *Gray v Guardian Trust Australia Ltd* [2003] NSWSC 704, in which Austin J held at [9]:

The Court will assist the personal representatives, upon application, to overcome their difficulty by giving advice and direction, thereby removing the risk that the Court may exercise its discretion to refuse recovery of costs out of the estate, provided that they followed the Court's directions ...

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[2008] QSC 321, [13]. See also *Taranto v Hansard* [2008] QSC 136 (McMurdo J).

141

Ibid [14]. See also *Application of Macedonian Orthodox Community Church St Petka Inc* [2006] NSWSC 392, [23] (Young CJ in Eq); *Ireland v Retallack* [2012] NSWSC 1179 (Hallen AsJ).

142

Macedonian Church Case (2008) 237 CLR 66, 83 (Gummow ACJ, Kirby, Hayne and Heydon JJ).

143

Ibid 94.

12.132 This statement may suggest that a trustee who is sued is, in fact, obliged to approach the court for judicial advice before defending legal proceedings.¹⁴⁴

12.133 In subsequent cases, the Supreme Court of Queensland has referred to the *Macedonian Church Case*, but not specifically to the existence of any such duty.¹⁴⁵ In *Glassock v The Trust Company (Australia) Pty Ltd*, 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:¹⁴⁶

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)

12.134 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'.¹⁴⁷

12.135 If the judicial advice is obtained in the form referred to at [12.128] above, it will resolve, from the outset, the question of whether it is proper for a trustee to fund the costs of the proceedings from the assets of the trust.

Limitations on the use of the procedure

12.136 In the *Macedonian Church Case*, the High Court observed 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.¹⁴⁸

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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 n 15.

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Glassock v The Trust Company (Australia) 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.

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[2012] QSC 15, [14]–[15].

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[2012] QSC 281, [18].

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(2008) 237 CLR 66, 92 (Gummow ACJ, Kirby, Hayne and Heydon JJ).

the application of [the judicial advice provision] 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.

Discussion Paper

12.137 In the Discussion Paper, the Commission sought submissions on 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.¹⁴⁹

Consultation

12.138 The Bar Association of Queensland, the Queensland Law Society, Professor Lee and a legal practitioner who practises in trusts and succession law each submitted that there is no 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.

12.139 The Bar Association of Queensland considered that the decision of the High Court in the *Macedonian Church Case* served as a 'timely reminder to trustees of the broad utility of the judicial advice procedure' which section 96 provides. This respondent also commented that:

The great advantage of section 96 is its breadth. Great care would be needed to ensure that any attempt to clarify the circumstances in which a trustee ought apply, or the matters about which directions may be sought, did not limit the breadth of the section and the utility of the procedure.

12.140 The Bar Association of Queensland further commented that:

Although there is at present no evidence of a deluge of applications being made for advice whether to litigate, it could perhaps be best dealt with by the court by way of practice direction, eg, requiring relatively straight-forward applications to be dealt with on the papers.

12.141 The Queensland Law Society expressed the view that the summary of the principles for making a section 96 application stated by Boddice J in *Glasscock v The Trust Company (Australia) Pty Ltd* was sufficient guidance for trustees and their legal advisors.

12.142 The Public Trustee suggested that, rather than enumerating the circumstances in which trustees ought to apply to the court for directions under

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Trusts Discussion Paper (2012) 559.

section 96, consideration could be given to clarifying in the legislation that section 96 might be engaged where the executor or trustee is in doubt — but, if not so in doubt, the trustee is not obliged to approach the court.

12.143 In relation to the terms in which section 96(1) of the Act is drafted, the legal practitioner also commented that the requirement for:

the written statement of fact is ‘antiquated’ as it is almost always these days by affidavit by the trustees. I think that is preferable because then the court has the trustees’ situation on oath, and there is minimal extra cost between preparing a statement of fact and an affidavit.

12.144 The Queensland Law Society endorsed this view.

The Commission’s preliminary view

12.145 The new legislation should include provisions to the general effect of sections 96 and 97 of the *Trusts Act 1973* (Qld).

12.146 In the Commission’s view, it is not necessary for the provision in the new legislation based on section 96 of the Act to specify the circumstances in which a trustee ought to apply to the court for directions (or the matters about which directions may be sought) under that provision. Furthermore, that provision should not require that an application for judicial advice be made on ‘a written statement of facts’ (as is presently the case under section 96(1)). As provided for in the *Uniform Civil Procedure Rules 1999* (Qld), evidence in such a proceeding would ordinarily be given on affidavit.¹⁵⁰

The protection given by section 97(2)

12.147 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*, and is included in most of the other Australian statutory judicial advice provisions.¹⁵¹

12.148 In *Re Grose*, 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 representatives¹⁵² — Mayo J explained that a person who holds an

¹⁵⁰ See *Uniform Civil Procedure Rules 1999* (Qld) r 390(b).

¹⁵¹ *Trustee Act 1925* (ACT) s 63(2); *Trustee Act 1925* (NSW) s 63(2); *Trustees Act 1962* (WA) s 95(2).

¹⁵² *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).

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:¹⁵³

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* to obtain protection on the facts they submit.

12.149 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, 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'.¹⁵⁴

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.

12.150 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)*,¹⁵⁵ which dealt with the analogous position of a liquidator seeking the advice and directions of the court.

Discussion Paper

12.151 In the Discussion Paper, the Commission noted that the test in section 97(2) uses the words 'fraud or wilful concealment or misrepresentation'. Arguably, on a strict reading, those words might not cover an innocent omission, whereas the test in *Re Grose* would cover that circumstance.¹⁵⁶ The Commission sought submissions about whether there is any need to clarify the scope of the test in section 97(2) of the *Trusts Act 1973* (Qld) and, if so, what the test should be.¹⁵⁷

Consultation

12.152 The Public Trustee commented that there may be some benefit in clarifying the test in section 97(2) to include an innocent omission. On the other

¹⁵³ [1949] SASR 55, 59–60.

¹⁵⁴ *Re Grose* [1949] SASR 55, 60 (Mayo J).

¹⁵⁵ [1990] 2 Qd R 93, 98 (Cooper J).

¹⁵⁶ *Trusts Discussion Paper* (2012) [12.130].

¹⁵⁷ *Ibid* 561.

hand, the Bar Association of Queensland, the Queensland Law Society, Professor Lee and a legal practitioner who practises in trusts and succession law each considered that there is no need to change the test in section 97(2) of the *Trusts Act 1973* (Qld).

12.153 The Queensland Law Society suggested that the current test was apposite to a legal practitioner's general duty to inform the court of all relevant facts. Similarly, the legal practitioner commented that it is appropriate that trustees 'should be prepared and diligent'.

12.154 The Bar Association of Queensland also observed that the test in section 97(2) 'does not appear to have caused any difficulty in practice':

Directions made pursuant to section 96(1) on the basis of stated facts only afford protection if the trustee has fully and fairly disclosed all material facts to the court. The correlative of the protection afforded the trustee by the section is the duty of the trustee to put all relevant facts and circumstances before the court. Directions made when this duty has not been fulfilled are worthless. (note omitted)

The Commission's preliminary view

12.155 The Commission considers that there is no need, under the new legislation, to change the test that currently applies under section 97(2) the *Trusts Act 1973* (Qld).

REMUNERATION OF TRUSTEES

12.156 Equity historically regarded trusteeship as an honorary position.¹⁵⁸ For that reason, the usual rule under the general law is that, in the absence of special provision in the trust instrument for remuneration,¹⁵⁹ a trustee 'shall have no allowance for his care and trouble'.¹⁶⁰

12.157 However, a Court of Equity has inherent jurisdiction to authorise remuneration where it considers such a course to be necessary for the proper administration of the trust.¹⁶¹

12.158 In addition, legislation in most of the Australian jurisdictions confers a statutory power on the court to authorise trustee remuneration.¹⁶² In Queensland, trustee remuneration is dealt with in section 101 of the *Trusts Act 1973* (Qld).

¹⁵⁸ See *Trusts Discussion Paper* (2012) [12.131] ff.

¹⁵⁹ See, eg, *Re Dowling* [1961] VR 615.

¹⁶⁰ *Robinson v Pett* (1734) 3 P Wms 249; 24 ER 1049. 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: see 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].

¹⁶¹ *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).

Section 101(1): Authorisation of remuneration by the court

12.159 Section 101(1) of the *Trusts Act 1973* (Qld) gives the court a broad power, 'in any case in which the circumstances appear to it so to justify', to authorise a person to charge such remuneration for the person's services as trustee 'as the court may think fit'.¹⁶³ It does not limit the court's inherent jurisdiction to authorise remuneration.¹⁶⁴

12.160 In authorising a trustee's remuneration under section 101(1), 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.¹⁶⁵

12.161 As explained in the Discussion Paper, detailed provision is made in Part 10 of Chapter 15 of the *Uniform Civil Procedure Rules 1999* (Qld) ('Part 10') for the filing, assessment and passing of estate accounts by the court.¹⁶⁶ In addition, Division 5 of Part 10 includes provisions dealing with applications to the court for commission.¹⁶⁷ Under rule 657C, a trustee of an estate may apply to the court for remuneration that the trustee may charge under section 101(1) of the *Trusts Act 1973* (Qld). Although an account need not be filed, assessed or passed before such an application is determined, the court may adjourn the application for commission until that has been done.¹⁶⁸ The court may make any order for commission it considers appropriate, and may take into account a number of specified matters, including the value and composition of the estate, the provisions of the will or trust instrument, the conduct of all persons connected with the administration of the estate, the nature, extent and value of work done by persons other than the trustee, and the efficiency of the administration of the estate.¹⁶⁹

12.162 The equivalent provisions to section 101 of the *Trusts Act 1973* (Qld) in the other jurisdictions provide the court with a discretion to allow trustee

¹⁶² *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.

¹⁶³ Similar provision for the remuneration of personal representatives is made in *Succession Act 1981* (Qld) s 68.

¹⁶⁴ Nor does s 101(1) limit the court's power in s 94 of the *Trusts Act 1973* (Qld), under which the court may authorise trustee remuneration if such payment 'is necessary or expedient to the proper management and administration of the trust': *Re Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd* [1999] 2 Qd R 524, 527 (Williams J).

¹⁶⁵ *Re Postle and Hodson's Application* [1991] 1 Qd R 160, 163–4 (Byrne J).

¹⁶⁶ See *Trusts Discussion Paper* (2012) ch 7, n 258. Under the *Uniform Civil Procedure Rules 1999* (Qld), an 'estate account' must give an account of the property of the estate to which it applies: rr 644 (definition of 'estate account'), 648(1). 'Estate' is defined, for ch 15 of the rules, as 'estate of a deceased person' and, for ch 15 pt 10 of the rules, it is defined to include a trust estate: rr 596, 644. As well as ordering that an estate account be assessed, the court has power under ch 15 pt 10 to refer 'any issue relating to a lawyer's fees charged to an estate' to a costs assessor for assessment: r 650(1).

¹⁶⁷ 'Commission' is defined under r 644 as remuneration or commission payable to a personal representative under *Succession Act 1981* (Qld) s 68, or remuneration a trustee may charge under *Trusts Act 1973* (Qld) s 101(1).

¹⁶⁸ *Uniform Civil Procedure Rules 1999* (Qld) r 657D(1).

¹⁶⁹ *Uniform Civil Procedure Rules 1999* (Qld) r 657E.

remuneration as is 'just and reasonable'.¹⁷⁰ In New Zealand, the provision also sets out a list of circumstances to which the court must have regard in considering what commission is just and reasonable, including, for example, the amount and difficulty of the services rendered by the trustee, the skill and success of the trustee in administering the trust, and the value of the trust property.¹⁷¹ The Law Commission of New Zealand has proposed that, subject to some changes of wording, the provision should be retained.¹⁷²

Section 101(2): Remuneration of professional trustees (statutory charging clause)

12.163 Section 101(2) of the Act provides for the charging of fees by professional trustees.¹⁷³ Similar provision is made in Western Australia.¹⁷⁴

12.164 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.¹⁷⁵ Moreover, charging clauses for professional services included in trust instruments were strictly construed, and a distinction was made between professional and non-professional work.¹⁷⁶

12.165 Section 101(2) of the *Trusts Act 1973* (Qld) overcomes these restrictions. It provides 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', including acts which a non-professional trustee could have done personally.

12.166 Section 101(2) also provides that 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).

¹⁷⁰ *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)–(2); *Trustee Act 1956* (NZ) s 72(1). In the Northern Territory, Victoria and Western Australia, a trustee's commission allowed out of the trust property under the statutory provision must not exceed five per cent. Nevertheless, in those jurisdictions, the court may allow commission in its inherent jurisdiction at a rate higher than the amount allowed by the statute: *Re the Will of Stratton* [1981] WAR 58, 64 (Brinsden J).

¹⁷¹ *Trustee Act 1956* (NZ) s 72(1A).

¹⁷² Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 208 (Proposal P44).

¹⁷³ Specific provision is also made for the Public Trustee and for licensed trustee companies to charge fees for their services: see *Public Trustee Act 1978* (Qld) ss 17, 17A; *Corporations Act 2001* (Cth) ch 5D pt 5D.3.

¹⁷⁴ *Trustees Act 1962* (WA) s 98(5).

¹⁷⁵ *Re Sherwood* (1840) 3 Beav 338; 49 ER 133; *Re Gates* [1933] 1 Ch 913; *Re Hill* [1934] 1 Ch 623; *Re Edmonds* [1943] VLR 97. For the exception to this rule, see *Trusts Discussion Paper* (2012) ch 12, n 161.

¹⁷⁶ *Re Ames* (1883) 25 Ch D 72; *Clarkson v Robinson* [1900] 2 Ch 722.

Discussion Paper

12.167 In the Discussion Paper, the Commission observed that concerns have been raised from time to time that professional trustees or personal representatives may sometimes charge remuneration at higher rates than might be authorised on an application to the court.¹⁷⁷

12.168 The Commission noted that one way to address these concerns is to introduce a provision allowing the court to review and, if appropriate, reduce the amount of a trustee's remuneration.¹⁷⁸ In particular, the Commission observed that the National Committee for Uniform Succession Laws recommended the adoption of a provision based on section 86A of the *Probate and Administration Act 1898* (NSW).¹⁷⁹ That section provides:¹⁸⁰

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. (emphasis added)

12.169 The National Committee considered that the provision should empower the court to review an amount payable to the person for his or her services as personal representative, or an amount charged by the personal representative in relation to the deceased person's estate, despite any provision in the will or another statute authorising the charging of the amount, and should enable the court to review the fees and charges of the Public Trustee (or its equivalent) and trustee companies.¹⁸¹ This was reflected in clause 432 of its model Administration of Estates Bill 2009.¹⁸²

12.170 The Commission also referred in the Discussion Paper to a specific provision for the review of licensed trustee companies' fees, which was included in the *Corporations Act 2001* (Cth) as part of the national licensing regime introduced in 2010 for trustee companies. The Explanatory Memorandum to the Bill that introduced that regime explained that a 'major objective' of the reforms was to 'ensure that, as far as possible, trustee companies are not subjected to multiple or

177 *Trusts Discussion Paper* (2012) [12.146]. See, eg, *Hughes v Estate of Weedon* (Unreported, Supreme Court of New South Wales, Hodgson J, 16 December 1994).

178 *Trusts Discussion Paper* (2012) [12.147] ff.

179 See *Administration of Estates Report* (2009) vol 3, [27.128], Rec 27-5.

180 That provision is in wide enough terms to allow the court to review a trustee's remuneration as well as other amounts charged by the trustee in respect of the estate, such as legal costs: see, eg, *Chick v Grosfeld* [2012] NSWSC 1166; *Shave v Shave* [2011] NSWSC 1356.

181 *Administration of Estates Report* (2009) vol 3, [27.124], [27.169], Rec 27-5(b).

182 *Ibid* vol 4, model Administration of Estates Bill 2009, cl 432.

overlapping regulatory regimes'.¹⁸³ It further explained that:¹⁸⁴

Broadly, the policy intent is that the Commonwealth will have exclusive responsibility for 'entity level' regulation of trustee companies' traditional services, including licensing those companies and regulating the fees they can charge for those traditional services. At the same time, State and Territory legislation, and the rules of common law and equity, will continue to govern the functions and powers of trustee companies. Also, it is intended to preserve rules which apply generally to persons such as trustees, executors, administrators and guardians (including trustee companies when they perform those roles).

12.171 Among other things, the amendments introduced 'a single regime for the disclosure and regulation of fees charged by trustee companies',¹⁸⁵ the 'general approach' of which was to deregulate the fees charged for traditional trustee company services, subject to requirements of public disclosure and a prohibition against charging fees in excess of the published schedule.¹⁸⁶

12.172 The regulation of licensed trustee companies' fees is dealt with in Part 5D.3 of Chapter 5D of the *Corporations Act 2001* (Cth). It includes a provision dealing with the court's power to review trustee companies' fees.¹⁸⁷ Section 601TEA 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.¹⁸⁸ 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, including a beneficiary or the settlor of the trust.¹⁸⁹ In considering whether the fees are excessive, the court may consider any or all of a number of specified matters, including the extent to which the work performed by the trustee company was, or is likely to be, reasonably necessary, the quality and complexity of the work, and the extent (if any) to which the trustee company was, or is likely to

183 Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) 44. See *Corporations Act 2001* (Cth) s 601RAE(2)(b), (4); *Corporations Regulations 2001* (Cth) reg 5D.1.04, schs 8AB–8AD, which deal with the interaction between the trustee company provisions of the corporations legislation and State and Territory laws. The provisions of pt 1.1A of the *Corporations Act 2001* (Cth), including s 5G, which deal generally with the interaction between the corporations legislation and State and Territory laws do not apply in this context: *Corporations Act 2001* (Cth) s 601RAE(6).

184 Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) 34.

185 Ibid 34. See *Corporations Act 2001* (Cth) ch 5D pt 5D.3.

186 Ibid 49. See *Corporations Act 2001* (Cth) ss 601TAA–601TAB, 601TCA.

187 Provisions in State legislation for the court to review the commission charged by trustee companies were repealed as part of the introduction of the national regime: see *Trustee Companies Act 1964* (NSW) s 18(3), repealed by *Trustee Companies Amendment Act 2009* (NSW) sch 1, item [7]; *Trustee Companies Act 1968* (Qld) s 45, repealed by *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) s 86; *Trustee Companies Act 1953* (Tas) s 18(5), repealed by *Trustee Companies Amendment Act 2010* (Tas) s 13; *Trustee Companies Act 1984* (Vic) s 21(3), repealed by *Trustee Companies Legislation Amendment Act 2010* (Vic) s 8.

188 *Corporations Act 2001* (Cth) s 601TEA(1). Under that Act, 'the Court' means the Federal Court, a Supreme Court, or the Family Court: s 58AA(1).

189 *Corporations Act 2001* (Cth) s 601TEA(4). A 'person with a proper interest in the estate' is defined in s 601RAD(1).

be, required to deal with extraordinary issues or to accept a higher level of risk or responsibility than is usually the case.¹⁹⁰

12.173 The court's power under section 601TEA is, however, 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.¹⁹¹ The Commission noted that this is in direct contrast with the approach of the National Committee for Uniform Succession Laws, which has the express purpose of enabling the court to review remuneration charged in accordance with a provision in the will. The National Committee's recommendation was made, however, prior to the introduction of the national licensed trustee companies regime implemented by Chapter 5D of the *Corporations Act 2001* (Cth).

12.174 The Commission sought submissions on whether the *Trusts Act 1973* (Qld) should 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 the scope of the court's power should be.¹⁹²

Consultation

12.175 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law each submitted that the *Trusts Act 1973* (Qld) should include a provision empowering the court to review the remuneration charged by a person for the person's services as trustee. The Bar Association of Queensland commented:

There is great merit in the proposal that trustees' remuneration be subject to the review of the court as this is a subject that, in practice, can cause problems ...

12.176 The Queensland Law Society, Professor Lee and the legal practitioner considered that a provision to the effect of section 86A of the *Probate and Administration Act 1898* (NSW) should be adopted. The Queensland Law Society suggested, however, that the court's power of review, where the trustee is a professional trustee, should be consistent with section 601TEA of the *Corporations Act 2001* (Cth).

12.177 The Bar Association of Queensland submitted that the provision should clearly identify the persons who are entitled to seek a review 'as, in practice, this can prove to be problematic'. In its view, this should expressly include 'successor trustees, beneficiaries, discretionary objects and beneficiaries of a deceased estate during its administration whose right is only to enforce its due administration'.

12.178 The Bar Association of Queensland also considered that an application for review of a trustee's remuneration should extend to the review of the trustee's 'costs and outlays, eg, incurred with solicitors, as in practice it is very often these

¹⁹⁰ *Corporations Act 2001* (Cth) s 610TEA(3).

¹⁹¹ *Corporations Act 2001* (Cth) ss 601TEA(2)(a), 601TBB. Nor does it apply with respect to fees relating to a charitable trust that are charged as permitted by pt 5D.3 div 4 subdiv A: s 601TEA(2)(b).

¹⁹² *Trusts Discussion Paper* (2012) 567.

costs and outlays that are most problematic'. This respondent also submitted that careful consideration should be given to the relationship of any proposed review provision in the trusts legislation with the provisions in Part 10 of Chapter 15 of the *Uniform Civil Procedure Rules 1999* (Qld), 'to ensure that they work together seamlessly'.

12.179 The Public Trustee suggested that the criteria set out in section 601TEA of the *Corporations Act 2001* (Cth) or in section 17(4) of the *Public Trustee Act 1978* (Qld)¹⁹³ 'might provide useful guidance' for the court when reviewing a trustee's remuneration.

The Commission's preliminary view

12.180 The Commission considers that the new legislation should include a provision dealing with the remuneration of trustees based on section 101 of the *Trusts Act 1973* (Qld). The Commission also considers that the provision should empower the court to review the remuneration charged by a person for the person's services as trustee.

12.181 In this regard, the Commission endorses the recommendation of the National Committee for Uniform Succession Laws and proposes that the new legislation should include a provision to the general effect of section 86A of the *Probate and Administration Act 1898* (NSW) and clause 432 of the National Committee's model Administration of Estates Bill 2009, with the appropriate modifications so that it applies to trustees. The Commission notes that this would be wide enough to allow the court to review other amounts charged in respect of the trust estate, such as solicitors' costs.

12.182 The Commission considers that one of the principal benefits of the review mechanism is in overcoming the situation in which the trust instrument or a statute has authorised remuneration or commission at a level that, in the particular circumstances of the trust, turns out to be excessive. Allowing the court to review the remuneration in those circumstances ensures that the court can protect the interests of the beneficiaries. The Commission is therefore of the view that the provision should enable the court to review the trustee's remuneration despite any provision in the trust instrument or in a statute authorising the charging of the amount.

12.183 In light of the national regulation of licensed trustee companies' fees under Part 5D.3 of Chapter 5D of the *Corporations Act 2001* (Cth), however, the Commission does not consider that there would be room for its proposed review mechanism to operate in the context of licensed trustee companies. As explained above, the general policy intention of the national regime is to reserve to the Commonwealth exclusive responsibility in that area, and section 601TEA of the

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Public Trustee Act 1978 (Qld) s 17(4) provides that, when fixing fees and charges for its services, the amount of the fee or charge must be decided having regard to: (a) the type and complexity of the service performed; and (b) the degree of care, responsibility, skill or special knowledge required to perform the service.

Corporations Act 2001 (Cth) already provides for the review by the court of the fees charged by such companies.¹⁹⁴

12.184 The Commission does not consider it necessary for the legislation to specify any particular matters for the court to consider in deciding whether the remuneration is excessive, as the court will exercise its discretion in accordance with the existing case law concerning the determination of what is just and reasonable remuneration for the trustee.

REVIEW OF ACTS, OMISSIONS AND DECISIONS

The inherent jurisdiction of the court

12.185 It has been said in relation to the court's inherent jurisdiction to supervise trustees that:¹⁹⁵

Where a trustee fails to perform one of their duties as a trustee the court may intervene and, if necessary, compel the trustee to perform the duty or will otherwise remedy the situation. Where a trustee has a duty to do something he or she is bound to do that prescribed thing, whether or not he or she considers it the best course of action. However, where a trustee has a power to do something, or the trustee is required to exercise a discretion, the situation is somewhat different. In this situation the trustee is not bound to take a particular action, but to exercise his or her judgement actively and honestly as to whether to do or refrain from doing something, and then to act accordingly. The role of the court in this situation is to ensure that discretions and powers entrusted to trustees are properly exercised by them. (note omitted)

12.186 Traditionally, the exercise by trustees of discretionary powers given by the trust instrument in the execution of the trust is 'a matter for them and not the court provided, broadly speaking, they act within power, bona fide and in accordance with the purposes for which the discretion was conferred'.¹⁹⁶

12.187 In *Karger v Paul*, McGarvie J described the obligation of a trustee who exercises a discretionary power as follows:¹⁹⁷

I regard it as an inherent requirement of the exercise of any discretion that it be given real and genuine consideration. ... there must be the 'exercise of an active discretion'. It has been held that when the occasion for the exercise of a discretionary power has arisen, trustees, while not bound to exercise the discretion, are bound to consider whether it ought in their judgment to be

¹⁹⁴ See [12.170] ff.

¹⁹⁵ Law Commission of New Zealand, *Court Jurisdiction, Trading Trusts and Other Issues*, Issues Paper No 28 (2011) [1.10]. See also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1606].

¹⁹⁶ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 441–2 (Sheller JA), citing *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 333 (Truro LC); *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 209 (Sir Robert Megarry V-C); *Karger v Paul* [1984] VR 161, 165–6 (McGarvie J). See generally RW White, 'Trusts — An Australian Perspective' (Revised version of paper presented at a Higher Courts Seminar arranged by the New Zealand Institute of Judicial Studies, Auckland and Wellington, 21 and 24 May 2010) [38] ff.

¹⁹⁷ [1984] VR 161, 164–5.

exercised. I think that it goes without saying that they must give real and genuine consideration. It seems to me that it is in this sense only that the Court can examine whether the trustees gave 'proper' consideration to the exercise of the discretion. ...

It is an established general principle that unless trustees choose to give reasons for the exercise of a discretion, their exercise of the discretion can not be examined or reviewed by a court so long as they act in good faith and without an ulterior purpose ... I would add the further requirement, so obvious that it is often not mentioned, that they act upon real and genuine consideration. (notes omitted)

12.188 In *Re Londonderry's Settlement*, Harman LJ explained the policy underlying this principle as follows:¹⁹⁸

[T]rustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons actuating them in coming to a decision. This is a long-standing principle and rests largely ... on the view that nobody could be called upon to accept a trusteeship involving the exercise of a discretion unless, in the 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. To this there is added a rider, namely, that if trustees do give reasons, their soundness can be considered by the court.

12.189 The court may control the exercise (or non-exercise) of a discretionary power by a trustee where:¹⁹⁹

it was exercised in bad faith, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the settlor, or without giving a real or genuine consideration to the exercise of the discretion. The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable or unwise. (notes omitted)

12.190 In this context, bad faith (or mala fides) includes a refusal to recognise that a discretion exists, a refusal to make an informed decision, and a refusal to take relevant considerations into account (or the taking into account of irrelevant considerations). It also includes making a decision for an ulterior motive or purpose.²⁰⁰

12.191 The authorities also indicate that, where a trustee's discretion is expressed to be absolute (or uncontrolled), mala fides on the part of the trustee may need to be shown for the court to intervene.²⁰¹

12.192 The court will presume that the trustee has acted in good faith (or bona fide) and the onus of proving that the trustee has acted in bad faith lies on those

¹⁹⁸ [1965] 1 Ch 918, 928–9.

¹⁹⁹ *A-G (Cth) v Breckler* (1999) 197 CLR 83, 99, approving a statement of Northrop J at first instance and subsequently referred to by Heerey J in *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469, 480.

²⁰⁰ See *Wendt v Orr* [2004] WASC 28, [52]–[53] (Commissioner Johnson QC); JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1609].

²⁰¹ *Tabor v Brooks* (1878) 10 Ch D 273, 277–8 (Malins V-C); *Gisborne v Gisborne* (1877) 2 App Cas 300.

impeaching his or her actions.²⁰² As a matter of principle, it does not appear that unreasonableness in the exercise of the discretion is itself a ground for setting aside a decision, although it may evidence that the exercise was mala fide or otherwise not within power.²⁰³

12.193 It has been suggested that the duty to give proper consideration to discretionary decisions and to exercise them properly is one of a trustee's fundamental duties.²⁰⁴

12.194 As explained earlier, the general principle is that, unless a lack of bona fides is alleged, a trustee is not obliged to provide reasons for the exercise of a discretionary power.²⁰⁵ Ordinarily, therefore, the court will not examine the validity of trustees' reasons as an independent basis for impugning the exercise of the trustees' discretion.²⁰⁶ If, however, trustees choose 'of their own volition' to disclose their reasons, 'they are treated as waiving their immunity and inviting examination and review of the reasons'.²⁰⁷ Where the trustees have made their reasons examinable in this way, 'they are examined to see whether they satisfy the standard of being valid reasons',²⁰⁸ and, if the court considers that the reasons do not justify the decision, it may correct the decision accordingly.²⁰⁹ However, where, in the course of proceedings brought against the trustees alleging a lack of good faith, the trustees are 'virtually obliged' to disclose in evidence the way they went about exercising their discretion (in order to avoid adverse inferences being drawn),

202 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1614].

203 See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 428 (Mahoney JA), citing *Tabor v Brooks* (1878) 10 Ch D 273, 277–8 (Malins V-C). 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) [46].

204 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) [48].

205 *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 447–8; 42 ER 330, 333 (Truro LC); *Re Londonderry's Settlement* [1965] 1 Ch 918, 928 (Harman LJ); *Karger v Paul* [1984] VR 161, 165 (McGarvie J); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 434 (Mahoney JA), 442 (Sheller JA).

206 *Karger v Paul* [1984] VR 161, 164 (McGarvie J). It has been suggested, however, that the traditional approach should not be applied as an invariable principle: see 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], in which White J states:

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.

207 *Karger v Paul* [1984] VR 161, 166 (McGarvie J). See also at 164, 165, citing, eg, *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440; 42 ER 330.

208 *Karger v Paul* [1984] VR 161, 166 (McGarvie J).

209 See *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 333–4, in which Truro LC commented:

If ... 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.

that disclosure does not enliven the right to examine and review the validity of reasons.²¹⁰

Section 8

12.195 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 other person, or to give directions about an apprehended act, omission or decision.

12.196 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 Act or by law or by the trust instrument, 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.

12.197 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.²¹¹ The person must also have a direct or indirect interest in the trust property or a right of due administration in respect of the trust.²¹² The last group contemplates not only a person who is a taker in default of appointment but also a person who is a potential beneficiary under a discretionary trust.

12.198 The provision applies in relation to the exercise of any power conferred by the Act or by law or by the instrument (if any) creating the trust.

12.199 In contrast to the position under the general law, under section 8(1), the court may compel 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’. The provision 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 decision of a trustee to appoint a co-trustee.²¹³

²¹⁰ *Karger v Paul* [1984] VR 161, 166 (McGarvie J). In *Wendt v Orr* [2004] WASC 28, Commissioner Johnson QC observed (at [47]) that, once the whole of the evidence establishes that the exercise of the trustee’s discretion was in good faith, upon a real and genuine consideration and in accordance with the purposes for which the discretion was conferred, it is not open to the court to rely on that evidence to impugn the exercise of the discretion.

²¹¹ *Re Whitehouse* [1982] Qd R 196, 204 (Macrossan J).

²¹² See, eg, *Re Faulkner* [1999] 2 Qd R 49 (Moynihan J).

²¹³ *Re Whitehouse* [1982] Qd R 196, 203, 207–8 (Macrossan J).

12.200 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.

12.201 Section 8(3) empowers the court to determine any question of fact involved (or to give directions as to the manner in which the question shall be determined). It also provides that, where the order sought may adversely affect the rights of a person who is not a party to the proceedings (for example, where the applicant is one of a number of beneficiaries),²¹⁴ the court may direct that the person be made a party to the proceedings.

12.202 The jurisdiction conferred on the court by section 8 is expressed in wide terms.²¹⁵ As Macrossan J explained in *Re Whitehouse*:²¹⁶

[T]he power of the court under s 8 to review a trustee's acts and decisions is one which should not be narrowly construed. By this I mean that the jurisdiction should not be read down or unduly confined.

12.203 Macrossan J also observed, however, that the court will interfere with a discretionary decision made by a trustee under section 8 only if a proper case is established by the person seeking the review.²¹⁷

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* [arise] out of the traditional reluctance of the courts to interfere with the discretionary acts of private trustees ...

12.204 This approach was approved by the Full Court of the Supreme Court of Queensland in *Tierney v King*. In that case, Matthews J (with whom Kelly and Macrossan JJ agreed) said:²¹⁸

[A]lthough the right to review a decision conferred by s 8(1) ... 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.

²¹⁴ See, eg, *Bergade v La Provence Developments Pty Ltd* [1995] QSC 56 (White J).

²¹⁵ *Re Whitehouse* [1982] Qd R 196, 203–4 (Macrossan J), quoted in *Burns v Burns* [2008] QSC 173, [30] (Chesterman J).

²¹⁶ [1982] Qd R 196, 203.

²¹⁷ *Ibid* 203–4.

²¹⁸ [1983] 2 Qd R 580, 583.

12.205 Provisions in similar terms to section 8 apply in Western Australia and New Zealand.²¹⁹

The nature and grounds of review under section 8

12.206 Section 8 does not specifically state the grounds on which the court may review an act, omission or decision (or give directions about an apprehended act, omission or decision). The court has, however, interpreted and defined the scope and nature of its jurisdiction under section 8.

12.207 Consistent with the relevant equitable principles that apply under the general law, the courts have recognised a distinction between the exercise of the trustee's discretion, and the decision reached by the trustee as a result of that exercise. Under section 8, the court will consider whether the discretion was 'exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject'.²²⁰ The court, however, will not ordinarily impugn the decision reached by a trustee on the sole basis that the decision itself is felt to be unfair, unreasonable, unwise or inaccurate.²²¹ An applicant must show 'cogent' reasons for interfering with the trustee's discretion on that basis.²²² In *Burns v Burns*, Chesterman J explained:²²³

According to Lord Chancellor Truro in *Re Beloved Wilkes' Charity* (1851) 42 ER 330 at 333:

'The duty of supervision on the part of this court will ... 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.'

It is the 'accuracy of the conclusion' the applicant complains of here. To make out a 'particular case' an applicant must demonstrate cogent reasons for interfering with the discretion: see *Re Koczowski* [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. (emphasis added)

219 *Trustees Act 1962* (WA) s 94; *Trustee Act 1956* (NZ) s 68. Unlike Queensland, standing to apply under the provisions in those jurisdictions does not appear to extend to the potential beneficiaries of a discretionary trust: see IJ Hardingham, 'Controlling Discretionary Trustees' (1975) 12 *University of Western Australia Law Review* 91, 118; 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.

220 *Re Koczowski* [1974] Qd R 177, 185 (Dunn J). See also *Burns v Burns* [2008] QSC 173, [36] (Chesterman J).

221 *Re Koczowski* [1974] Qd R 177, 185-6 (Dunn J); *Burns v Burns* [2008] QSC 173, [32]-[36] (Chesterman J).

222 *Burns v Burns* [2008] QSC 173, [36] (Chesterman J), citing *Re Koczowski* [1974] Qd R 177, 185-6 (Dunn J).

223 *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 that in some way there has been a failure properly to exercise the discretion ...

12.208 It has also been held that, on a section 8 application, the court may examine a trustee's reasons, including reasons given in the course of proceedings, with a view to determining whether the trustee was wrong in his or her appreciation of the facts or that the trustee made an unwise or unjustified exercise of discretion in the circumstances.²²⁴ To that extent, it would appear that section 8 modifies the general law position that, unless trustees choose to state their reasons, the court will not examine the validity of reasons they may give in the course of proceedings to examine their exercise of discretionary power as an independent basis for impugning the exercise of their discretion.

12.209 The general approach of the courts in relation to the statutory power to review a trustee's act, omission or decision was aptly summarised in *Wendt v Orr*.²²⁵

Whilst the court should remain reluctant to interfere with discretionary decisions of a trustee and should not substitute its own view of the correct conduct, intervention must occur in appropriate cases. The circumstances of such cases will vary, but include situations where the trustees have not in fact exercised the discretion, have not addressed themselves to the sound exercise of the discretion, have made a decision for an ulterior motive or purpose, or have refused to take relevant considerations into account, including the impact of the decision on a beneficiary or class of beneficiaries. (emphasis added)

12.210 The courts have entertained a variety of applications under section 8, including applications for review of decisions about maintenance and advancement, review of distributions, review of appointments of trustees, directions concerning the investment of trust property, and requests for information from trustees.²²⁶ On an application under section 8, the court will usually examine in detail the evidence of the inquiries made by the trustees, the information they had and the reasons for, and manner of, their exercising the discretion.

12.211 For example, in *Jaques v Public Trustee of Queensland*,²²⁷ the Public Trustee, as trustee, was given an absolute power under a testamentary trust to apply a trust fund, as to both income and capital, to maintain a beneficiary. The beneficiary sought a review of the Public Trustee's decision not to adopt a financial plan put forward by a professional accounting firm on behalf of the applicant, and an order to transfer the bulk of the fund to a commercial fund manager. At issue was whether the Court should interfere with the trustee's exercise of discretion to maintain a particular investment strategy. The applicant criticised the investment strategy adopted by the Public Trustee by asserting that the terms of the will did not impose an obligation on the Public Trustee to balance the interests of the applicant as life tenant and the charities as remaindermen. The applicant also asserted that the strategy did not take advantage of 'more tax effective environments' including

224 *Jaques v Public Trustee of Queensland* [2008] QSC 108, [22] (Wilson J).

225 [2004] WASC 28, [56] (Commissioner Johnson QC) in relation to the equivalent provision in Western Australia, citing with approval *Re Whitehouse* [1982] Qd R 196, 203 (Macrossan J).

226 See, eg, *Re Koczorowski* [1974] Qd R 177; *Burns v Burns* [2008] QSC 173; *Re Faulkner* [1999] 2 Qd R 49; *Re Whitehouse* [1982] Qd R 196; *Jaques v Public Trustee of Queensland* [2008] QSC 108; *Tierney v King* [1983] 2 Qd R 580. See also with respect to the equivalent provision in s 94 of the *Trustees Act 1962* (WA), *Wendt v Orr* [2004] WASC 28.

227 [2008] QSC 108 (Wilson J).

superannuation and that it had led to the loss of Centrelink and Medicare concessions.

12.212 After reviewing the evidence, including the reasons which the Public Trustee had given prior to, and in the course of, the proceedings, Wilson J held that no basis to interfere with the Public Trustee's discretion had been made out on the facts of the case, and dismissed the application. His Honour observed that there was no suggestion of bad faith, and that the Public Trustee had not been shown to have erred in fact or to have exercised his discretion in a way which was unwise or unjustified.²²⁸

12.213 In exercising its jurisdiction under section 8, the court has been guided by relatively well-settled general law principles, but has also recognised that the statutory right to review should not be narrowly construed. Given that the new legislation will confer wider powers on trustees, there is scope for the greater use of a beneficial provision to the effect of section 8. In this context, questions of transparency and flexibility are of particular importance. If the statutory review provision in the new legislation is drafted to include a non-exhaustive statement of the grounds on which the court may interfere with the exercise of a trustee's discretionary power, it would address the issue of transparency, whilst still leaving the grounds for review open for the courts to continue to develop and refine.

12.214 The Law Commission of New Zealand has observed that conflicting judicial authorities in that jurisdiction have given rise to 'some uncertainty' as to the relevant standard to apply under the equivalent New Zealand statutory review provision.²²⁹ As a result, it has recently proposed a single ground of review.²³⁰ That Commission considered, but rejected, the option of restricting the statutory grounds to those already developed by the court in its supervisory equitable jurisdiction, noting concerns that it would be too complex a task to develop an exhaustive statement of those grounds and that such an approach may have unintended consequences. It also noted concerns that a possible new ground of whether 'the court considers that the trustee acted reasonably' was too imprecise in terms of when a trustee's non-compliance might be considered 'unreasonable', and imported the administrative law concept of unreasonableness into trust law. It ultimately proposed, as a compromise between these various considerations, that the standard should be 'whether it was one that was not reasonably open to the trustee in the circumstances'.²³¹

228 Ibid [25]–[26].

229 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [10.29].

230 Ibid 192 (Proposal P42(2)).

231 Ibid [10.31], [10.33]–[10.36].

Discussion Paper

12.215 In the Discussion Paper, the Commission sought submissions about the review mechanism provided by section 8 of the *Trusts Act 1973* (Qld), particularly in relation to whether it should be amended to state the grounds for review.²³²

Consultation

12.216 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee, Professor Lee and a legal practitioner who practises in trusts and succession law each submitted that section 8 of the *Trusts Act 1973* (Qld) should not be amended.

12.217 The Bar Association of Queensland observed that there is 'merit in allowing the court maximum flexibility in the development and application of the principles of equity' insofar as they apply to the review of the acts and omissions of trustees and other persons in the exercise of powers conferred by the Act, by law or by the trust instrument.

12.218 The Queensland Law Society commented that there have not been any issues of concern raised in relation to the grounds for review under section 8.

12.219 Professor Lee submitted that an 'attempt to list the grounds on which an approach to the court would be justified would be fraught with difficulties and might even restrict the court's jurisdiction'. He also commented that the case law gives guidance to trustees and that should not be compromised.

12.220 The Public Trustee considered that, in its present form, section 8 gives 'a significant degree of flexibility' to the court in respect of review of actions, omissions and decisions by trustees. The Public Trustee also considered that the case law in relation to section 8, particularly in Queensland by the Supreme Court, is instructive and that 'both applicants and trustees on proper advice should be well positioned to understand and appreciate the Court's attitude to particular applications'. The legal practitioner also preferred the flexibility of the existing provision.

The Commission's preliminary view

12.221 The Commission is of the view that the new legislation should include a provision to the general effect of section 8 of the *Trusts Act 1973* (Qld). Given that the new legislation will confer wider statutory powers on trustees, as well as particular statutory duties, the Commission considers that, in the interests of transparency and flexibility, it is desirable for the statutory review provision to include a non-exhaustive statement of the grounds for review. At this interim stage of the review, the Commission is of the view that it would be desirable and appropriate to include, at the minimum, the established grounds that a trustee's discretionary power was exercised in bad faith, without real or genuine consideration or contrary to the purpose of the trust.

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Trusts Discussion Paper (2012) 575.

12.222 Given the very dense wording of section 8(1) of the Act, and the desirability of making the new legislation accessible, the provision in the new legislation that gives effect to section 8 should be drafted so that it clearly reflects the various steps involved in the statutory review process.

PERSONS ENTITLED TO APPLY TO COURT

12.223 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. The provision has its origins in section 37 of the English *Trustee Act 1850*.²³³ There is an equivalent provision in the trustee legislation of the other Australian jurisdictions, and in New Zealand and England.²³⁴

Section 98(1)

12.224 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 a person who is duly appointed as a trustee or intended to be appointed as a trustee.

Persons 'beneficially interested' in the trust property

12.225 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),²³⁵ a creditor in an administration action,²³⁶ and a person who has a contingent interest in the trust property.²³⁷

12.226 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 potential beneficiary under a discretionary trust arguably has no standing under section 98(1) since

²³³ *Trustee Act 1850*, 13 & 14 Vict, c 60.

²³⁴ *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.

²³⁵ *Ayles v Cox* (1853) 17 Beav 584; 51 ER 1161.

²³⁶ *Re Wragg* (1863) 1 De GJ & S 356; 46 ER 143.

²³⁷ *Re Trusts of Sheppard's Will* (1862) 4 De GF & J 423; 45 ER 1247. In argument before the court, however, it had also been 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. See also *Davis v Angel* (1862) 31 Beav 223; 54 ER 1123.

ordinarily²³⁸ the beneficiary has no beneficial interest in the trust property.²³⁹ The law generally recognises that an interest of that nature 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.²⁴⁰ A potential 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 him or her.²⁴¹ However, a potential beneficiary under a discretionary trust has the right to compel the trustee to consider whether or not to make a distribution to him or her and, like beneficiaries of all trusts, a right to the proper (or due) administration of the trust.²⁴²

12.227 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.²⁴³ A potential beneficiary under a discretionary trust, 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),²⁴⁴ subject to the applicant satisfying the court that the trustee's act, omission or decision should be reviewed.

12.228 The legislation in most of the other jurisdictions also gives standing to a person who is 'beneficially interested' in the trust property.²⁴⁵

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See, however, *ASIC v Carey (No 6)* (2006) 153 FCR 509, in which French J observed (at 520) that:

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. ... On the other hand, where a discretionary trust is controlled by a trustee who is in 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 potential beneficiary under a discretionary trust has neither an interest in possession (namely, a present right of present enjoyment of the property), an immediate right to income as it accrues, nor a contingent interest in the trust property: see *Gartside v Inland Revenue Commissioners* [1968] AC 553, 607 (Lord Reid), 616–17 (Lord Wilberforce); *ASIC v Carey (No 6)* (2006) 153 FCR 509, 520 (French J); *Hunt v Muollo* [2003] 2 NZLR 322, 325 (Tipping J for the Court). Consequently, a potential beneficiary under a discretionary trust 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 J for the Court).

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Hunt v Muollo [2003] 2 NZLR 322, 325 (Tipping J for the Court).

241

Ibid 326. See also *Re Vestey's Settlement* [1951] 1 Ch 209, 219–20 (Evershed MR); *Queensland Trustees Ltd v Commissioner of Stamp Duties* (1952) 88 CLR 54, 62–5.

242

Gartside v Inland Revenue Commissioners [1968] AC 553, 607 (Lord Reid), 617–18 (Lord Wilberforce); *Kennon v Spry* (2008) 238 CLR 366, 393 (French CJ).

243

Trusts Act 1973 (Qld) s 8, which is discussed at [12.195] ff above.

244

Re Whitehouse [1982] Qd R 196, 203, 207–8 (Macrossan J).

245

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.

12.229 However, 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.²⁴⁶ For the reasons explained above, the test arguably excludes a potential beneficiary under a discretionary trust (until the trustee exercises his or her discretion to distribute in favour of him or her).

Persons who are duly appointed as a trustee or intended to be appointed as a trustee

12.230 Section 98(1) of the Act 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. The Western Australian and New Zealand provisions are in similar terms.²⁴⁷ The legislation in the other Australian jurisdictions and in England gives standing to a person duly appointed as trustee.²⁴⁸

Section 98(2)

12.231 Section 98(2) of the Act 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).

12.232 The general standing provisions in all of the other jurisdictions, except South Australia, include a similar test.²⁴⁹

Consultation

12.233 In the Discussion Paper, the Commission sought submissions on whether there is a need to modify any of the existing powers conferred on the court by the provisions in Part 7 of the *Trusts Act 1973* (Qld).²⁵⁰

12.234 The Bar Association of Queensland and Professor Lee both suggested that the test for standing to apply under section 98 should be amended so that, like the test for standing to make an application for the review of a trustee’s decision under section 8, it gives standing to a potential beneficiary under a discretionary trust. The Bar Association of Queensland explained:

²⁴⁶ It has been 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 (Campbell J); *Macarthur v Cawdor Nominee Pty Ltd* [2003] NSWSC 249, [11] (Campbell J), citing *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 426–7 (Mahoney JA; Kirby P agreeing at 408).

²⁴⁷ *Trustees Act 1962* (WA) s 93(1); *Trustee Act 1956* (NZ) s 67(1).

²⁴⁸ *Trustee Act 1925* (ACT) s 92(1); *Trustee Act 1925* (NSW) s 92(1); *Trustee Act* (NT) s 39(1); *Trustee Act 1936* (SA) s 42; *Trustee Act 1898* (Tas) s 42(1); *Trustee Act 1958* (Vic) s 64(1); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 58(1).

²⁴⁹ *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).

²⁵⁰ *Trusts Discussion Paper* (2012) 578.

There seems to be no reason in principle why a person, such [as] a discretionary object, would have standing to apply under section 8, but not under section 98.

The Commission's preliminary view

12.235 The Commission is of the view that the new legislation should include a provision to the general effect of section 98 of the *Trusts Act 1973* (Qld), setting out who may apply to the court for various orders under the legislation, except that the test for standing to apply under that provision, like the provision based on section 8 of the Act, should enable a potential beneficiary under a discretionary trust to apply to the court. This new test for standing would obviate the need to determine, in the circumstances of a particular case, the precise nature of the beneficiary's interest in the trust.

OTHER PROVISIONS DEALING WITH THE COURT'S JURISDICTION

12.236 Part 7 of the *Trusts Act 1973* (Qld) also includes a number of provisions dealing with the court's power to make other orders.

Contracts by guardians on behalf of infants

12.237 Section 86 of the *Trusts Act 1973* (Qld) is unique to Queensland. It empowers the court, where it considers it necessary or desirable in the interest of an infant (or in modern terminology a 'minor') or of an infant and some other person, to authorise the guardian of the infant or 'some other fit and proper person' to enter into an agreement for or on behalf of the infant. Such an agreement is deemed to be 'as effectual and binding' as if the infant had been of full age and mental capacity and had entered into the agreement himself or herself.

12.238 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.

12.239 Section 86 is in the same terms as the provision recommended by the Commission in its 1971 Report.²⁵¹ The aim of the provision is to authorise an agreement to compromise a claim on behalf of a minor that might not otherwise be binding.²⁵² It supplements the inherent jurisdiction of a court of equity, in its *parens patriae* jurisdiction, to sanction compromises of disputed rights on behalf of minors where it is for the minor's benefit.²⁵³

²⁵¹ *Trusts and Settled Land Report* (1971) 61, draft Trusts Bill, cl 86.

²⁵² *Ibid* 61. See generally *Katundi v Hay* [1940] St R Qd 39 (Philp J).

²⁵³ See *Wood v Public Trustee (WA)* (1995) 22 MVR 369, 372–3 (Pidgeon J; Rowland and Franklyn JJ agreeing); *Dickson v Australian Associated Motor Insurers* [2011] 1 Qd R 214 (Mullins J); *Katundi v Hay* [1940] St R Qd 39, 41 (Philp J).

Power of court to make order in absence of parties

12.240 Section 99 of the *Trusts Act 1973* (Qld) authorises the court to make orders in the absence of the parties. It has its origins in early English legislation,²⁵⁴ and a similar provision is included in the trustee legislation of the other Australian jurisdictions, New Zealand and England.²⁵⁵

12.241 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.

12.242 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

12.243 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, in respect of specified orders, be paid out of the trust funds, and to apportion the costs and expenses in the manner it considers just.

12.244 Section 100 has its origins in early English legislation,²⁵⁶ and a similar provision is contained in the trustee legislation of most of the other Australian jurisdictions, New Zealand and England.²⁵⁷

Payment into court by trustee

12.245 Section 102 of the *Trusts Act 1973* (Qld) deals with the payment into court of money or securities by trustees. The provision deals with the situation, for example, where the trustee holds funds on behalf of a minor, or a person who cannot be located, or pending the outcome of litigation concerning a person's interest under the trust. 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.²⁵⁸

12.246 Section 102 also specifies that the receipt or certificate of the proper officer is a sufficient discharge to the trustee or trustees for funds paid into court.

²⁵⁴ *Trustee Act 1893*, 56 & 57 Vict, c 53, s 43.

²⁵⁵ *Trustee Act 1925* (ACT) s 88; *Trustee Act 1925* (NSW) s 88; *Trustee Act* (NT) s 47; *Trustee Act 1936* (SA) s 58; *Trustee Act 1898* (Tas) s 51; *Trustee Act 1958* (Vic) s 65; *Trustees Act 1962* (WA) s 96; *Trustee Act 1956* (NZ) s 70; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 59.

²⁵⁶ *Trustee Act 1850*, 13 & 14 Vict, c 60, s 51.

²⁵⁷ *Trustee Act 1925* (NSW) s 93; *Trustee Act* (NT) s 41; *Trustee Act 1936* (SA) s 44; *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.

²⁵⁸ *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).

12.247 A similar provision is contained in the trustee legislation in the other Australian jurisdictions, and in New Zealand and England.²⁵⁹

Discussion Paper

12.248 In the Discussion Paper, the Commission sought submissions on whether there is a need to modify any of the existing powers conferred on the court by the provisions in Part 7 of the *Trusts Act 1973* (Qld).²⁶⁰ The Commission did not receive any submissions in relation to the court's powers under sections 86, 99, 100 or 102 of the Act.

The Commission's preliminary view

12.249 In the Commission's view, the new legislation should include provisions to the general effect of sections 86, 99 and 100 of the *Trusts Act 1973* (Qld), dealing with the court's power to:

- authorise contracts by guardians on behalf of minors;
- make orders in the absence of parties; and
- charge costs on the trust estate.

12.250 The new legislation should also include a provision to the general effect of section 102 of the *Trusts Act 1973* (Qld), dealing with the payment into court of money or securities by trustees.

PRELIMINARY RECOMMENDATIONS

Appointment and removal of trustees by the court

12-1 The new legislation should include provisions to the general effect of sections 80 and 81 of the *Trusts Act 1973* (Qld), except that the provision based on section 80 of the Act should also empower the court to remove a trustee without the concurrent appointment of another trustee.

Disqualification of trustees by the court

12-2 The new legislation should include a provision to the effect that, where the court has removed a person as a trustee of a trust and the court is satisfied that:

- (a) the person has committed one or more breaches of trust; and

²⁵⁹ *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, s 63.

²⁶⁰ *Trusts Discussion Paper* (2012) 578.

- (b) the nature and seriousness of those breaches is such that the person is unfit to act as a trustee and ought to be disqualified from being appointed as a trustee in respect of any trust for a particular period;

the court may make an order that the person cannot be appointed as a trustee in respect of any trust for the period stated in the order.

12-3 The new legislation should include a provision to the effect that:

- (a) if the court has made an order that a person cannot be appointed as a trustee in respect of any trust for a particular period; and
- (b) at the time of the making of the order, the person is a trustee of another trust;

the court may make an order, if it considers it appropriate in the circumstances, to remove the person as trustee of that other trust.

Appointment and removal of other persons by the court

12-4 The new legislation should include a provision to the general effect that, if a trust instrument creates an office, however described, in respect of which the person appointed to that office from time to time, not being a trustee, is vested with a power or powers under the instrument, the court may make orders to remove the person from that office and to appoint a new person to that office in the same circumstances as the court may appoint or remove a trustee under the provision referred to in Recommendation 12-1 above.

Vesting orders

12-5 The new legislation should provide for the court to make orders vesting property in trustees and other persons, and to make other related orders and declarations, as is presently the case under Part 7, Division 3 of the *Trusts Act 1973* (Qld), but in a simplified and modernised drafting style.

Power to authorise dealings with trust property

12-6 The new legislation should include a provision to the general effect of section 94 of the *Trusts Act 1973* (Qld), dealing with the court's power to authorise dealings with the trust property and clarifying that the circumstances in which a disposition or transaction cannot be effected because of an absence of power in the trust instrument extend to the situation where the trust instrument expressly prohibits or limits the exercise of that power.

Power to authorise the variation of the beneficial interests under the trust

12-7 The new legislation should include a provision to the general effect of section 95 of the *Trusts Act 1973* (Qld), dealing with the court's power to authorise the variation of the beneficial interests under the trust.

Judicial advice and directions

12-8 The new legislation should include provisions to the general effect of sections 96 and 97 of the *Trusts Act 1973* (Qld), except that the provision based on section 96 of the Act should not require that an application for judicial advice be made on 'a written statement of facts' (as is presently the case under section 96(1)).

Remuneration of trustees

12-9 The new legislation should include a provision to the general effect of section 101 of the *Trusts Act 1973* (Qld), dealing with the remuneration of trustees.

12-10 The new legislation should include a provision, modelled generally on section 86A of the *Probate and Administration Act 1898* (NSW) and clause 432 of the model Administration of Estates Bill 2009 of the National Committee for Uniform Succession Laws, empowering the court to review the remuneration charged by a person for the person's services as trustee or another amount charged by the person in respect of the trust estate, notwithstanding any provision in the trust instrument or in a statute authorising the charging of the amount.

Application to the court to review acts, omissions and decisions

12-11 The new legislation should include a provision to the effect of section 8 of the *Trusts Act 1973* (Qld), and which:

- (a) is drafted so that it clearly reflects the various steps involved in the statutory review process; and
- (b) articulates a non-exhaustive statement of the grounds for review (including that a trustee's discretionary power was exercised in bad faith, without real or genuine consideration or contrary to the purpose of the trust).

Persons entitled to apply to court

12-12 The new legislation should include a provision to the general effect of section 98 of the *Trusts Act 1973* (Qld), setting out the test for standing to apply to the court for various orders under the legislation, except that the provision should also enable a potential beneficiary under a discretionary trust to apply to the court.

Other provisions concerning the court's powers

12-13 The new legislation should include provisions to the general effect of sections 86, 99, 100 and 102 of the *Trusts Act 1973* (Qld) dealing with the court's power to authorise contracts by guardians on behalf of minors, make orders in the absence of parties and charge costs on the trust estate, and dealing with the payment into court of money or securities by trustees.

Chapter 13

Cy pres Schemes for Charitable Trusts

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INTRODUCTION

13.1 Part 8 of the *Trusts Act 1973* (Qld) comprises a small number of provisions that clarify certain matters related to charitable trusts, including the circumstances in which property the subject of a charitable trust may be applied *cy pres*. This chapter considers whether, in addition to the court, the Attorney-General should be empowered to approve *cy pres* schemes for certain charitable trusts.

BACKGROUND

Trusts for charitable purposes

13.2 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.

13.3 Because of this different treatment, the need arises for the law to 'provide a standard to distinguish the charitable from the non-charitable'.² Under the general law, therefore, a charitable trust must have a recognised charitable purpose.³

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.

13.4 Although the *Statute of Charitable Uses 1601* is no longer in force, the courts continue to refer to its preamble in determining whether a given purpose is charitable at law.⁴ 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*.⁵

13.5 To be recognised as ‘charitable’, a charitable trust must also be of public benefit. 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.⁶

13.6 The established rules of law relating to charity, including the requirement of public benefit, are preserved by section 103(1) and (4) of the *Trusts Act 1973* (Qld), despite the repeal of the *Statute of Charitable Uses 1601*. Section 103(2)–(3) also extends the recognition of what is charitable to the provision, ‘in the interests of social welfare’, of ‘facilities for recreation or other leisuretime occupation’.⁷

13.7 Under the general law, if a trust is expressed to be for a range of purposes, only some of which are charitable, the trust may fail.⁸ However, 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.⁹

13.8 Charitable trusts, having purposes rather than beneficiaries as their objects, represent a long-standing exception to the ‘beneficiary principle’ — that is, the rule that, ordinarily, ‘a purported trust without a beneficiary is void’, since there is no-one to enforce the trust.¹⁰

² GE Dal Pont, ‘Why Define “Charity”? Is the Search for Meaning Worth the Effort?’ (2002) 8(1) *Third Sector Review* 5, 6.

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 GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [2.1], [4.3], referring to the preamble to the *Statute of Charitable Uses 1601*, 43 Eliz 1, c 4, set out at *Trusts Discussion Paper* (2012) [13.5]. *Trusts Act 1973* (Qld) s 3(1) sch 1 (Act as passed) repealed the application of the statute in Queensland.

⁵ See *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).

⁶ See *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).

⁷ For a discussion of the background to these provisions, see *Trusts Discussion Paper* (2012) [13.8], n 11.

⁸ However, a charitable trust may be saved if the non-charitable purpose is merely incidental and ancillary to the main charitable purpose, or if there can be an apportionment or severance made between the charitable and non-charitable purposes. See generally *Re Clarke* [1923] 2 Ch 407, 414–15, 417–18 (Romer J); GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [13.1], [13.10]–[13.14].

⁹ Similar provision is made in most of the other Australian jurisdictions: see *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.

¹⁰ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [108]. See also *Morice v Bishop of Durham* (1804) 9 Ves Jun 399, 405; 32 ER 656, 658 (Grant MR).

13.9 Charitable trusts are also an exception to the general principle that property cannot remain subject to a trust indefinitely. Provided that the property vests in the trustee for a recognised charitable purpose within the perpetuity period,¹¹ it may be held for that purpose indefinitely.¹² Further, subject to certain qualifications, once property has been duly dedicated to charitable purposes, it cannot ordinarily be resumed for non-charitable purposes.¹³

Enforcement of charitable trusts

13.10 The court has inherent (and statutory) jurisdiction to deal with the enforcement of charitable trusts.¹⁴ As well as dealing with breaches of trust, the court has power in particular circumstances to settle 'schemes' to give effect to valid charitable trusts that would otherwise be incapable of being performed.¹⁵

13.11 For instance, the court may settle what is sometimes referred to as an 'administrative' or a 'general' scheme to provide the necessary machinery to carry out a charitable trust where the particular means by which the property is to be applied to the charitable purpose have not been, or have not been sufficiently, specified by the trust instrument:¹⁶

The Court has a broad inherent jurisdiction to alter, delete or insert administrative provisions in a charitable trust where it is thought expedient to regulate the administration of the [trust]. Such schemes are intended only to modify the mechanics of how property devoted to charitable purposes is to be distributed ...

13.12 Instead of settling an administrative scheme, the court might make orders under its general statutory jurisdiction for the appointment of trustees or the conferral of administrative or management powers on trustees.¹⁷

¹¹ The common law rule against perpetuities requires that dispositions of property must vest within a particular period. See the discussion in *Trusts Discussion Paper* (2012) [3.3], [3.64].

¹² GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [6.10], citing *Monds v Stackhouse* (1948) 77 CLR 232, 243 (Latham CJ).

¹³ *Ibid* [14.6]. See *Cram Foundation v Corbett-Jones* [2006] NSWSC 495, [50] (Brereton J); *Hixon v Campbell* (1924) 24 SR (NSW) 436, 443 (Maughan AJ).

¹⁴ *A-G v Church of England Property Trust, Diocese of Sydney* (1933) 34 SR (NSW) 36, 52 (Long Innes J); JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1067]; *Trusts Act 1973* (Qld) s 106(1).

¹⁵ *Phillips v Roberts* [1975] 2 NSWLR 207, 222–3 (Mahoney JA).

¹⁶ *Re Meshakov-Korjakin* [2011] VSC 372, [54] (Mukhtar AsJ). See also *Re Robinson* [1931] 2 Ch 122, 128–9 (Maughan J); *Phillips v Roberts* [1975] 2 NSWLR 207, 222–3 (Mahoney JA). An administrative scheme might involve, for example, the appointment of a trustee, the clarification of the trustees' powers or obligations, or other variation of the administrative provisions of the trust deed. For example, in *College of Law Pty Ltd v A-G (NSW)* [2009] NSWSC 1474, the Court settled a scheme enumerating certain powers of the trustees of a constructive trust to deal with the trust property where there was no trust instrument. See generally HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [20.1050]. In New South Wales and Western Australia, the Attorney-General also has power to approve an administrative scheme to 'extend or vary the powers of trustees of a charitable trust', or to 'prescribe or vary the mode of administering the trust', where the value of property does not exceed the prescribed amount: *Charitable Trusts Act 1993* (NSW) ss 12(1)(b), (c), 14(1)(a) (\$500 000); *Charitable Trusts Act 1962* (WA) ss 8(1), 10A (less than \$50 000, or where the income in the previous financial year was less than \$10 000).

¹⁷ *Trusts Act 1973* (Qld) ss 80, 94, discussed in Chapter 12. The court's jurisdiction under those provisions applies to any trust, whether it is a private or charitable trust.

13.13 More particularly, the court has power to settle ‘*cy pres* schemes’ to substitute a different charitable purpose where the original purpose of the trust is impossible or impracticable to carry out.¹⁸

13.14 The difference between *cy pres* and administrative schemes is said to be one between ends and means:¹⁹

There is a clear conceptual difference between a *cy pres* scheme and an administrative scheme for a charitable trust. It is the difference between ends and means. A *cy pres* scheme can be directed when it is impossible or impractical to carry out the objects of the trust ... An administrative scheme supplements and/or clarifies any provisions the settlor has stipulated concerning the manner in which the objects of the trust are to be pursued, when practical circumstances show that the settlor’s stipulation (if any) of the means is inadequate or impractical.

13.15 The court’s jurisdiction depends on there being someone upon whose application the court can enforce the trust. Ordinarily, this is the beneficiary of the trust but, as explained above, a charitable trust has a purpose and not a beneficiary as its object. Instead, ‘[t]he guardian of the public interest in the enforcement of charities is the Crown, represented by the Attorney-General’.²⁰ Thus, the Attorney-General, as representative of the Crown in its *parens patriae* function, has the right and duty under the general law to seek to enforce charitable trusts.²¹

The right which the Attorney General has to file an information is a right of prerogative; the King, as *parens patriæ*, has a right, by his proper officer, to call upon the several Courts of Justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases ...

13.16 Although the Attorney-General will not be required to be joined in all proceedings related to charities,²² the Attorney-General represents the objects of a charitable trust²³ and is the proper party to commence proceedings to enforce such trusts. In particular, the Attorney-General has the right and duty to bring proceedings to establish the existence of a charitable trust, and to inform the court if the trustees of a charitable trust fall short of their duty.²⁴ In addition, the Attorney-

¹⁸ See [13.22] ff below.

¹⁹ *Corish v A-G (NSW)* [2006] NSWSC 1219, [9] (Campbell J).

²⁰ *Bradshaw v University College of Wales* [1988] 1 WLR 190, 192 (Hoffman J). See also *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 62–3 (Lord Simonds); *Construction Industry Training Board v A-G* [1973] 1 Ch 173, 186 (Buckley LJ).

²¹ *A-G (Ireland) v Dublin* (1827) 1 Bligh NS 312, 347–8; 4 ER 888, 902 (Lord Redesdale). See generally GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [14.23]–[14.25], [17.13].

²² As to the circumstances in which the Attorney-General will be a necessary party to proceedings, see generally *Ware v Cumberlege* (1855) 20 Beav 503, 511; 52 ER 697, 700–1 (Romilly MR); *Uniting Church in Australia Property Trust (NSW) v Monsen* [1978] 1 NSWLR 575, 590–1 (Rath J).

²³ *A-G v Bishop of Worcester* (1851) 9 Hare 328, 361; 68 ER 530, 546 (Turner VC).

²⁴ See, respectively, *Hauxwell v Barton-upon-Humber Urban District Council* [1974] Ch 432, 450 (Brightman J); *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 62 (Lord Simonds).

General has the right and duty ‘to assist the court, if need be, in the formulation of a scheme for the execution of a charitable trust’.²⁵

13.17 In some jurisdictions, statute gives the Attorney-General additional powers concerning charitable trusts.²⁶ In particular, as is discussed below, the Attorney-General in some jurisdictions has limited statutory powers to approve *cy pres* schemes without the need for an application to the court.

Applications to the court

13.18 The court also has power to deal with charitable trusts under statute. In particular, section 106 of the *Trusts Act 1973* (Qld) empowers the court, in respect of any charitable trust,²⁷ and upon application, to give directions in respect of the administration of the trust or 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.²⁸

13.19 An application to the court under section 106 may be made by the Attorney-General 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.²⁹ For the purpose of this section, ‘charity’ is defined as ‘any institution, whether or not incorporated, which is established for charitable purposes’.³⁰

13.20 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. On any such application, the court may make such orders as to costs as may be just.³¹

13.21 Similar provision is made in some of the other Australian jurisdictions, and in New Zealand.³²

25 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 62 (Lord Simonds). See also *Re Davies* (1940) 58 WN (NSW) 35, 36–7 (Roper J).

26 For example, 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.

27 *Trusts Act 1973* (Qld) s 106(5) defines ‘charitable trust’ as ‘any property held in trust for a charitable purpose’.

28 See also *Trusts Act 1973* (Qld) s 93, discussed in *Trusts Discussion Paper* (2012) ch 12, which provides for the court to make vesting orders in the case of charity trustees.

29 It is suggested that a person will have a sufficient interest in the administration of the trust if his or her interest is ‘materially greater than or different from that possessed by ordinary members of the public’: *Re Hampton Fuel Allotment Charity* [1989] Ch 484, 494 (Nicholls LJ), cited in GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [14.47].

30 *Trusts Act 1973* (Qld) s 106(5).

31 *Trusts Act 1973* (Qld) s 106(3)–(4).

CY PRES SCHEMES

Applying trust property *cy pres*

13.22 The ‘perpetual dedication to charity’ of property the subject of a charitable trust 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.³³ That mechanism is the court’s inherent jurisdiction to settle a ‘*cy pres* scheme’.³⁴

13.23 Under the general law, 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 specified purpose of the trust.³⁵ It has been said that this means ‘something less than physical impossibility’, but more than mere inexpediency.³⁶ Impossibility may arise in a number of circumstances:³⁷

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)

13.24 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.³⁸

13.25 An initial impossibility might also arise in the case of a bequest to a named charitable institution that has ceased to exist by the time of the testator’s death. The

³² *Trustee Act 1925* (ACT) ss 94A–94E; *Trustee Act 1936* (SA) ss 60–69; *Charitable Trusts Act 1962* (WA) s 21; *Charitable Trusts Act 1957* (NZ) s 60. In some of the other jurisdictions, the court is given other specific statutory powers to deal with charitable trusts: see, eg, *Charitable Trusts Act 1993* (NSW) s 7 (powers to make various orders to protect charitable trust property); *Charities Act 1978* (Vic) s 13 (power to order removal of trustee of charitable trust). Some jurisdictions also give the court express statutory power to approve a *cy pres* scheme: see *Trustee Act 1936* (SA) s 69B(3)(a), (6); *Variation of Trusts Act 1994* (Tas) s 6; *Charitable Trusts Act 1962* (WA) s 15; *Charitable Trusts Act 1957* (NZ) s 53. In Western Australia and New Zealand, 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; *Charitable Trusts Act 1957* (NZ) s 35.

³³ GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [14.6].

³⁴ *Ibid* [14.6], [15.1].

³⁵ *Ibid* [15.1] ff.

³⁶ *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).

³⁷ GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [15.20].

³⁸ *Re Tyrie* [1970] VR 264.

ordinary rule is that such a gift will lapse, but there are a number of exceptions.³⁹ One of these exceptions is where, ‘upon the proper construction of the will, it is found that the testator had a general charitable intention to benefit work or purposes of the kind which the named institution carried out’, in which case the property the subject of the trust can be applied *cy pres*.⁴⁰

13.26 This is one instance of the principle that, in cases of initial impossibility, a gift or trust for a charitable purpose may be saved by a *cy pres* scheme if its terms indicate a general, as distinct from a merely particular, charitable intention:⁴¹

the consequence of such a trust failing *ab initio* is that [ordinarily], the funds must be returned to the donors unless it appears that the accomplishment of the particular purpose did not exhaust the charitable intention of the donor, and that his substantial intention was to advance some wider charitable purpose, although by means of the particular purpose. In such a case, the circumstance that the trust for a charitable purpose is incapable of literal execution according to its tenor is not fatal to the gift which may then be administered *cy pres* by a Court of Equity. These are instances of a donor having, as is said, manifested a ‘general charitable intention’ — an expression used to describe a charitable intention wider than the advancement of the particular purpose which has failed, although not necessarily ‘general’ as that word is commonly used.

13.27 A general charitable intention is not ‘general’ in the sense that the trust refers only to an unqualified or general charitable purpose.⁴² It is ‘an intention which, while not going beyond the bounds of the legal conception of charity, is more general than a bare intention that the impracticable direction be carried into execution as an indispensable part of the trust declared’, and involves:⁴³

a question whether the desires or directions of the author of the trust, with which it is found impracticable to comply, are essential to his purpose [or whether] a wider purpose forms his substantial object and the directions or desires which cannot be fulfilled are but a means chosen by him for the attainment of that object ...

13.28 Under the general law, there is no definite presumption in favour of a general charitable intention, but ‘the court leans, it is said, in favour of charity and is

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As explained by A Lyons J (at [9]–[13]) in *Public Trustee of Queensland v A-G (Qld)* [2009] QSC 353, the general law in Queensland recognises four exceptions, namely, where, on the proper construction of the instrument, either: (1) the gift was intended to operate as an accretion to the assets of the institution so as to become subject to the charitable trusts applicable to those assets from time to time, and those trusts remain on foot; (2) there is a successor institution carrying on the work of the named institution; (3) the gift is one to a particular charitable purpose that remains capable of fulfilment, rather than a gift to the particular named institution; or (4) the testator had a general charitable intention to benefit work or purposes of the kind which the named institution carried out. It is only if the fourth exception applies that a *cy pres* scheme is necessary; in the remaining instances, the court will give the administrative directions necessary to give effect to the gift. See also *Maher v A-G (Qld)* [2011] QSC 61, [9]–[12] (Philippides J); *Public Trustee of Queensland v Rutledge* [2010] QSC 379, [10] (Philippides J); *Public Trustee of Queensland v Queensland* [2009] 2 Qd R 327.

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Public Trustee of Queensland v A-G (Qld) [2009] QSC 353, [12] (A Lyons J). See also *Re Tyrie (No 1)* [1972] VR 168, 178 (Newton J).

41

Beggs v Kirkpatrick [1961] VR 764, 767 (Adam J).

42

GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [15.49].

43

A-G (NSW) v Perpetual Trustees Co Ltd (1940) 63 CLR 209, 225 (Dixon and Evatt JJ), quoted with approval in *Re Annandale* [1986] 1 Qd R 353, 358 (Derrington J).

ready to infer a general intention'.⁴⁴ The question is one of construction of the terms of the trust,⁴⁵ but is said to depend 'less on the construction of language than upon an estimate of the relative importance attached to the particular and to the general by the author of the scheme'.⁴⁶

13.29 The court can also settle a *cy pres* scheme to save a charitable trust where there is a 'supervening impossibility' — that is, where the purposes of the trust were initially possible but, with the passage of time, have ceased to be so.⁴⁷ 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.⁴⁸

13.30 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*.⁴⁹ It widens the circumstances in which property may be applied *cy pres* under the general law.⁵⁰

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.

13.31 Section 105 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—⁵¹
- (i) have been as far as may be fulfilled; or

⁴⁴ *A-G (NSW) v Perpetual Trustees Co Ltd* (1940) 63 CLR 209, 228 (Dixon and Evatt JJ).

⁴⁵ *Ibid* 227.

⁴⁶ *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396, 428 (Dixon J).

⁴⁷ 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*. Under the general law, it does not appear to be necessary to find a general charitable intention in cases of supervening impossibility in order to settle a *cy pres* scheme: see *Cram Foundation v Corbett-Jones* [2006] NSWSC 495, [49]–[50] (Brereton J); *Hixon v Campbell* (1924) 24 SR (NSW) 436, 441–2 (Maughan AJ). It may nevertheless be necessary under statutory *cy pres* provisions for the court 'to act in accordance with the spirit of the trust, to do which it is necessary to have regard to any general indications in the trust instrument': *A-G (NSW) v Fulham* [2002] NSWSC 629, [20], and see *Trusts Act 1973* (Qld) s 105.

⁴⁸ *Re Peirson Memorial Trust* [1995] QSC 308. See also, eg, *Re Anzac Cottages Trust* [2000] QSC 175, discussed in *Trusts Discussion Paper* (2012) [3.65].

⁴⁹ *Trusts Act 1973* (Qld) s 105 was based on the *Charities Act 1960*, 8 & 9 Eliz 2, c 58, s 13. See now *Charities Act 2011* (UK) c 25, s 62.

⁵⁰ *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.

⁵¹ It has been held that this is 'wide enough to include gifts which would otherwise fail at the outset': *Re Pitt* (2002) 84 SASR 109, 119 (Duggan J), discussing the equivalent provision in South Australia.

- (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;⁵²
- (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.
- (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.⁵³
- (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.

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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). In *Fowler v Geelong College* (Unreported, Supreme Court of Victoria, Eames J, 13 December 1996) it was held (at 18) that the court may also have regard to 'evidence of the sympathies, prejudices, approach to life, and attitudes of the testatrix at the time she made her Will' in determining the spirit of the trust.

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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'.

- (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.⁵⁴ (notes added)

13.32 Similar provision is made in most of the other Australian jurisdictions, and in New Zealand.⁵⁵

Cy pres schemes by the Attorney-General

13.33 As explained above, the Attorney-General, representing the objects of the charity, has the right and duty under the general law to assist the court in the formulation of *cy pres* schemes for the execution of charitable trusts. The Attorney-General's role is to 'assist the Court to see to it that the original charitable intention is effectuated by the scheme as nearly as it can be having regard to the fact that the original means of effectuating that intention have failed'.⁵⁶

13.34 Under the general law, the Attorney-General 'has no independent authority to change the destination of a trust fund against the will of the testator'.⁵⁷ This is the current position in Queensland.

13.35 However, the legislation in some of the other Australian jurisdictions enables trustees of certain charitable trusts to apply to the Attorney-General for the approval of a *cy pres* scheme, in lieu of making an application to the court.⁵⁸

⁵⁴ 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.

⁵⁵ *Charitable Trusts Act 1993* (NSW) ss 9–11; *Trustee Act 1936* (SA) s 69B(1)–(2), (6); *Variation of Trusts Act 1994* (Tas) ss 5–6, 10; *Charities Act 1978* (Vic) s 2; *Charitable Trusts Act 1962* (WA) ss 7, 7B. See also *Charitable Trusts Act 1957* (NZ) s 32. In South Australia, the court must be satisfied that the proposed scheme 'accords, as far as reasonably practicable, with the spirit of the trust': *Trustee Act 1936* (SA) s 69B(6)(a). In Western Australia, the court may approve a *cy pres* scheme if satisfied that 'the scheme is a proper one, that should carry out the desired purpose or proposal, and that is not contrary to law or public policy or good morals', and that 'every proposed purpose is charitable and can be carried out': *Charitable Trusts Act 1962* (WA) s 18(1)(a), (c). The *Trusts Act 1973* (Qld) does not include any similar requirements.

⁵⁶ *Re Davies* (1940) 58 WN (NSW) 35, 36 (Roper J).

⁵⁷ *Re Vosz* [1926] SASR 218, 233 (Murray CJ).

⁵⁸ In England, the Charity Commission has power to approve *cy pres* schemes under the *Charities Act 2011* (UK) c 25, s 67. Similar power is not conferred on the new office of the Commissioner of the Australian Charities and Not-for-profits Commission, established by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

13.36 In those jurisdictions, the Attorney-General may approve a *cy pres* scheme on the same grounds as the court.⁵⁹ Accordingly, the provisions in those jurisdictions setting out the occasions on which property may be applied *cy pres* — in similar terms to section 105 of the *Trusts Act 1973* (Qld) — will operate.⁶⁰ However, the Attorney-General's jurisdiction to approve *cy pres* schemes is limited to trusts that fall below a certain monetary threshold.

13.37 In New South Wales, the Attorney-General may establish a *cy pres* scheme, by order, if the value of the trust property affected by the scheme does not exceed \$500 000 or another amount prescribed by regulation.⁶¹ The Attorney-General may establish a scheme on the application of a trustee or, in 'special cases', on his or her own initiative,⁶² but must not do so if satisfied that the subject matter is 'more fit to be dealt with by the Court'.⁶³ The Attorney-General also has power to establish a *cy pres* scheme on the referral of the court, whether or not the value of the property is less than \$500 000.⁶⁴ A scheme established by the Attorney-General has the same effect as if it had been made by the court,⁶⁵ and a trustee may appeal to the court against an order made by the Attorney-General.⁶⁶

13.38 In South Australia, the Attorney-General's jurisdiction to approve a *cy pres* scheme, on the application of the trustee, is limited to charitable trusts in which the value of the trust property does not exceed \$300 000 or another amount prescribed by regulation.⁶⁷ If the application raises questions that, in the Attorney-General's opinion, should be decided by the court, he or she may refer the application to the court.⁶⁸

13.39 In Tasmania, the Attorney-General may approve a *cy pres* scheme, on application by the trustees, if satisfied that the value of the property subject to the trust does not exceed the prescribed amount.⁶⁹ If the property consists of, or includes, real property, the prescribed amount is \$200 000. If the property consists of personal property only, the prescribed amount is \$100 000.⁷⁰ The Attorney-

59 See *Charitable Trusts Act 1993* (NSW) ss 9–10, 12(1)(a); *Trustee Act 1936* (SA) s 69B(1), (6); *Variation of Trusts Act 1994* (Tas) ss 5, 6(1), 7(2)(b); *Charities Act 1978* (Vic) ss 2, 4(3)(a)(i), (4)(a); *Charitable Trusts Act 1962* (WA) s 18. But see, in Victoria, the additional ground for the Attorney-General to approve a *cy pres* scheme in s 4(3)(b), discussed in n 73 below, which is not also conferred by the statute on the court.

60 In addition, in Tasmania, the Attorney-General (but not the court) is expressly required to be satisfied that 'as far as reasonably practicable the scheme accords with the spirit of the original gift': *Variation of Trusts Act 1994* (Tas) s 7(5)(a).

61 *Charitable Trusts Act 1993* (NSW) ss 12(1)(a), 14(1)(a). No other monetary amount is presently prescribed.

62 *Charitable Trusts Act 1993* (NSW) s 13(1)(a)–(b).

63 *Charitable Trusts Act 1993* (NSW) s 14(1)(b).

64 *Charitable Trusts Act 1993* (NSW) ss 13(1)(c), (2), 14(2).

65 *Charitable Trusts Act 1993* (NSW) s 12(4).

66 *Charitable Trusts Act 1993* (NSW) s 18.

67 *Trustee Act 1936* (SA) s 69B(3)(b). No other monetary amount is presently prescribed.

68 *Trustee Act 1936* (SA) s 69B(4).

69 *Variation of Trusts Act 1994* (Tas) s 7(2).

70 *Variation of Trusts Act 1994* (Tas) s 7(1); *Variation of Trusts Regulations 2004* (Tas) reg 4.

General may approve of the scheme, with any alterations that he or she thinks fit, disapprove of the scheme, refer the scheme back to the trustees for further consideration, or refuse the application and request the trustees to apply to the court.⁷¹ If a scheme is approved, the trustees will be granted a certificate of approval that has effect as if it were an order of the court.⁷²

13.40 In Victoria, the Attorney-General may sanction a *cy pres* scheme, on the application of the trustees, if satisfied that the total value of the corpus of the property is less than \$500 000 or an amount fixed by order of the Governor in Council published in the Government Gazette.⁷³ 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.⁷⁴ The Attorney-General may approve the scheme proposed by the trustees, subject to such provisions and conditions, if any, as he or she thinks fit.⁷⁵ The trustees will not be liable for any breach of trust arising solely from their application of the property in accordance with a scheme approved by the Attorney-General.⁷⁶

13.41 In Western Australia, the Attorney-General's power to approve a *cy pres* scheme, on the application of the trustees, applies where the value of the property (including any accumulated income) is less than \$50 000 or an amount prescribed by regulation, or the income in the previous financial year was less than \$10 000 or such amount prescribed by regulation.⁷⁷ The Attorney-General may remit the proposed scheme to the trustees for consideration of any suggested amendments, and may approve, or refuse to approve, the scheme as finally submitted by the trustees.⁷⁸ In deciding whether to approve the scheme, the Attorney-General is to have regard to any representations made to him or her by persons with an interest in the matter.⁷⁹ If the Attorney-General refuses to approve a proposed scheme, reasons must be given, and the trustees may apply to the court for approval of the scheme.⁸⁰

13.42 In most of these jurisdictions, provision is made either for the Attorney-General to charge and fix the costs and expenses incurred by him or her in

71 *Variation of Trusts Act 1994* (Tas) ss 7(3), 8.

72 *Variation of Trusts Act 1994* (Tas) s 7(7)–(8).

73 *Charities Act 1978* (Vic) s 4(1)(a), (3)(a)(ii). No other monetary amount has been published. The Attorney-General may also sanction a *cy pres* scheme if the property was given for specific charitable purposes that fail and the total value of the corpus of the property does not exceed \$50 000 or an amount fixed by order of the Governor in Council: s 4(1)(b), (3)(b). That provision, which originally applied where the value of the property did not exceed \$1000, appears to have been introduced to provide a mechanism for 'relatively small charitable funds' given for a specific purpose that fails to be devoted to another charitable purpose 'even where there is no general charitable intention on the part of the donor': see Victoria, *Parliamentary Debates*, Legislative Assembly, 2 November 1978, 5512 (Mr Maclellan, Minister of Transport).

74 *Charities Act 1978* (Vic) s 4(2).

75 *Charities Act 1978* (Vic) s 3(c).

76 *Charities Act 1978* (Vic) s 4(5).

77 *Charitable Trusts Act 1962* (WA) s 10A(1). No other monetary amount is presently prescribed.

78 *Charitable Trusts Act 1962* (WA) ss 10(1)(a), 10A(4).

79 *Charitable Trusts Act 1962* (WA) s 10A(5)(b).

80 *Charitable Trusts Act 1962* (WA) s 10A(8).

connection with the application (including legal costs),⁸¹ or for the payment of a prescribed application fee.⁸²

13.43 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,⁸³ and approvals given by the Attorney-General.⁸⁴

Discussion Paper

13.44 In the Discussion Paper, the Commission observed that a provision to allow the Attorney-General to approve *cy pres* schemes for certain smaller charitable trusts might involve a saving in costs that would otherwise be incurred by an application to the court. The Commission also noted, however, that requiring applications to be made to the court would ensure that the court's particular expertise is brought to bear on the issues involved.⁸⁵

13.45 The Commission sought submissions on whether the *Trusts Act 1973* (Qld) should 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:⁸⁶

- in respect of which charitable trusts an application should be capable of being made;
- who should be entitled to make an application;
- what specific matters the Attorney-General should need to be satisfied of before approving a *cy pres* scheme; and
- what notice requirements should be imposed.

⁸¹ *Charitable Trusts Act 1993* (NSW) s 21; *Trustee Act 1936* (SA) s 69B(7)–(8); *Charitable Trusts Act 1962* (WA) s 10A(11).

⁸² *Charities Act 1978* (Vic) s 4(1); *Charities Regulations 2005* (Vic) reg 4, which provide a sliding scale of prescribed fees 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).

⁸³ *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.

⁸⁴ *Charitable Trusts Act 1993* (NSW) ss 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), 19 (register of all orders made by the Attorney-General to be maintained and open to inspection by any person); *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)(b) (notice of approval to be published in the Gazette).

⁸⁵ *Trusts Discussion Paper* (2012) [13.36].

⁸⁶ *Ibid* 590.

Consultation

Whether the legislation should empower the Attorney-General to approve cy pres schemes

13.46 Crown Law, the Queensland Law Society, the Bar Association of Queensland, the Public Trustee and Professor Lee each expressed support for the inclusion of provisions to allow the Attorney-General to approve *cy pres* schemes in certain circumstances.

13.47 Crown Law commented that:

Cy-près applications are heard in the Supreme Court and, for smaller trusts, we believe that the costs associated with court proceedings are a matter of concern. Spending money on court proceedings diverts resources from the charitable purposes of the trust.

13.48 Similarly, the Public Trustee, although 'entirely content' with the current application of, and procedure in, section 106 of the *Trusts Act 1973* (Qld), particularly with respect to *cy pres* schemes, submitted that the 'one caveat offered is the cost and time committed to applications to Court'.

13.49 Crown Law submitted that the Attorney-General should be permitted to approve *cy pres* schemes, on the application of the trustees, where the value of the trust property is less than \$500 000, but that it would still be open for the trustee, or the Attorney-General, to apply to the court for approval of a scheme. Crown Law did not consider it necessary for the Attorney-General to have the power to establish a *cy pres* scheme on referral of the court or on his or her own initiative.

13.50 Similarly, both the Queensland Law Society and the Bar Association of Queensland considered that the Act should include a provision in the same terms, including as to monetary limits, as that in Victoria, to give trustees the right to apply to the Attorney-General for directions for the application of the property *cy pres*, in lieu of making an application to the court. In their view, applications should be based on the net value of the trust assets, and should be capable of being made only by the trustees of the trust. The Bar Association of Queensland commented that:

Whilst the monetary limit is in some respects arbitrary, there is warrant, for reasons of comity, for an application to the Attorney-General being the same as the amounts in the Victorian Act.

13.51 The Public Trustee suggested that a power for the Attorney-General to approve a *cy pres* scheme would be of benefit. This respondent cautioned that identifying the monetary threshold that should apply to the Attorney-General's jurisdiction 'is a difficult and necessarily subjective matter', but suggested that the \$500 000 limit that applies in Victoria might be appropriate. Similarly, Professor Lee suggested that an application should be capable of being made, by any person who is interested in the administration of the trust, where the capital value of the trust is less than \$500 000. He also suggested that the Attorney-General should be empowered to authorise the trustees to bring a charitable trust to an end if its income is insufficient for the purposes of the trust.

13.52 Crown Law, the Queensland Law Society and the Bar Association of Queensland each expressed the view that the Attorney-General should follow the same approach as the court in approving a *cy pres* scheme. Crown Law considered that this would require the Attorney-General to be satisfied that the circumstances in section 105(1) of the *Trusts Act 1973* (Qld) have arisen, that there is a general charitable intention in cases of initial impossibility, and that the charitable purpose substituted by the scheme is as near as possible to the original purpose of the trust. Professor Lee also suggested that the provision allowing the Attorney-General to approve a scheme should apply when an occasion for applying the property *cy pres*, as provided by section 105 of the Act, has arisen.

13.53 The Public Trustee considered that the Act should expressly require the Attorney-General to be satisfied that the scheme accords as far as reasonably practicable with the spirit of the trust, and is justified in the circumstances of the particular case. The Queensland Law Society and the Bar Association of Queensland expressed a similar view. Professor Lee suggested that the Attorney-General should be satisfied that, having regard to the spirit of the trust, the scheme will provide a more suitable and effective method of using the property.

13.54 Crown Law suggested that both applications and approvals should be publicly available, 'for example, through publication on the internet'. The Queensland Law Society and the Bar Association of Queensland suggested that applications to the Attorney-General should be notified to any person or entity with an interest in the trust and publicly advertised (in the same way as a notice of intention to apply for a grant of probate), that the Attorney-General should identify the persons and entities who should be served with a copy of the application and invite them to make submissions, and that any person who is served with an application or who makes submissions should be notified of the Attorney-General's decision on the application.

13.55 On the other hand, a legal practitioner who practises in trusts and succession law did not consider that the Act should be amended to allow *cy pres* applications to be made to the Attorney-General, expressing concern that the Attorney-General may not have the appropriate expertise or facility to deal with such applications.

Other matters raised by respondents

13.56 Crown Law also suggested that, in addition to *cy pres* schemes, the Act should allow the Attorney-General to approve administrative schemes for charitable trusts that would 'merely provide necessary machinery for the administration of the trust'.

13.57 In addition, the Queensland Law Society and the Bar Association of Queensland suggested that the provisions of the *Charitable Funds Act 1958* (Qld), which provide 'an informal type of *cy pres* scheme' for certain types of funds should be reviewed and inserted into the *Trusts Act 1973* (Qld).

The Commission's preliminary view

Whether the legislation should empower the Attorney-General to approve cy pres schemes

13.58 In the Commission's view, the new legislation should allow the trustees of a charitable trust to apply to the Attorney-General for the approval of a *cy pres* scheme in certain circumstances, in lieu of making an application to the court.

13.59 The Commission considers that the conferral of a limited jurisdiction on the Attorney-General is desirable given the costs involved in applications to the court and the traditional role of the Attorney-General in the enforcement of charitable trusts. It would also be consistent with the position in a number of the other Australian jurisdictions.

13.60 Like the other jurisdictions, the Commission considers that the Attorney-General's jurisdiction should be limited to trusts where the value of the trust property falls below a certain monetary threshold. The Commission acknowledges that the determination of an appropriate monetary limit is a somewhat arbitrary exercise. It also recognises the range of monetary thresholds that apply in the other jurisdictions. Having regard to the significant costs that may be involved in a court hearing, however, the Commission considers that a limit of \$1 million would be appropriate.

13.61 In the Commission's view, the legislation should otherwise provide that the Attorney-General may approve a *cy pres* scheme, on the application of the trustees of the trust, on the same grounds as the court. This would mean that section 105 of the *Trusts Act 1973* (Qld) would apply, as would the general law requirements that there must be a general charitable intention in cases of initial impossibility, and that the charitable purpose substituted by the scheme is one that is as near as possible to the original purpose of the trust.

13.62 Given the scope of section 105(1) of the *Trusts Act 1973* (Qld), this would allow the Attorney-General to approve a scheme in the case of many smaller trusts where, for example, the value of the trust property is insufficient to carry out the original intended purpose of the trust, or the purpose has otherwise ceased to provide a suitable and effective method of using the property having regard to the spirit of the trust.

13.63 The Commission also considers that the legislation should include the following measures to ensure transparency and procedural fairness in relation to the exercise of the Attorney-General's *cy pres* jurisdiction:

- Having regard to the provisions in the other jurisdictions, the Commission considers that the legislation should provide for applications to be publicly notified, to allow persons with an interest in the matter to make submissions to the Attorney-General, and for approvals given by the Attorney-General to be published.
- The legislation should provide that the Attorney-General is not to approve a *cy pres* scheme if he or she considers that it would be more appropriate for

the application to be dealt with by the court, because, for example, of its contentious character or any special question of law or fact.

- Given the sizeable nature of the jurisdiction that is to be conferred on the Attorney-General, the Attorney-General's decisions should be subject to appeal, rather than being subject to review on the more limited grounds available under the *Judicial Review Act 1991* (Qld). Accordingly, the new legislation should provide that the trustees or other aggrieved persons may appeal a decision of the Attorney-General to the Supreme Court.

Whether the legislation should empower the Attorney-General to approve administrative schemes

13.64 The Commission does not consider it necessary or desirable for the new legislation to give the Attorney-General the power to approve administrative schemes for charitable trusts.

13.65 As explained earlier in this chapter, an administrative scheme involves variations or additions to the administrative provisions of a charitable trust.⁸⁷ Only two other jurisdictions — New South Wales and Western Australia — make provision for the Attorney-General to establish such schemes, for example, by extending or varying the trustees' powers.⁸⁸ In the Commission's view, such matters are appropriately determined by the court.

13.66 Moreover, the appointment of new trustees or the variation or conferral of trustees' powers does not arise only in the context of charitable trusts. The court's general statutory jurisdiction to make such orders applies with respect to any trust.⁸⁹ It would be incongruous for the trustees of private trusts to apply to the court for the conferral of new powers, but the trustees of charitable trusts, under a particular monetary threshold, to apply to the Attorney-General.

Review of the provisions of the Charitable Funds Act 1958 (Qld)

13.67 As explained above, the *Charitable Funds Act 1958* (Qld) provides a statutory procedure for the application to other purposes of funds raised for specific 'charitable purposes', including by lotteries.⁹⁰ However, that Act defines 'charitable purpose' in wide terms, so that the Act applies to collections that may be made for purposes that are not otherwise recognised as being charitable at law. In contrast, sections 105 and 106 of the *Trusts Act 1973* (Qld) are specific in their terms to charitable trusts.

13.68 Furthermore, the *Charitable Funds Act 1958* (Qld) concerns issues that are peculiar to the types of funds in question, which often involve numerous and anonymous contributors. Whether the special procedures and provisions in that Act

87 See [13.11] above.

88 See n 16 above.

89 See *Trusts Act 1973* (Qld) ss 80, 94 and [13.12] above.

90 See n 54 above.

continue to be appropriate is a matter for consideration within the particular context of that Act, and does not fall within the scope of this review.

PRELIMINARY RECOMMENDATIONS

13-1 The new legislation should make provision for the Attorney-General to approve *cy pres* schemes for charitable trusts where the value of the trust property does not exceed \$1 million.

13-2 The provisions dealing with the Attorney-General's *cy pres* jurisdiction should provide that:

- (a) the trustees of a charitable trust may, in lieu of making an application to the court, apply to the Attorney-General for the approval of a *cy pres* scheme;
- (b) the Attorney-General may approve a *cy pres* scheme on the same grounds as the court;
- (c) an application to the Attorney-General for the approval of a *cy pres* scheme must be publicly notified to allow submissions to be made by persons with an interest in the application;
- (d) an approval by the Attorney-General of a *cy pres* scheme must be published;
- (e) the Attorney-General is not to approve a *cy pres* scheme if he or she considers that it would be more appropriate for the application to be dealt with by the court, because, for example, of its contentious character or any special question of law or fact; and
- (f) a trustee or a person aggrieved by a decision of the Attorney-General may appeal the decision to the Supreme Court.

Chapter 14

Remedies for the Wrongful Distribution of Trust Property

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INTRODUCTION

14.1 In *Re Diplock*,¹ 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.

14.2 First, the creditor or beneficiary has a personal action in equity (described as a claim '*in personam*'²) 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.³ The Court of Appeal considered that, '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

1 [1948] Ch 465, affd *Ministry of Health v Simpson* [1951] AC 251.

2 Ibid 476.

3 Ibid 502.

the estate to which he was not entitled'.⁴

14.3 The Court of Appeal held, however, that the *in personam* 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.⁵

14.4 Secondly, an unpaid or underpaid creditor or beneficiary may have a right to trace the money (described as a claim '*in rem*'⁶), provided that it is possible to identify or disentangle the money where it has been mixed with assets of the recipients.⁷ 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'.⁸

14.5 The decision in *Re Diplock* was affirmed by the House of Lords in *Ministry of Health v Simpson*.⁹ Lord Simonds considered that the reasoning and conclusion of the Court of Appeal were 'unimpeachable', but raised a doubt as to whether the principles articulated by the Court of Appeal in relation to distributions made by personal representatives would also apply to distributions made by trustees.¹⁰ Lord Simonds also effectively excluded any defence of change of position in relation to the *in personam* claim.¹¹

LEGISLATIVE RESPONSES TO *RE DIPLOCK*

14.6 Two Australian jurisdictions, Queensland and Western Australia, have legislative provisions that deal with the issues raised in *Re Diplock*.

Queensland

14.7 Section 113 of the *Trusts Act 1973* (Qld) gives effect to several recommendations made by this Commission in its 1971 Report. It was originally enacted as section 109 of the *Trusts Act 1973* (Qld), but in 2009 was renumbered as section 113.¹²

4 Ibid 503.

5 Ibid.

6 Ibid 476.

7 Ibid 536–7. See also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2710].

8 [1948] Ch 465, 521.

9 [1951] AC 251.

10 Ibid 265–6.

11 Ibid 276.

12 See *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) s 83(2).

14.8 In its 1971 Report, the 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* would not necessarily be available in relation to a distribution of trust property.¹³ 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’.¹⁴ It 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.

14.9 In that Report, the Commission generally endorsed *Re Diplock*,¹⁵ and recommended that, except by leave of the court, a person must first exhaust any remedies that he or she may have against the trustee or personal representative before enforcing any remedy against the recipient of the property that has been wrongfully distributed.¹⁶ This is provided for in section 113(2).

14.10 The Commission also considered that the denial of the defence of change of position in relation to an *in personam* claim in *Ministry of Health v Simpson* was ‘regrettable’, and recommended that the defence be available to an incorrectly paid recipient of property.¹⁷ The defence of change of position appears in section 113(3).

Western Australia

14.11 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. 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’.¹⁸ 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 claimant a sum not exceeding the value of those assets or the

¹³ *Trusts and Settled Land Report* (1971) 73–4.

¹⁴ *Ibid* 74.

¹⁵ [1948] Ch 465, 503. See [14.2]–[14.3] above.

¹⁶ *Trusts and Settled Land Report* (1971) 74. In *Hagan v Waterhouse* (1991) 34 NSWLR 308, Kearney J held (at 370) 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. It is unclear, however, whether that statement reflects the position under s 113(2) of the *Trusts Act 1973* (Qld) or whether, because s 113(2) refers to ‘any remedy’, the requirement to exhaust available remedies against the trustee or 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).

¹⁷ *Trusts and Settled Land Report* (1971) 74.

¹⁸ *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].

value of that interest. The statutory right given to the person is in addition to 'all other rights and remedies (if any) available to that person'.¹⁹

14.12 However, as explained below, section 65(7) of the *Trustees Act 1962* (WA) reverses the effect of *Re Diplock* concerning the order in which an unpaid claimant may exercise his or her remedies against the trustee and a person to whom a wrongful distribution has been made.

14.13 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.

THE ORDER IN WHICH REMEDIES SHOULD BE ENFORCED

14.14 As explained earlier, section 113(2) of the *Trusts Act 1973* (Qld) generally provides for remedies in respect of the wrongful distribution of trust property to be enforced in the same order as laid down in *Re Diplock*. It provides:

- (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.

14.15 In recommending a provision in these terms in its 1971 Report, the Commission expressly rejected the approach found in section 65(7) of the *Trustees Act 1962* (WA), 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'.²⁰

14.16 Section 65(7) of the *Trustees Act 1962* (WA) provides that 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. It also provides that a 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 other remedies available to the person, whether under section 65 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'.²¹

14.17 In *Corporate Systems Publishing Pty Ltd v Lingard (No 4)*, Beech J held that section 65(7) of the *Trustees Act 1962* (WA):²²

¹⁹ *Trustees Act 1962* (WA) s 65(4).

²⁰ *Trusts and Settled Land Report* (1971) 74. Ford and Lee note, however, that s 113(2) mitigates the harshness of the rule in *Re Diplock* by enabling a remedy to be enforced in the first instance, with the leave of the court, against the recipient of the property: HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7010].

²¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7030].

²² [2008] WASC 21, [184].

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.

14.18 Given that section 113(2) of the *Trusts Act 1973* (Qld) also refers to the enforcement of 'any remedy', the comment of Beech J would also appear to apply to the Queensland provision.

14.19 Ford and Lee have suggested that, in light of developments in the law since *Re Diplock*, the rationale for requiring a claimant to exhaust all available remedies against the trustee before enforcing any remedy against the recipient of the property no longer applies.²³

[T]he reason given by the court [in *Re Diplock* for requiring a claimant first to exhaust all remedies against the personal representative] 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:

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 ...

14.20 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.²⁴ 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.²⁵

²³ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [17.5010].

²⁴ *Administration of Estates Report* (2009) vol 2, [22.57].

²⁵ *Ibid*, Rec 22-2(c)(ii).

Discussion Paper

14.21 In the Discussion Paper, the Commission sought submissions on whether section 113(2) of the *Trusts Act 1973* (Qld) should 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, or whether section 113(2) should be changed in some other way.²⁶

Consultation

14.22 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal academic each expressed the view that section 113(2) of the *Trusts Act 1973* (Qld) should be amended to remove the requirement for a claimant first to exhaust all remedies against the trustee before enforcing any remedy against a person to whom a wrongful distribution has been made.

14.23 In particular, the Queensland Law Society, the Bar Association of Queensland and the Public Trustee agreed with the view expressed by the National Committee for Uniform Succession Laws that the general requirement in section 113(2) for the claimant first to exhaust any remedy against the trustee is an unnecessary restriction.

14.24 The legal academic observed that the restriction in section 113(2) is directed to the simultaneous enforcement of remedies, and that the provision does not prevent the simultaneous institution of proceedings against the trustee and the third party recipient. In his view, a claimant should be able both to bring the claims against the trustee and third party recipient together, and to enforce the remedies against them simultaneously, subject to the limitation on double recovery:

As far as simultaneous *enforcement* of both remedies is concerned, I endorse the position stated by Ford and Lee ... that the rejection by the High Court of Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 of the mistake of fact/mistake of law distinction in relation to the claim for money had and received renders otiose the requirement (in *Re Diplock*) that a plaintiff exhaust common law claims before pursuing the equitable claim (for which the fact/law distinction is irrelevant). There is simply a restitutionary claim against the third party recipient whether the mistake was one of fact or of law. The technical reason for disallowing the simultaneous pursuit of both remedies no longer applies. (emphasis in original)

14.25 However, a legal practitioner who practises in trusts and succession law commented that he generally approved of section 113(2).

The Commission's preliminary view

14.26 Given that the law no longer prevents the recovery of moneys paid under a mistake of law, the Commission considers that the rationale for requiring a claimant to exhaust all of the remedies that may be available against the trustee before enforcing any remedy against a distributee of the trust property no longer

²⁶

Trusts Discussion Paper (2012) 601.

applies. Accordingly, the Commission is of the view that the new legislation should not include a provision to the effect of section 113(2) of the *Trusts Act 1973* (Qld).

14.27 However, the Commission does not consider that it would be sufficient simply to omit section 113(2), as *Re Diplock* would arguably still govern the order in which remedies may be enforced against the trustee and a distributee of the trust property. Instead, the new legislation should provide expressly that a person who has suffered loss by reason of the wrongful distribution of trust property is not required to exhaust all of the remedies that may be available against the trustee before enforcing any remedy against a person to whom a wrongful distribution of the trust property has been made.

14.28 In enforcing any remedies against a distributee of the trust property or the trustee who made the distribution (or both), a claimant would be subject to the rule against double satisfaction, which has been described as a 'universal rule' that prevents a claimant from recovering more than he or she has lost.²⁷

THE DEFENCE OF CHANGE OF POSITION

14.29 As mentioned earlier, in *Ministry of Health v Simpson*, Lord Simonds effectively excluded any defence of change of position in relation to the *in personam* claim that was recognised in *Re Diplock*.²⁸

14.30 However, section 113(3) of the *Trusts Act 1973* (Qld) provides a defence of change of position where any remedy is sought to be enforced against a person to whom a wrongful distribution of trust property has been made. It provides:

- (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.

14.31 To rely on the defence, the recipient of the trust property must establish that he or she received the distribution in good faith and altered his or her position in reliance on the propriety of the distribution.

14.32 Section 65(8) of the *Trustees Act 1962* (WA) also provides a defence of change of position, which applies where the person received the property in good faith and has so altered his or her position in reliance on having an indefeasible interest in the property that, 'in the opinion of the Court, having regard to all possible implications in respect of the trustee and other persons, it is inequitable to grant relief or to grant relief in full'.

²⁷ *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635, 661 (Gummow and Hayne JJ). See also at 656 (Gleeson CJ and Callinan J), 669 (Kirby J).

²⁸ [1951] AC 251, 276.

14.33 In *David Securities Pty Ltd v Commonwealth Bank of Australia*, the High Court recognised the defence of change of position in relation to a common law claim for moneys paid under a mistake, stating:²⁹

[i]f we accept the principle that payments made under a mistake of law should be prima facie recoverable, in the same way as payments made under a mistake of fact, a defence of change of position is necessary to ensure that enrichment of the recipient of the payment is prevented only in circumstances where it would be *unjust*. (emphasis in original)

14.34 However, there is some uncertainty as to whether the defence would be recognised as a defence to an *in personam* claim based on *Re Diplock*. In *Blue Sky Private Equity Ltd v Crawford Giles Pty Ltd*, Gray J discussed the remedies available where trust moneys are transferred to a volunteer. After referring to the proprietary remedy and the special rules laid down in *Re Diplock* where the volunteer mixes the trust moneys with his or her own moneys, his Honour stated:³⁰

[i]n addition, there is a right *in personam* to proceed in equity provided that the primary remedy against the defaulting trustee had first been exhausted or compromised. There is no general defence of ‘*change of position*’ to the equitable claims, unlike the position in respect of a common law claim for restitution. (notes omitted)

14.35 Gray J observed that the law ‘on questions of mistake of fact, mistake of law and the rationale of unjust enrichment is vexed’.³¹

14.36 Ford and Lee consider that 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 that, although the provision may still be of procedural value, it is no longer needed.³²

14.37 However, a number of other commentators are of the view that there is no defence of change of position to the equitable *in personam* claim of the kind recognised in *Re Diplock*, except in Queensland and Western Australia where the defence is provided by statute.³³

14.38 In relation to the requirements in section 113(3) for establishing the defence of change of position, Ford and Lee³⁴ consider that the provision anticipated the subsequent developments in the law in *David Securities Pty Ltd v Commonwealth Bank of Australia*, where a majority of the High Court stated that ‘the central element’ in the defence of change of position, in jurisdictions where it

²⁹ (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

³⁰ [2012] SASC 28, [100].

³¹ *Ibid* [106].

³² HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7010]. See also M Cope, *Equitable Obligations: Duties, Defences and Remedies* (Lawbook, 2007) [7.240].

³³ RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) [14-010]. See also the similar views expressed in JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2319]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [24.125].

³⁴ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7010].

has been accepted, 'is that the defendant has acted to his or her detriment on the *faith of the receipt*'.³⁵ They suggest, however, that section 113(3) 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*:³⁶

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* ...

14.39 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 moneys paid under a mistake of law,³⁷ 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 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 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).³⁸

Discussion Paper

14.40 In the Discussion Paper, the Commission endorsed the National Committee's recommendation, observing that it 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 therefore proposed that 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.³⁹

Consultation

14.41 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee and a legal practitioner who practises in trusts and succession law

³⁵ (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), citing P Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1989), 410.

³⁶ 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 not 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.

³⁷ See [14.19], [14.33], [14.38] above.

³⁸ *Administration of Estates Report* (2009) vol 2, [22.61], Rec 22-5(b).

³⁹ *Trusts Discussion Paper* (2012) [14.35], 603.

each agreed with the Commission's proposal. The Public Trustee commented that section 113 'should not entirely codify the defences available — and clarification that the provision does not limit any other defence that may be available should be made'.

14.42 Professor Lee observed that the scope of the defence of change of position under the general law, particularly in relation to the question of detrimental reliance, is 'in a state of development'. He commented that section 113(3) 'takes the narrower position of requiring reliance', and expressed a preference for the wider formulation of the defence that was articulated in *Lipkin Gorman v Karpnale Ltd.*⁴⁰ He suggested that this would be achieved by omitting the words 'in reliance on the propriety of the distribution' from section 113(3).

The Commission's preliminary view

14.43 Given that there is still some uncertainty as to whether the defence of change of position would be recognised as a defence to an *in personam* claim based on *Re Diplock*, the Commission is of the view that the new legislation should preserve the statutory defence of change of position that is currently provided by section 113(3) of the *Trusts Act 1973* (Qld).

14.44 The Commission also considers that the defence should be expressed in the same terms in which it appears in section 113(3), which is generally consistent with the High Court's statement of the defence in *David Securities Pty Ltd v Commonwealth Bank of Australia*.⁴¹ The Commission notes the support by one respondent for the wider formulation of the defence of change of position that has been recognised in England by the House of Lords. However, if the wider defence were adopted in the new legislation, the statutory defence in relation to claims for the wrongful distribution of trust property would then differ from the defence of change of position as it applies in Australia more broadly to other causes of action.

14.45 However, in recognition of the possibility that the law may develop in that direction, the Commission considers that the new legislation should provide that the provision based on section 113(3) does not limit any other defence that may be available, under an Act or at law or in equity, to the person to whom the wrongful distribution has been made. This will ensure that, if the wider defence is ultimately recognised, there will not be any argument that the person to whom the wrongful distribution has been made is restricted to the statutory defence.

CONTRIBUTION AND INDEMNITY

14.46 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:⁴²

⁴⁰ [1991] 2 AC 548. See n 36 above.

⁴¹ See [14.38] above.

⁴² *Administration of Estates Report* (2009) vol 2, [22.59], Rec 22-3.

- able to join the personal representative or trustee as a party to the proceeding brought against him or her; and
- entitled to contribution and indemnity from the personal representative or trustee in the amount or on the terms that the court considers appropriate.

Discussion Paper

14.47 In the Discussion Paper, the Commission endorsed the recommendation of the National Committee for Uniform Succession Laws, and proposed that 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.⁴³

- may join the trustee as a party to the proceeding brought against him or her; and
- is entitled to contribution and indemnity from the trustee in the amount or on the terms that the court considers appropriate.

Consultation

14.48 The Queensland Law Society, the Bar Association of Queensland, a legal academic and a legal practitioner who practises in trusts and succession law each agreed with the Commission's proposal.

14.49 The legal academic considered, however, that the provision regarding the contribution and indemnity of the trustee should apply only to third party recipients who received the distribution in good faith:

A provision enabling the third party *who has received the distribution in good faith* to obtain contribution and indemnity from the trustee would be adequate protection for third party recipients. Third party recipients who knew or who were wilfully blind to the fact that they were receiving trust property should not be indemnified in respect of their liability under the first limb of the rule in *Barnes v Addy*.⁴⁴ Such third parties are (and ought to be) open to the same liability as the trustee and should not be able to transfer the burden of that liability to the trustee. (note added)

14.50 The Public Trustee also submitted that it would clearly be convenient to enable the trustee from whom contribution and indemnity is sought to be joined in the same proceedings with the recipient.

⁴³ *Trusts Discussion Paper* (2012) [14.37], 603–4.

⁴⁴ (1874) LR 9 Ch App 244. In that case, Lord Selborne LC stated (at 251–2) that 'strangers are not to be made constructive trustees ... unless [they] receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees'. The first part of that statement is commonly described as involving 'knowing receipt' such that '[p]ersons who receive trust property become chargeable if it is established that they received it with notice of the trust': *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 140–1.

14.51 On the other hand, Professor Lee considered that, given the availability of the defence of change of position, it is unnecessary to include a provision for contribution and indemnity from the trustee:

The court does what is equitable in all the circumstances. In this context there is no room for a proposition that the trustee or anyone else should make a further payment to the distributee.

The Commission's preliminary view

14.52 On further consideration, the Commission is of the view that it is not necessary to provide that, if a proceeding is brought against a person to whom a wrongful distribution has been made, that person may join the trustee as a party to the proceeding. Rule 62 of the *Uniform Civil Procedure Rules 1999* (Qld) provides that each person whose presence is necessary to enable the court to 'adjudicate effectually and completely on all matters in dispute in a proceeding' must be included as a party to the proceeding. A person who claimed to have suffered loss by reason of the wrongful distribution of trust property would ordinarily need to join both the trustee and the distributee, since the success of the claim against the distributee would depend on it being established that the trustee had, in fact, made a wrongful distribution of the trust property.

14.53 Further, the Commission has recommended that the new legislation should preserve the defence of change of position that is currently provided by section 113(3) of the *Trusts Act 1973* (Qld). That provision empowers the court, where it considers that it would be inequitable to enforce the remedy against the distributee, to make such order as it considers to be just in all the circumstances. In view of the protection given by that provision to a distributee of the trust property, the Commission does not consider it necessary to provide additionally that the distributee is entitled to contribution and indemnity from the trustee.

EXTENT OF DISTRIBUTEES' LIABILITY

14.54 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.⁴⁵ Because a judgment may include an award of interest,⁴⁶ the National Committee further recommended that 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.⁴⁷

⁴⁵ Administration of Estates Report (2009) vol 2, [22.60].

⁴⁶ See, eg, *Civil Proceedings Act 2011* (Qld) s 58(3).

⁴⁷ Administration of Estates Report (2009) vol 2, [22.60], Rec 22-4.

14.55 In Western Australia, section 65(3)(a) of the *Trustees Act 1962* (WA) provides that an order of the court made on a claim to which the section applies may provide that:

any person to whom any assets, to which the section applies, were distributed, or his personal representative, shall pay to the person making the claim or to the trustee a sum not exceeding the value of those assets; ... (emphasis added)

14.56 Commentators on the Western Australian provision have observed that, in most cases, 'this will simply be the amount of money received and would seem to exclude an award of interest'.⁴⁸ They suggest, however, that the provision is ambiguous where the distributed assets are non-monetary.⁴⁹

If the assets are non-monetary, it is unclear at what time the assets or interest should be valued. The natural sense of the section would suggest that the defendant would be liable for the value of the assets at the time they were received. However, it is arguable that if the recipient has since sold the assets, the court should accept the sale price as the value of the assets; and, if the recipient still holds the assets, their value might be assessed as at the time of judgment. In this way, the recipient would be protected from a fall in the value of the assets, without having to resort to a change of position defence. It would also prevent the recipient from obtaining a windfall through the appreciation of the asset. (notes omitted)

Discussion Paper

14.57 In the Discussion Paper, the Commission endorsed the National Committee's approach in relation to these issues, and proposed that 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:⁵⁰

- any judgment against the person must not be more than the amount of the distribution made to the person; and
- 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.

Consultation

14.58 The Queensland Law Society, the Bar Association of Queensland, the Public Trustee, a legal academic and a legal practitioner who practises in trusts and succession law each agreed with the Commission's proposal.

14.59 The legal academic suggested that the proposed amendments reflect the current law as to the measure of the claims contemplated by section 113, namely, that 'it is limited to the amount received by the third party recipient from the trustee

⁴⁸ P Creighton and E Bant, 'Recipient Liability in Western Australia' (2000) 29 *University of Western Australia Law Review* 205, 224.

⁴⁹ *Ibid.*

⁵⁰ *Trusts Discussion Paper* (2012) [14.39], 604.

(plus interest)'. Although this respondent did not, therefore, consider the proposed amendments to be strictly necessary, he agreed that they would be appropriate 'in order to ensure that there is absolutely no room for doubt'.

14.60 On the other hand, Professor Lee considered that there may be circumstances where the recipient of a wrongful distribution in good faith should be required to repay more than the amount received. In his view, these are complex matters that should be left to the court's discretion:

In the past the courts have been generous to recipients claiming change of position, even over generous. I would therefore trust the court to take into account all circumstances in such cases and rely on it not to make an order that is unjust as against the recipient.

The Commission's preliminary view

14.61 The Commission notes that it would be consistent with the general law (as it applies to the *in personam* claim recognised in *Re Diplock*) to provide that any judgment against a person who received a wrongful distribution in good faith must not exceed the amount of the distribution made to the person. On further consideration, however, the Commission considers that it may provide greater flexibility not to impose a specific cap in the legislation and to leave the assessment of equitable compensation to the court.

PRELIMINARY RECOMMENDATIONS

14-1 Subject to Recommendations 14-2 and 14-3, the new legislation should include a provision to the general effect of section 113 of the *Trusts Act 1973* (Qld).

14-2 The provision referred to in Recommendation 14-1 should not include a provision to the effect of section 113(2) of the *Trusts Act 1973* (Qld), but should provide instead that a person who has suffered loss by reason of the wrongful distribution of trust property is not required to exhaust all of the remedies that may be available against the trustee before enforcing any remedy against a person to whom a wrongful distribution of the trust property has been made.

14-3 The new legislation should provide that the provision based on section 113(3) of the *Trusts Act 1973* (Qld) does not limit any other defence that may be available, under an Act or at law or in equity, to the person to whom the wrongful distribution has been made.

Chapter 15

Jurisdiction to Hear Disputes in Relation to Trusts

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INTRODUCTION

15.1 The terms of reference require the Commission, in reviewing the *Trusts Act 1973* (Qld), 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 The Supreme Court of Queensland has a statutory jurisdiction to exercise all of the powers and authorities conferred on the court by the *Trusts Act 1973* (Qld). This chapter considers whether, and to what extent, the jurisdiction to hear and determine trust disputes under the new legislation should remain with the Supreme Court alone, or should also be conferred on another court or tribunal.

TYPES OF AVAILABLE RELIEF

Equitable relief

15.3 Equity furnishes the court, where it has the relevant jurisdiction, 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

- Declaratory judgments, being authoritative but non-coercive statements of the law or the parties' rights, 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.
- Injunctions, 'forbidding or commanding the person to whom they are addressed to do something', 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.
- Accounts, compelling an accounting party, such as a trustee, to produce records of, and explain, his or her dealings with the relevant property, 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.
- Equitable compensation (or 'damages'), 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.

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.³ '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.⁴

Statutory relief under the *Trusts Act 1973* (Qld)

15.5 Statutory relief with respect to trusts is also available under the *Trusts Act 1973* (Qld). The Supreme Court has jurisdiction to exercise the powers conferred on the court by the Act, including the power to:

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], [17.3010]. See also the discussion of equitable relief in *Trusts Discussion Paper* (2012) [15.3].

³ See *Foskett v McKeown* [2001] 1 AC 102, 128 (Lord Millett), cited in *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 252 (Allsop P; Campbell JA and Handley AJA agreeing).

⁴ M Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) [36.2], [36.19]. See also the discussion of tracing in Chapter 14.

- 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).

THE JURISDICTION OF THE SUPREME COURT

15.6 The jurisdiction, powers and authorities given to a ‘court’ under the *Trusts Act 1973* (Qld) are, with one exception,⁵ conferred exclusively on the Supreme Court or a judge thereof.⁶ The position is similar in the other Australian jurisdictions,⁷ except Victoria, which confers statutory jurisdiction on the County Court (the equivalent of the District Court) in addition to the Supreme Court.⁸

15.7 In Queensland, the Supreme Court has unlimited jurisdiction at law, in equity and otherwise.⁹ Significantly, it has inherent jurisdiction to supervise the administration of trusts and advise trustees,¹⁰ and has the power to grant declaratory relief, independent of the granting of any other relief.¹¹

⁵ See *Trusts Act 1973* (Qld) s 86 (Contracts by guardians on behalf of infants). 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). See also the discussion of s 86 in Chapter 12.

⁶ See *Trusts Act 1973* (Qld) s 5(1) (definition of ‘court’).

⁷ *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’).

⁸ *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).

⁹ *Constitution of Queensland 2001* (Qld) s 58.

¹⁰ See generally *Administration of Estates Report* (2009) vol 2, ch 20 (Obtaining the Court’s advice or directions); LexisNexis, *Halsbury’s Laws of Australia* (at 19 May 2010) ‘Trusts, Advice and Direction from the Court’ [430-5055]–[430-5075].

¹¹ *Civil Proceedings Act 2011* (Qld) s 10.

15.8 In contrast, the District Court, Magistrates Courts, and the Queensland Civil and Administrative Tribunal ('QCAT') 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.¹²

THE JURISDICTION OF THE 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 \$750 000,¹³ including equitable claims or demands for the recovery of money or damages.¹⁴ 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.¹⁵

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'.¹⁶

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:¹⁷

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 has been said that the jurisdiction to hear and determine actions for 'the execution of a trust' enables the District Court to make orders 'to ensure the proper carrying out of a trust'.¹⁸ Of the original English provision conferring jurisdiction on

¹² LexisNexis, *Encyclopaedic Australian Legal Dictionary* (definitions of '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).

¹³ *District Court of Queensland Act 1967* (Qld) s 68(2).

¹⁴ *District Court of Queensland Act 1967* (Qld) s 68(1)(a)(i).

¹⁵ *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).

¹⁶ *District Court of Queensland Act 1967* (Qld) s 68(1)(b)(xiii).

¹⁷ 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).

¹⁸ 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, the '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'.

the County Courts ‘in all suits for the execution of a trust’,¹⁹ it was held that the jurisdiction extended to constructive trusts and was not limited to express trusts.²⁰

15.13 It would appear that the conferral of jurisdiction on the District Court to hear and determine actions for the execution of a trust under section 68(1)(b)(viii) of the *District Court of Queensland Act 1967* (Qld) is a wide conferral of jurisdiction that would apply to many of the matters dealt with under the *Trusts Act 1973* (Qld).²¹ The precise limits of this jurisdiction, however, are unclear. In particular, there is no legislative guidance as to whether, and to what extent, the District Court’s jurisdiction and powers in this regard extend beyond the ‘administrative’ aspects of the execution of a trust. It also appears that this jurisdiction is rarely used.

15.14 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,²² as well as the powers conferred on the Supreme Court by an Act. Arguably, in relation to the execution of a trust, this provision confers on the District Court the powers and authorities conferred on the Supreme Court by the *Trusts Act 1973* (Qld).

15.15 The District Court (or a District Court judge) is also specifically empowered under section 86 of the *Trusts Act 1973* (Qld) to authorise a guardian or some other fit and proper person to enter into an agreement for, or on behalf of, a minor, where the amount or subject matter involved is within the District Court’s jurisdiction.

Developments in other jurisdictions

15.16 In Victoria, the County Court (the equivalent of the District Court) was given a concurrent trusts jurisdiction under the *Trustee Act 1958* (Vic) in 1985, in order to ‘assist in reducing delays and improving access to justice’.²³

15.17 In New Zealand, District Courts have the same equitable jurisdiction as the High Court (the equivalent of the Supreme Court) to hear and determine any proceeding where the amount claimed or the value of the property claimed or in

¹⁹ See *County Courts (Equity Jurisdiction) Act 1865*, 28 & 29 Vict, c 99, s 1(2) (Repealed), set out at *Trusts Discussion Paper* (2012) [15.12], n 30, and discussed in 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’.

²⁰ *Clayton v Renton* (1867) LR 4 Eq 158, 161 (Stuart V-C).

²¹ 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.

²² *District Court of Queensland Act 1967* (Qld) s 69(2)(a)–(b).

²³ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 November 1985, 2606 (C Mathews, Minister for the Arts). The *County Court Act 1958* (Vic) s 37(1)(a) also confers jurisdiction on the Court to hear and determine all applications, claims, disputes and civil proceedings regardless of the type of relief sought or the subject matter as are not by that or any other Act excluded from its jurisdiction.

issue does not exceed \$200 000.²⁴ However, where a provision of an Act²⁵ 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.²⁶ As a result, District Courts in New Zealand have jurisdiction to determine breach of trust claims within their monetary limit, but cannot exercise any powers under the *Trustee Act 1956* (NZ).²⁷

15.18 The Law Commission of New Zealand has recently proposed that District Courts should have jurisdiction, concurrent with the High Court, to hear and determine proceedings and make orders under new trusts legislation where the amount claimed or the value of the property claimed or in issue does not exceed \$500 000.²⁸

15.19 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.²⁹ Under this proposal, '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'.³⁰

15.20 The Law Commission of New Zealand further proposed that any party to these types of proceedings should be able to give notice objecting to the proceeding being determined in that court and to have the proceeding transferred as of right to the High Court.³¹

15.21 In terms of the extent of the jurisdiction conferred, it recommended against giving District Courts jurisdiction under some specific provisions in new trusts legislation, partly because of the potential for aspects of a trust proceeding before that court to raise issues that fall beyond the court's jurisdiction.³²

The conferral of statutory powers on the District Court

15.22 The general issue of whether, and to what extent, the jurisdiction to hear and determine trust disputes under the new legislation should remain with the

²⁴ *District Courts Act 1947* (NZ) s 34(1)(a).

²⁵ Other than s 16 of the *Judicature Act 1908* (NZ).

²⁶ *District Courts Act 1947* (NZ) s 34(2).

²⁷ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [12.5].

²⁸ *Ibid* 223 (Proposal P50(2)). See also at [12.37].

²⁹ *Ibid* Proposal P50(3). See also at [12.37].

³⁰ *Ibid* [12.37].

³¹ *Ibid* 223 (Proposal P50(4)). Under s 43 of the *District Courts Act 1947* (NZ), a defendant has the right to have a proceeding transferred to the High Court if the sum sought, or the value of the property or relief claimed, exceeds \$50 000. Where the amount involved in the claim is less than \$50 000, the defendant may object but the transfer will be at the discretion of the court. The court may order that such proceedings be transferred only if it is satisfied that some important question of law or fact is likely to arise.

³² Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [12.36].

Supreme Court alone or be more explicitly conferred on the District Court raises several considerations.

15.23 The first consideration is whether the new legislation should continue to recognise the current role of the Supreme Court as the court of predominant jurisdiction in relation to the law of trusts.

15.24 On the one hand, it has been observed that trusts law is a highly technical and specialised area of the law, which often raises issues of both legal and factual complexity, and requires judicial expertise and a consistent and principled approach.³³ It is arguable that the best way of achieving that outcome is by allocating all, or most, trust cases to a single court.³⁴ On the other hand, the conferral of a statutory trusts jurisdiction on a court that has a lower costs structure than the Supreme Court is one way of increasing access to justice.³⁵ As noted in the Discussion Paper, there is some, although not a significant, difference between the costs of litigating in the Supreme Court and the District Court.³⁶

15.25 A second consideration is that the District Court has a statutory jurisdiction under the *District Court of Queensland Act 1967* (Qld) to hear and determine matters in relation to ‘the execution of a trust’, although the extent of that jurisdiction, and the extent to which the powers conferred on the Supreme Court by the *Trusts Act 1973* (Qld) may be exercised for the purposes of that jurisdiction, are unclear.

15.26 The introduction of new legislation presents an opportunity to clarify, and possibly extend, the jurisdiction of the District Court to hear and determine trust disputes.

15.27 One option would be to give the District Court, within the limits of its monetary jurisdiction, the same powers that are conferred on the Supreme Court under the new legislation. Since the *Trusts Act 1973* (Qld) was passed, the civil jurisdiction of the District Court has increased substantially, both in terms of the range of matters that can now be heard by the Court and in its monetary limit.³⁷ This option is consistent with those developments.

15.28 Another option would be for the new legislation to give the District Court, within the limits of its monetary jurisdiction, some specific powers in cases that are identified as more ‘straightforward’ (such as the power to authorise the remuneration of a trustee), but not those specific powers that may involve the exercise of a substantive discretion by the court (such as the variation of the beneficial interests under a trust or the review of the exercise of a trustee’s

33 Ibid [12.15]; 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]; Scottish Law Commission, *Supplementary and Miscellaneous Issues Relating to Trust Law*, Discussion Paper No 148 (2011) [7.14], [7.16].

34 Scottish Law Commission, *Supplementary and Miscellaneous Issues Relating to Trust Law*, Discussion Paper No 148 (2011) [7.13].

35 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [12.17].

36 *Trusts Discussion Paper* (2012) [15.19] ff.

37 *District Court of Queensland Act 1967* (Qld) s 68.

discretionary power). This approach would continue to recognise the role of the Supreme Court as the court of predominant jurisdiction in respect of trusts law, which has the advantages described above. However, it would have the disadvantage that there may be aspects of a trust dispute heard by the District Court that still raise issues that fall beyond its jurisdiction.

Discussion Paper

15.29 In the Discussion Paper, the Commission sought submissions on whether the jurisdiction of the District Court to hear and determine trust matters (particularly in relation to the execution of a trust) should be clarified or extended and, if so, what types of powers and authorities the District Court should be able to exercise.³⁸

Consultation

15.30 The Bar Association of Queensland, the Queensland Law Society and a legal practitioner who practises in trusts and succession law did not advocate for any express legislative change in relation to the District Court's jurisdiction to hear and determine trust matters.

15.31 In this regard, the Bar Association of Queensland and the Queensland Law Society referred to the technical and specialised nature of trusts law (which often raises complex legal and factual issues) as a 'key issue'. They also referred to other considerations as favouring the retention of the status quo, including the desirability of having a single court with judicial expertise (and which can apply a consistent, principled approach in hearing and determining trust matters), the ability or otherwise of a lower court to grant one or more forms of statutory or equitable relief, and a lack of evidence to suggest that there are any significant delays in having trust applications heard by the Supreme Court.

15.32 The Bar Association of Queensland, the Queensland Law Society and the legal practitioner also noted that there is not a significant difference in the costs of making an application to the District Court and the Supreme Court.

15.33 Professor Lee, on the other hand, submitted that the extent of the District Court's jurisdiction to hear and determine actions for 'the execution of a trust' should be clarified:

It is undesirable that the District Court should be put in a position that it does not quite know whether it has jurisdiction with respect to an issue of the law of trusts that the Supreme Court clearly has; ...

15.34 Professor Lee also considered that, subject to the monetary limits of its jurisdiction, the District Court should have the same statutory jurisdiction to hear and determine trust matters as the Supreme Court, given the historical expansion of the District Court's jurisdiction and the assistance that could be expected to be given to the Court by the participation of counsel in proceedings.

The Commission's preliminary view

15.35 The Commission is of the view that, as is presently the case under the *Trusts Act 1973* (Qld), the Supreme Court should have all of the powers that are conferred on a court by the new legislation.

15.36 The Commission is also of the view that provision should be made to give the District Court, in cases where the trust property does not exceed in amount or value the monetary limit of its jurisdiction, the same powers that are conferred on the Supreme Court under the new legislation. This approach recognises that the District Court has a substantial general civil jurisdiction, which is commensurate with the level of judicial and representational expertise required to deal with trust matters. It also recognises that the District Court already has an apparently wide jurisdiction, in relation to the execution of a trust, to exercise the powers conferred on the Supreme Court by the *Trusts Act 1973* (Qld). The Commission also considers that it is important to give the parties to trust proceedings the benefit of any savings that would flow from the lower costs structure of the District Court.

THE JURISDICTION OF MAGISTRATES COURTS AND THE QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

Magistrates Courts

15.37 In Queensland, the civil jurisdiction of a Magistrates Court is limited to actions up to \$150 000.³⁹ A Magistrates Court does not have any general equitable or declaratory jurisdiction.⁴⁰ 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.⁴¹ To this extent, it provides a convenient and low cost avenue for the resolution of a trust dispute involving a lower monetary value.

Queensland Civil and Administrative Tribunal

15.38 Amongst other things, the Queensland Civil and Administrative Tribunal ('QCAT') has jurisdiction to hear and determine minor civil disputes⁴² up to

³⁹ *Magistrates Courts Act 1921* (Qld) ss 2 (definition of 'prescribed limit'), 4.

⁴⁰ *Chief Executive Department of Transport v Glasgow* [2001] QSC 378, [9] (Thomas JA).

⁴¹ *Magistrates Courts Act 1921* (Qld) s 4(c). See also *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439 in which McPherson JA held (at 444–5) that s 4(c) of that Act 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 beneficiaries personally, exercising the trustee's right to be indemnified by the beneficiaries. For a discussion of a trustee's right to be indemnified by the beneficiaries, see *Trusts Discussion Paper* (2012) [11.70].

⁴² '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)). Typical examples of a debt dispute include money owed for the removal of minor overhanging branches, an unpaid invoice or account, a dishonoured cheque, rent arrears (other than arrears of rent for a residential tenancy), work done or goods supplied for an agreed cost, money lent and not repaid and wages owing: Queensland Civil and Administrative Tribunal, *Debt Disputes* (27 March 2012) <<http://www.qcat.qld.gov.au/matter-types/debt-disputes>>. The definition of 'minor civil dispute' in the Act 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)).

\$25 000,⁴³ 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).⁴⁴

15.39 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'. 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.⁴⁵ In addition, the Tribunal has the power, exercisable only by a legally qualified member, to make declarations and grant injunctions, and to make interim orders it considers 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).⁴⁶

15.40 QCAT's procedures are designed to be less formal than those followed in courts. The Tribunal has a statutory responsibility to deal with matters in a way that is accessible, fair, just, economical, informal and quick.⁴⁷ There is no general right to legal representation in Tribunal hearings, although leave for representation may be given if the proceeding is likely to involve complex questions of fact or law.⁴⁸

Developments in other jurisdictions

15.41 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 conveyance of trust property to beneficiaries of lapsed trusts, and for certain matters relating to charitable bodies and public trusts.⁴⁹ The Scottish Law Commission has proposed that the Court of Session should have exclusive jurisdiction in all trust applications.⁵⁰ It noted that a trusts jurisdiction, particularly in the area of trust variation, often confers significant discretion on the court, requiring

⁴³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 8, sch 3 (definition of 'prescribed amount').

⁴⁴ *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: s 6(2). The Acts conferring jurisdiction on QCAT are listed on the QCAT website: QCAT, 'QCAT Rules and Legislation' (3 May 2013) <<http://www.qcat.qld.gov.au/using-qcat/qcat-rules-and-legislation>>.

⁴⁵ *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 Ltd v Body Corporate for Parkview Gardens* [2011] QCAT 299, [15]–[17].

⁴⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 58(1)(b), 59, 60, sch 3 (definition of 'legally qualified member').

⁴⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 3(b), 28.

⁴⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(1), (3)(b).

⁴⁹ *Trusts (Scotland) Act 1921* (Scot) ss 22–24.

⁵⁰ Scottish Law Commission, *Supplementary and Miscellaneous Issues Relating to Trust Law*, Discussion Paper No 148 (2011) [7.17] (Proposal 17).

a consistent and principled approach. It was also conscious that trusts involve issues of some complexity, requiring specialised knowledge of the law:⁵¹

[W]e 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.

Discussion Paper

15.42 In the Discussion Paper, the Commission noted that the main factors that favour the conferral of jurisdiction to hear and determine trust disputes involving less complex matters or lower monetary values on either Magistrates Courts or QCAT (or both) are their relatively low costs and convenience. Conducting legal proceedings in these forums is usually significantly less expensive than in the Supreme Court or District Court.⁵² Magistrates Courts and QCAT also operate at a local, rather than regional, level throughout the State.

15.43 The Commission noted that the main argument against the conferral of such a jurisdiction 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 application of which requires judicial expertise and is assisted by the legal representation of the parties. It commented that the conferral of such a jurisdiction on Magistrates Courts or QCAT may not be generally consistent with their existing jurisdictions, which have a focus on the quick resolution of more minor civil disputes in relatively large numbers⁵³ (and, in the case of QCAT, informal proceedings in respect of which there is generally no prima facie right of legal representation).⁵⁴

15.44 The Commission noted that one option for reform might be to confer on Magistrates Courts or QCAT a limited jurisdiction to exercise a specific power under the *Trusts Act 1973* (Qld) in cases that are likely to be relatively straightforward. However, it also noted that, even if a limited trusts jurisdiction is given to Magistrates Courts or QCAT, there could be aspects of a proceeding that fall outside their respective jurisdictions, either because they do not have another statutory trusts power that is ancillary to the matter at hand, or because they do not have a general equitable jurisdiction. This option also raised the issue, particularly in the case of Magistrates Courts, of whether or not it would be appropriate to

51 Ibid [7.16].

52 *Trusts Discussion Paper* (2012) [15.19] ff.

53 Over 90% of matters going before courts in Queensland are heard by magistrates sitting in communities in over 100 locations to deal with the large volume of cases. 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* (2012) 4, 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* (2012) <<http://www.qcat.qld.gov.au/about-qcat/publications/qcat-annual-report-2011-12/our-year>>.

54 *Trusts Discussion Paper* (2012) [15.35].

confer a general or limited jurisdiction to grant equitable or declaratory relief (for example, in relation to tracing).⁵⁵

15.45 The Commission sought submissions on whether it would 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 Magistrates Courts or QCAT.⁵⁶

Consultation

15.46 The Bar Association of Queensland, the Queensland Law Society, Professor Lee and a legal practitioner who practises in trusts and succession law did not support the conferral of a limited trusts jurisdiction on Magistrates Courts or QCAT. The Public Trustee expressed a similar view.

15.47 In expressing their views, the Bar Association of Queensland and the Queensland Law Society relied on the reasons mentioned at [15.31] above.

15.48 Professor Lee observed that it would be difficult to define the limits of any trusts jurisdiction conferred on Magistrates Courts or QCAT. In this regard, he commented that, while some issues that may arise in trust matters would be very easy to resolve, other issues would be very complicated.

15.49 The President of QCAT made the general observation that the issues raised in relation to the conferral of a trusts jurisdiction on the Tribunal had been ‘fairly and sufficiently ventilated’ in the Commission’s Discussion Paper.⁵⁷ The President also raised, as a discrete issue for consideration, the possibility of conferring a limited trusts jurisdiction on the Tribunal, when exercising its guardianship jurisdiction, in circumstances where ‘an adult, who is the subject of a guardianship and/or administration order, is dependent upon distributions from a trust but, by reasons of incapacity, is no longer able to assert his or her rights’:

QCAT’s guardianship jurisdiction is very large, and growing significantly each year. In 2011–12 of 29,832 applications lodged in the Tribunal, 9,701 were in the guardianship jurisdiction. The regulation of decision-makers is not dissimilar to the exercise, by the Courts, of powers over fiduciaries. The Tribunal has adjudicated in a number of matters which canvas issues involving trusts, or deal with compensation claims against errant decision-makers. The Tribunal has judicial members, now including three retired Supreme Court Judges. It also has, amongst its permanent members, a number of senior lawyers with long experience both in the guardianship jurisdiction and trust law.

There is merit, in terms of simplicity and cost savings, in considering the investment of limited powers under the *Trusts Act* upon the Tribunal in matters which arise in its guardianship jurisdiction. Those powers might be limited, for example, via a monetary ceiling, and to matters which directly impact the person the subject of a QCAT order.

⁵⁵ Ibid [15.36].

⁵⁶ Ibid 616.

⁵⁷ See *ibid* [15.31]–[15.37].

The Commission's preliminary view

15.50 In the Commission's view, the new legislation should not confer jurisdiction on either Magistrates Courts or QCAT to hear and determine trust disputes involving less complex matters or lower monetary values.

15.51 The Commission agrees with the general proposition that the complex and specialised nature of trusts law requires the application of judicial and representational expertise. As mentioned earlier, Magistrates Courts and QCAT deal with very large numbers of more minor civil disputes (and, in the case of QCAT, there is a focus on informal proceedings in respect of which there is generally no prima facie right of legal representation). Given the nature and scope of the existing jurisdictions of Magistrates Courts and QCAT, the Commission is of the view that the jurisdiction to hear trust disputes should remain with the Supreme Court or the District Court (as the case may be).

15.52 The Commission is also of the view that QCAT should not be given a limited jurisdiction, when exercising its guardianship jurisdiction, to make orders under the new legislation in relation to a trust of which an adult with impaired capacity is a beneficiary, as proposed by the President of QCAT.

15.53 The *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to appoint and remove an administrator who may manage the financial affairs of an adult who has impaired capacity.⁵⁸ However, it has no jurisdiction under the Act to remove trustees or to alter the legal and equitable interests in property held on trust.⁵⁹ If a trustee holds property on trust for an adult with impaired capacity, the Tribunal has no power over the trustee or the trust property.

15.54 The Commission considers that, for the reasons given at [15.51] above, the Tribunal's jurisdiction should not be extended as has been suggested by the President of QCAT. It may also be argued that any other parties who may be involved in the trust matter (for example, the trustees and any other beneficiaries) should not be required to submit to the jurisdiction of the Tribunal, when they would otherwise be entitled to have the matter heard by the Supreme Court or the District Court (as the case may be) under the new legislation.

PRELIMINARY RECOMMENDATIONS

15-1 The Supreme Court should have all of the powers that are conferred on a court by the new legislation.

⁵⁸ *Guardianship and Administration Act 2000* (Qld) ss 12(1), 31(3). If the adult has a guardian appointed, but does not have an administrator appointed, the Tribunal will have no jurisdiction under the Act to make an order about the financial affairs of the adult.

⁵⁹ *Guardianship and Administration Tribunal v The Public Trustee of Queensland* [2005] QSC 126; *Guardianship and Administration Tribunal v Perpetual Trustees Qld Ltd* [2008] QSC 49.

15-2 The District Court, in cases where the trust property does not exceed in amount or value the monetary limit of its jurisdiction, should have the same powers as the Supreme Court under the new legislation.

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