

**Version No. 092**  
**Trustee Act 1958**

**Act No. 6401/1958**

Version incorporating amendments as at 1 July 1998

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**Version No. 092**  
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**Act No. 6401/1958**

Version incorporating amendments as at 1 July 1998

An Act to consolidate the Law relating to Trustees.

**BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):**

Pt 1A  
(Heading)  
inserted by  
No. 17/1988  
s. 5(1)(a).

**PART IA—PRELIMINARY**

S. 1  
amended by  
No. 45/1989  
s. 5.

**1. *Short title and commencement***

This Act may be cited as the **Trustee Act 1958**, and shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the Government Gazette.

**2. *Repeals, savings and application of Act***

- (1) The Acts mentioned in the First Schedule to this Act to the extent thereby expressed to be repealed are hereby repealed accordingly.
- (2) Except as in this Act expressly or by necessary implication provided—
  - (a) all persons things and circumstances appointed or created by or under any of the repealed Acts or existing or continuing under any of the repealed Acts immediately before the commencement of this Act shall under and subject to this Act continue to have the

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same status operation and effect as they respectively would have had under the repealed Acts if they had not been so repealed; and

- (b) in particular and without affecting the generality of the last preceding paragraph, such repeal shall not affect any debenture or stock issued or any vesting order or appointment made or other thing done under any of such Acts and any order or appointment so made may be revoked or varied in like manner as if it had been made under this Act, and such repeal shall not affect any limitation imposed in respect of instruments executed before the passing of the **Statute of Trusts 1864** if such limitation is operative at the commencement of this Act, and the provisions of the **Trustee Act 1931** in relation to converted securities and the discretions authorities immunities protections rights powers and obligations of trustees shall continue in operation as though the said Act had not been repealed.

- (3) This Act, except where otherwise expressly provided shall apply to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before or after the commencement of this Act.

S. 2(3)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.1).

The powers and discretions conferred and the duties imposed on, and the directions given and indemnities immunities and protection allowed to, trustees and other persons by this Act shall be in addition to the powers discretions duties directions indemnities immunities and protection set out in the instrument (if any) creating the trust, but the powers discretions duties and directions provided for in this Act, unless otherwise stated,

shall apply if and so far only 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.

This Act shall not affect the legality or validity of anything done before the commencement of this Act, except as otherwise hereinafter expressly provided.

Nothing in this Act shall affect the operation of section 8 of the **State Trustee (State Owned Company) Act 1994**.

No. 5770 s. 3.

**3. Definitions**

(1) In this Act unless inconsistent with the context or subject-matter—

S. 3(1) def. of "authorized dealer in the short term money market" inserted by No. 9204 s. 2(a)(i), substituted by No. 9699 s. 23.

**"authorized dealer in the short term money market"** means a corporation that, under section 97(7)(b) of the **Companies (Victoria) Code**, is declared, or deemed to be declared, to be an authorized dealer in the short term money market;

S. 3(1) def. of "authorized investments" repealed by No. 104/1995 s. 3.

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S. 3(1) def. of "bank" inserted by No. 9204 s. 2(a)(ii), amended by Nos 29/1988 s. 57(18)(a), 94/1990 s. 40(14)(a).

**"bank"** means any body corporate defined as a bank by section 5(1) of the Banking Act 1959–73 of the Commonwealth which carries on business in Victoria;

**"bankrupt"** includes **"insolvent"**;

**"building society"** means a building society within the meaning of the **Building Societies Act 1986**;

S. 3(1) def. of "building society" inserted by No. 9653 s. 2(2), substituted by No. 8/1986 s. 139(5).

**"contingent right"** as applied to land includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent;

**"convey"** and **"conveyance"**, applied to any person, include the execution or doing by that person of every necessary or suitable assurance act and thing for conveying, assigning, appointing, surrendering or otherwise transferring or disposing of property;

**"Court"** means the Supreme Court and, in relation to property or an estate or interest in property the value of which property does not exceed the jurisdictional limit of the County Court, the Supreme Court or the County Court;

S. 3(1) def. of "Court" amended by Nos 16/1986 s. 24, 110/1986 s. 140(2).

**"execute"** includes the doing of all acts and things necessary for a conveyance, and with reference to an instrument not under seal means sign, and derivatives of **"execute"** have corresponding meanings;

**"guaranteed certificate"** means a guaranteed certificate within the meaning of section 3A;

S. 3(1) def. of "guaranteed certificate" inserted by No. 10143 s. 5(1)(a).

**"income"** includes rents and profits;



S. 3(1) def. of "land" amended by No. 92/1990 s. 128(Sch. 1 item 30(a)(b)).

**"instrument"** includes Act of Parliament;

**"land"** includes land of any tenure buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way, and other corporeal hereditaments; also a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, over or derived from land, and also an undivided share in land; and **"hereditaments"** means real property which under an intestacy might formerly have devolved on an heir;

**"mortgage"** and **"mortgagee"** include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee;

S. 3(1) def. of "mortgage-backed certificate" inserted by No. 10143 s. 5(1)(b), substituted as "mortgage-backed security" by No. 17/1988 s. 4.

**"mortgage-backed security"** means—

- (a) a mortgage-backed certificate or guaranteed certificate within the meaning of Part IB; or
- (b) a mortgage-backed security within the meaning of subdivision (17A) of Division 3 of Part II of the **Stamps Act 1958** in respect of which a declaration under Part IC is in force;

S. 3(1) def. of "mortgage investment certificate" inserted by No. 112/1986 s. 4(2);

**"mortgage investment certificate"** means a mortgage investment certificate within the meaning of section 3B;

**"pay"** and **"payment"** as applied in relation to stocks and securities and in connexion with the expression "into court" include the deposit or transfer of the same in or into court;

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**"personal representative"** means the executor, original or by representation, or administrator for the time being of a deceased person;

**"possession"** includes receipt of rents and profits or the right to receive the same (if any); and **"possessed"** applies to receipt of income of and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy in any land;

**"property"** includes real and personal property, and any estate share and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not;

**"recognized institution"** means an institution in respect of which a declaration under section 3A(4) is in force;

S. 3(1) def. of "recognized institution" inserted by No. 10143 s. 5(1)(c).

**"rights"** includes estates and interests;

**"sale"** includes an exchange;

**"securities"** includes—

- (a) stocks and shares;
- (b) any debenture, debenture stock, bond, note or other security;

S. 3(1) def. of "securities" substituted by No. 9204 s. 2(a)(iii).

**"securities payable to bearer"** includes securities transferable by delivery or by delivery and endorsement;

S. 3(1) def. of "securities payable to bearer" inserted by No. 9204 s. 2(a)(iii).

**"stock"** includes fully paid up shares, and so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by

instrument of transfer either alone or accompanied by other formalities, and any share or interest therein;

**"tenant for life" "statutory owner" "settled land" "settlement" "trustees of the settlement" and "term of years absolute"** have the same meanings as in the **Settled Land Act 1958**;

**"transfer"** in relation to stock or securities includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee;

**"trust"** does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expressions **"trust"** and **"trustee"** extend to implied and constructive trusts and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and **"trustee"** where the context admits, includes a personal representative, and **"new trustee"** includes an additional trustee;

**"trust for sale"** in relation to land means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale;  
**"trustees for sale"** means the persons (including a personal representative) holding land on trust for sale;

**"trustee company"** means a trustee company under the **Trustee Companies Act 1984**.

S. 3(1) def. of  
"trustee  
company"  
amended by  
No. 10168 s. 3.

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- (2) Any reference to the investment loan or advance of trust money by a trustee on the security of property shall be construed to include a reference to such investment loan or advance on the transfer of an existing security as well as on a new security.
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Pt 1B  
(Heading)  
inserted by  
No. 17/1988  
s. 5(1)(b).

**PART IB—RECOGNISED INSTITUTIONS**

S. 3A  
inserted by  
No. 10143  
s. 5(2).

**3A. *Secondary mortgage market***

(1) In this section—

**"approved guarantor"** means a person in respect of whom a declaration under sub-section (3) is in force;

**"approved insurer"** means—

- (a) the Housing Loans Insurance Corporation; or
- (b) a prescribed insurer;

**"certificate"** means a promissory note, bill of exchange, debenture stock, bonds, notes or any other document evidencing or acknowledging indebtedness of a corporation in respect of money whether or not that money is or may be deposited with or lent to the corporation;

**"freehold land"** includes an estate in land held under lease from the Crown in right of the Commonwealth or of a State;

**"guaranteed certificate"** means a certificate in the prescribed form that is—

- (a) issued by a recognized institution; and
- (b) endorsed with a certificate in the prescribed form by an approved guarantor;

**"mortgage-backed certificate"** means a certificate in the prescribed form that is—

- (a) issued by a recognized institution; or

- (b) endorsed in the prescribed manner and form by a recognized institution;

**"prescribed"** means prescribed by regulations made under this section;

**"relevant mortgage"** means a first mortgage of freehold land in Australia that is registered under the **Transfer of Land Act 1958** or, in the case of land in another State or Territory, under an enactment in force in that State or Territory corresponding to that Act where the principal sum secured by the mortgage does not exceed—

S. 3A(1) def. of "relevant mortgage" substituted by No. 10230 s. 4(a).

- (a) two-thirds of the value of the land; or
- (b) nine-tenths of the value of the land where—
- (A) the repayment of that part of the principal sum that exceeds two-thirds of the value of the land is insured under a contract of insurance issued by an approved insurer; and
- (B) the mortgagee is the insured under or the assignee of the benefit of that contract of insurance.
- (2) (a) In the definition of **"relevant mortgage"** the expression **"value of the land"** means the value shown in a valuation made by a valuer<sup>1</sup> as the value of that land either at the date the mortgage was entered into or at the date the recognized institution became mortgagee under or in respect of the mortgage.
- (b) Where a valuation is obtained from a valuer<sup>2</sup> under paragraph (a) of this sub-section and the value of the land as shown in that valuation is less than the value of the land as

S. 3A(2) substituted by No. 10230 s. 4(b).  
S. 3A(2)(a) amended by No. 91/1994 s. 36(11)(a).

S. 3A(2)(b) amended by No. 91/1994 s. 36(11)(b).

shown in a valuation by a valuer under paragraph (a) of this sub-section at the date the mortgage was entered into the lesser value shall be taken to be the "value of the land" for the purposes of the definition of "relevant mortgage".

S. 3A(2A)  
inserted by  
No. 10230  
s. 4(c).

(2A) A recognized institution shall not become mortgagee under or in respect of any relevant mortgage where the principal sum secured by that mortgage exceeds two-thirds of the value of the land unless and until it becomes the assignee of the benefit of the contract of insurance referred to in paragraph (b) of the definition of "relevant mortgage".

S. 3A(3)  
amended by  
No. 46/1998  
s. 7(Sch. 1).

(3) The Governor in Council, on the recommendation of the Minister, may, by Order published in the Government Gazette, declare a person, other than a recognized institution, to be an approved guarantor for the purposes of this section.

S. 3A(4)  
amended by  
No. 46/1998  
s. 7(Sch. 1).

(4) The Governor in Council, on the recommendation of the Minister, may, by Order published in the Government Gazette, declare a corporation to be a recognized institution for the purposes of this section.

S. 3A(5)  
amended by  
No. 46/1998  
s. 7(Sch. 1).

(5) A recognized institution shall, at such times and in respect of such periods as are prescribed, furnish such reports and documents as are prescribed to the Minister.

Penalty: 20 penalty units.

(6) A recognized institution shall ensure—  
(a) that the value of its assets is not at any time less than the sum of its liabilities, whether actual or contingent; and

(b) that its assets at all times include—

(i) relevant mortgages under which or in respect of which the recognized institution is the mortgagee and the value of which is not less than 70 per centum of the face value of unredeemed mortgage-backed certificates issued or endorsed by it; and

S. 3A(6)(b)(i)  
amended by  
No. 10230  
s. 4(d)(e).

(ii) investments of a kind referred to in section 4(1) as in force immediately before the commencement of section 4 of the **Trustee and Trustee Companies (Amendment) Act 1995** (not being investments mortgaged or charged for the benefit of another person) the value of which is not less than the sum of—

S. 3A(6)(b)(ii)  
amended by  
Nos 10230  
s. 4(d)(e),  
104/1995 s. 5.

(A) the amount by which the face value of unredeemed mortgage-backed certificates issued or endorsed by it exceeds the value of relevant mortgages under which or in respect of which the recognized institution is the mortgagee; and

(B) 50 per centum of the face value of unredeemed guaranteed certificates issued by it.

Penalty: 25 penalty units.

(7) For the purposes of this section, a reference to the value of a relevant mortgage under which or in respect of a recognized institution is the mortgagee is a reference to the sum of the value of the relevant mortgage and the amount of the principal paid under the mortgage by the mortgagor to or for the benefit of the recognized institution on or after the date on which the

S. 3A(7)  
substituted by  
No. 10230  
s. 4(f).



recognized institution became mortgagee under or in respect of the mortgage.

S. 3A(8)  
amended by  
No. 10230  
s. 4(g)(h).

- (8) Where, at any time, the value of relevant mortgages under which or in respect of which a recognized institution is the mortgagee is less than 70 per centum of the face value of unredeemed mortgage-backed certificates issued or endorsed by it, the recognized institution shall be deemed to comply with sub-section (6)(b)(i) if, at that time, it has on deposit with a bank an amount equal to the amount by which the value of those relevant mortgages is less than 70 per centum of the face value of those mortgage-backed certificates.

S. 3A(9)  
substituted by  
No. 10230  
s. 4(i).

- (9) For the purposes of this section, relevant mortgages that are held by a person as trustee for a recognized institution or by a person as agent for such a trustee shall be deemed not to be assets of the recognized institution for the purposes of sub-section (6)(b)(i) unless the person is a trustee corporation within the meaning of section 152 of the **Companies (Victoria) Code** or a person appointed as an agent of such a trustee corporation for the purposes of holding relevant mortgages.
- (10) An approved guarantor shall not endorse a certificate issued by a recognized institution with a certificate in the form prescribed for the purposes of the definition of guaranteed certificate unless the approved guarantor guarantees payment of the amounts due and owing under the certificate to the holder for the time being.

Penalty: 20 penalty units.

- (11) A person that is not a recognized institution shall not—
- (a) issue a certificate in the form prescribed for the purposes of the definition of mortgage-backed certificate; or

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(b) endorse on a document a certificate in the manner and form prescribed for the purposes of that definition.

Penalty: 20 penalty units.

(12) A person that is not an approved guarantor shall not endorse on a document a certificate in the form prescribed for the purposes of the definition of guaranteed certificate.

Penalty: 20 penalty units.

(13) Where an offence against this section is proved to have been committed with the consent or connivance of a person who is a director, manager, secretary or other officer of a corporation, that person, as well as the corporation, shall be deemed to have committed that offence and is liable to be proceeded against and punished accordingly.

(14) Where a director, manager, secretary or officer of a corporation is convicted of an offence against this section, proceedings shall not be brought, or continued, against the corporation.

(15) The Governor in Council may, on the recommendation of the Attorney-General, make regulations prescribing all matters which by this section are authorized or required to be prescribed for the purposes of this section.

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Part 1C  
(Heading and  
ss 3AC–3AE)  
inserted by  
No. 17/1988  
s. 7.

**PART 1C—MORTGAGE-BACKED SECURITIES**

S. 3AC  
inserted by  
No. 17/1988  
s. 7.

**3AC. Definitions**

(1) In this Part—

**"approved credit rating"** means a credit rating in respect of which a declaration under section 3AD is in force;

S. 3AC(1) def.  
of "approved  
indemnity"  
amended by  
No. 46/1998  
s. 7(Sch. 1).

**"approved indemnity"** means an indemnity or guarantee provided—

(a) by the Director of Housing under section 26A of the **Housing Act 1983**; or

(b) by a public authority approved by the Minister and in a form approved by the Minister;

**"mortgage-backed security"** has the same meaning as in subdivision (17A) of Division (3) of Part II of the **Stamps Act 1958**.

S. 3AD  
inserted by  
No. 17/1988  
s. 7, amended  
by No.  
46/1998  
s. 7(Sch. 1).

**3AD. Approved credit rating**

The Minister, on the recommendation of the Commissioner for Corporate Affairs, by notice published in the Government Gazette—

(a) may declare a credit rating issued by a specified person to be an approved credit rating for the purposes of this Part; and

(b) may revoke any such declaration.

S. 3AE  
inserted by  
No. 17/1988  
s. 7.

**3AE. Mortgage-backed security as authorised investment**

(1) The Commissioner for Corporate Affairs, by notice published in the Government Gazette, must declare a mortgage-backed security, or a class of

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mortgage-backed securities, to be an approved mortgage-backed security or class of mortgage-backed securities for the purposes of this Part if—

- (a) the Commissioner for Corporate Affairs is satisfied that the mortgage-backed security or class of mortgage-backed securities has, or will on issue have, an approved credit rating; or
  - (b) the person that issued the mortgage-backed security, or that issues mortgage-backed securities of that class, has the benefit of an approved indemnity.
- (2) The Minister may, by notice published in the Government Gazette, revoke a notice published under sub-section (1) if—
- (a) the Commissioner for Corporate Affairs ceases to be satisfied that the mortgage-backed security or class of mortgage-backed securities in respect of which the notice under sub-section (1) was published has an approved credit rating; or
  - (b) the person that issued the mortgage-backed security, or that issues mortgage-backed securities of the class, in respect of which the notice under sub-section (1) was published, ceases to have the benefit of an approved indemnity.

**S. 3AE(2)**  
**amended by**  
**No. 46/1998**  
**s. 7(Sch. 1).**

Pt 1D  
(Heading)  
inserted by  
No. 17/1988  
s. 5(1)(c).

**PART ID—MORTGAGE INVESTMENT CERTIFICATES**

S. 3B  
inserted by  
No. 112/1986  
s. 4(1).

**3B. *Mortgage investment certificates***

S. 3B(1)  
amended by  
No. 17/1988  
s. 5(2)(a).

(1) In this Part—

S. 3B(1) def. of  
"mortgage  
investment  
certificate"  
amended by  
Nos 84/1991  
s. 21(3),  
45/1994  
s. 42(Sch.  
item 12.2).

**"mortgage investment certificate"** means a document in the prescribed form that—

- (a) is issued by a trustee company subject to and in accordance with an approved trust deed; and
- (b) entitles the holder for the time being to exercise rights in accordance with the trust deed in relation to a first mortgage of freehold land registered under the **Transfer of Land Act 1958** (or, in the case of land in another State or in a Territory, under an enactment in force in that State or Territory corresponding to that Act) and held by the trustee company as trustee for the holder;

S. 3B(1) def. of  
"prescribed"  
amended by  
No. 17/1988  
s. 5(2)(a).

**"prescribed"** means prescribed by regulations made under this Part.

(2) A trust deed is an approved trust deed for the purposes of sub-section (1) if—

*Trustee Act 1958*  
*Act No. 6401/1958*

**s. 3B**

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- (a) it is approved by the Commissioner for Corporate Affairs on the application of a trustee company; and
- (b) it contains the prescribed conditions.
- (3) A reference in sub-section (1) to a first mortgage of freehold land is a reference to a first mortgage of freehold land held by a trustee company as an authorised investment under Part I or, if the land is in another State or in a Territory, under a law of that State or Territory corresponding to Part I.
- (4) The Governor in Council may, on the recommendation of the Minister, make regulations prescribing all matters which by this Part are authorised or required to be prescribed for the purposes of this Part.
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**S. 3B(2)(a)**  
amended by  
Nos 84/1991  
s. 21(3),  
45/1994  
s. 42(Sch.  
item 12.2).

**S. 3B(3)**  
amended by  
Nos 17/1988  
s. 5(2)(b),  
84/1991  
s. 21(3),  
45/1994  
s. 42(Sch.  
item 12.2).

**S. 3B(4)**  
amended by  
No. 17/1988  
s. 5(2)(c), (as  
amended by  
No. 17/1993  
s. 13(2)).

No. 5770  
ss 5–12.

**PART I—INVESTMENTS**

Pt 1 (Heading  
and ss 4–12B)  
amended by  
Nos 6511 s. 2,  
6535 s. 7(21),  
6580 s. 2, 6963  
s. 2, 7551 s. 50,  
7791  
ss 2(a)(b), 3,  
7833 s. 2, 8428  
s. 37, 9178 s. 7,  
9204  
s. 2(b)(d)(e),  
9574 s. 4, 9653  
s. 2(1)(a)(b),  
9816 ss 2(1)(2),  
3, 9895 s. 2(1),  
9902 s. 2(1),  
10048 ss 5(2),  
12(2), 14(4),  
10143 ss 4, 6,  
10168 s. 3,  
112/1986  
ss 5(1)(a)(b)(2),  
6, 55/1987  
s. 57(3),  
17/1988 ss 8,  
9(1)(2), 29/1988  
s. 57(18)(b),  
53/1988  
s. 45(Sch. 3  
items 80, 81)  
(as amended  
by No. 47/1989  
s. 23), 45/1989  
s. 4(1)(2)(a)–  
(c)(3)(4)(a)(b)(5),  
81/1989  
s. 3(Sch. item  
54), 84/1991  
s. 20, 115/1993  
s. 32(3),  
45/1994  
s. 42(Sch. item  
12.3), 91/1994  
s. 36(11)(c)–(e),  
substituted by  
No. 104/1995  
s. 4.

**4. Application of Part**

This Part applies to trusts created before or after the commencement of section 4 of the **Trustee and Trustee Companies (Amendment) Act 1995**.

S. 4  
substituted by  
No. 104/1995  
s. 4.

**5. Investments of trust funds**

A trustee may, unless expressly prohibited by the instrument creating the trust—

- (a) invest trust funds in any form of investment; and
- (b) at any time, vary an investment.

S. 5  
substituted by  
No. 104/1995  
s. 4.

**6. Duties of trustee in respect of power of investment**

- (1) Subject to the instrument creating the trust, 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 on behalf of other persons, exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
  - (b) if the trustee is not engaged in such a profession, business or employment, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.
- (2) A trustee must exercise a power of investment in accordance with any provision of the instrument creating the trust that is binding on the trustee and requires the obtaining of any consent or approval with respect to trust investments.

S. 6  
substituted by  
No. 104/1995  
s. 4.



- (3) Subject to the instrument creating the trust, a trustee must, at least once in each year, review the performance (individually and as a whole) of trust investments.

S. 7  
substituted by  
No. 104/1995  
s. 4.

### **7. Law and equity preserved**

- (1) Any rules and principles of law or equity that impose a duty on a trustee exercising a power of investment continue to apply except to the extent that they are inconsistent with this or any other Act or the instrument creating the trust.
- (2) Without limiting the generality of sub-section (1), a duty imposed by any rules and principles of law or equity includes—
- (a) a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust;
  - (b) a duty to invest trust funds in investments that are not speculative;
  - (c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries;
  - (d) a duty to take advice.
- (3) Any rules and principles of law or equity that relate to a provision in an instrument creating a trust that purports to exempt, limit the liability of, or indemnify a trustee in respect of a breach of trust, continue to apply.
- (4) If a trustee is under a duty to take advice, the reasonable costs of obtaining the advice are payable out of trust funds.

S. 8  
substituted by  
No. 104/1995  
s. 4.

### **8. Matters to which trustee must have regard in exercising power of investment**

- (1) Without limiting the matters that a trustee may take into account when exercising a power of investment, a trustee must, so far as they are

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appropriate to the circumstances of the trust, have regard to—

- (a) the purposes of the trust and the needs and circumstances of the beneficiaries; and
- (b) the desirability of diversifying trust investments; and
- (c) the nature of and risk associated with existing trust investments and other trust property; and
- (d) the need to maintain the real value of the capital or income of the trust; and
- (e) the risk of capital or income loss or depreciation; and
- (f) the potential for capital appreciation; and
- (g) the likely income return and the timing of income return; and
- (h) the length of the term of the proposed investment; and
- (i) the probable duration of the trust; and
- (j) the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment; and
- (k) the aggregate value of the trust estate; and
- (l) the effect of the proposed investment in relation to the tax liability of the trust; and
- (m) the likelihood of inflation affecting the value of the proposed investment or other trust property; and
- (n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment; and

(o) the results of a review of existing trust investments.

(2) A trustee may—

(a) obtain and consider independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice; and

(b) pay out of trust funds the reasonable costs of obtaining the advice.

S. 9  
substituted by  
No. 104/1995  
s. 4.

**9. *Powers of trustee in relation to securities***

(1) If securities of a body corporate are subject to a trust, the trustee may concur in any scheme or arrangement—

(a) for or arising out of the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the body corporate; or

(b) for the sale of all or any part of the property and undertaking of the body corporate to another body corporate; or

(c) for the acquisition of securities of the body corporate, or of control of the body corporate, by another body corporate; or

(d) for the amalgamation of the body corporate with another body corporate; or

(e) for the release, modification or variation of rights, privileges or liabilities attached to the securities, or any of them—

in the same manner as if the trustee were beneficially entitled to the securities.

(2) The trustee may accept instead of, or in exchange for, or in addition to, the securities subject to the

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trust any securities of any denomination or description of another body corporate party to the scheme or arrangement.

- (3) If a conditional or preferential right to subscribe for securities in a body corporate is offered to a trustee in respect of a holding in that body corporate or another body corporate, the trustee may, as to all or any of the securities—
  - (a) exercise the right and apply capital money subject to the trust in payment of the consideration; or
  - (b) assign the benefit of the right, or the title to the right, to a person, including a beneficiary under the trust, for the best consideration that can be reasonably obtained; or
  - (c) renounce the right.
- (4) A trustee accepting or subscribing for securities under this section is, for the purposes of any provision of this Part, exercising a power of investment.
- (5) A trustee may retain securities accepted or subscribed for under this section for any period for which the trustee could properly have retained the original securities.
- (6) The consideration for an assignment made under sub-section (3)(b) must be held as capital of the trust.
- (7) This section applies in relation to securities acquired before or after the commencement of section 4 of the **Trustee and Trustee Companies (Amendment) Act 1995** but subject to the instrument creating the trust.

**9A. *Investment in securities under RITS system***

- (1) A chose in action arising under the RITS system

S. 9A  
inserted by  
No. 104/1995  
s. 4.

and which entitles its holder to a security of a particular description ("the underlying security") is, for the purposes of this Act and the instrument creating a trust, taken to be the same in all respects as the underlying security.

- (2) The holding or acquisition by a trustee of a chose in action referred to in sub-section (1) is to be regarded as an investment by the trustee in the underlying security.
- (3) It does not matter that the right conferred by the chose in action referred to in sub-section (1) is a right in respect of securities of a particular description and not in respect of particular securities.
- (4) This section applies to a trust created before or after the commencement of section 4 of the **Trustee and Trustee Companies (Amendment) Act 1995** but applies only to the extent that the trust instrument creating the trust does not expressly prohibit its application.
- (5) In this section—

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

#### **10. *Power of trustee as to calls on shares***

Subject to the instrument creating the trust—

- (a) a trustee may apply capital money subject to a trust in payment of calls on shares subject to the same trust; and
- (b) if the trustee is a trustee company, it may exercise the powers conferred by this section despite the shares on which the calls are made being shares in the trustee company.

S. 10  
substituted by  
No. 104/1995  
s. 4.

**11. Power to purchase dwelling house as residence for beneficiary**

S. 11  
substituted by  
No. 104/1995  
s. 4.

- (1) Subject to the instrument creating the trust, a trustee may—
  - (a) invest any trust funds in the purchase of a dwelling house for a beneficiary to use as a residence; or
  - (b) enter into any other 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 the other beneficiaries, retain as part of the trust property a dwelling house for a beneficiary to use as a residence.
- (3) A dwelling house purchased, retained or otherwise secured for use by the beneficiary as a residence may be made available to the beneficiary for that purpose on such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.
- (4) The trustee may retain a dwelling house or any interest or rights in respect of a dwelling house acquired under this section after the use of the dwelling house of the beneficiary has ceased.
- (5) In this section—

**"dwelling house"** includes—

  - (a) any building or part of a building designed, or converted or capable of being converted, for use as a residence; and
  - (b) any amenities or facilities for use in connection with the use of a dwelling house.

S. 12  
substituted by  
No. 104/1995  
s. 4.

**12. *Power of trustee to retain investments***

A trustee is not liable for breach of trust by reason only of retaining an investment that has ceased to be—

- (a) an investment authorised by the instrument creating the trust; or
- (b) an investment properly made by the trustee exercising a power of investment; or
- (c) an investment made under this Act or a corresponding previous enactment; or
- (d) an investment authorised by any other Act or the general law.

S. 12A  
substituted by  
No. 104/1995  
s. 4.

**12A. *Loans and investments by trustees not breaches of trust in certain circumstances***

- (1) If a trustee lends money on the security of property, the trustee is not liable for breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made if it appears to the Court—
    - (a) that, in making the loan, the trustee was acting on a report as to the value of the property made by a person whom the trustee reasonably believed to be competent to give such a report and whom the trustee instructed and employed independently of any owner of the property; and
    - (b) that the amount of the loan did not exceed two-thirds of the value of the property as stated in the report; and
    - (c) that the loan was made in reliance on the report.
  - (2) This section applies to transfers of existing securities as well as to new securities and to
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investments made before or after the commencement of section 4 of the **Trustee and Trustee Companies (Amendment) Act 1995**.

**12B. *Limitation of liability of trustee for loss on improper investments***

S. 12B  
substituted by  
No. 104/1995  
s. 4.

- (1) If a trustee improperly advances trust money on a security that would at the time of the investment have been a proper investment if the sum advanced had been smaller than the actual sum advanced, the security is to be taken to be a proper investment in respect of the smaller sum, and the trustee is only liable to make good the difference between the sum advanced and the smaller sum, with interest.
- (2) This section applies to investments made before or after the commencement of section 4 of the **Trustee and Trustee Companies (Amendment) Act 1995**.

**12C. *Factors Court may take into account in action for breach of trust***

S. 12C  
inserted by  
No. 104/1995  
s. 4.

In proceedings against a trustee for breach of trust in respect of a duty under this Part relating to the trustee's power of investment, the Court may, when considering the question of the trustee's liability, take into account—

- (a) the nature and purpose of the trust; and
- (b) whether the trustee had regard to the matters set out in section 8 so far as is appropriate to the circumstances of the trust; and
- (c) whether the trust investments have been made pursuant to an investment strategy formulated in accordance with the duty of a trustee under this Part; and
- (d) the extent the trustee acted on the independent and impartial advice of a person



competent (or apparently competent) to give the advice.

S. 12D  
inserted by  
No. 104/1995  
s. 4.

**12D. *Power of Court to set off gains and losses arising from investment***

- (1) The Court may, when considering an action for breach of trust arising out of or in respect of an investment by a trustee where a loss has been, or is expected to be, sustained by the trust, set off all or part of the loss resulting from that investment against all or part of the gain resulting from any other investment whether in breach of trust or not.
- (2) The power of set off conferred by sub-section (1) is in addition to any other power or entitlement to set off all or part of any loss against any property.

S. 12E  
inserted by  
No. 104/1995  
s. 4.

**12E. *Housing loans by trustees***

- (1) If a trustee lends money on a real security in accordance with the provisions of this Act, or had made such a loan in accordance with the provisions of this Act as in force immediately before the commencement of section 4 of the **Trustee and Trustee Companies (Amendment) Act 1995**, the trustee is not chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property on which the loan is secured if—
    - (a) the trustee was not expressly forbidden by the instrument (if any) creating the trust to lend money on a real security; and
    - (b) the loan was a housing loan; and
    - (c) the loan is secured by a contract of insurance in the prescribed form entered into with an authorised insurer.
  - (2) The Minister may by notice published in the Government Gazette—
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- (a) declare a corporation that is lawfully carrying on the business of insuring mortgages in Victoria to be an authorised insurer for the purposes of this section;
- (b) revoke a declaration made under paragraph (a).
- (3) The Minister may by notice published in the Government Gazette—
- (a) specify terms and conditions to which an authorised insurer is authorised to enter into contracts of insurance for the purpose of this section; or
- (b) vary or revoke any such terms and conditions.
- (4) An authorised insurer who fails to comply with any terms or conditions subject to which it is authorised to enter into contracts of insurance for the purpose of this section shall be guilty of an offence against this Act.
- Penalty: 50 penalty units.
- (5) For the purposes of this section—
- (a) a declaration in force under section 8A(2) of this Act as in force immediately before the commencement of section 4 of the **Trustee and Trustee Companies (Amendment) Act 1995** is deemed to be a declaration under sub-section (2) of this section; and
- (b) terms and conditions applying under section 8A(3) of this Act as so in force are deemed to be terms and conditions applying under sub-section (3) of this section—
- and may be revoked or varied under this section.
- (6) In this section—
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**"authorised insurer"** means a corporation that has been declared to be an authorised insurer under sub-section (2);

**"dwelling-house"** includes—

- (a) any building that consists, or any buildings that consist, in whole or in substantial part, of residential accommodation, whether constituting a single unit of accommodation or two or more such units; and
- (b) any residential accommodation of a kind commonly known as a flat or home unit;
- (c) appurtenances, outbuildings, fences and permanent provision for lighting, water supply, drainage and sewerage provided in connection with the dwelling-house;

**"housing loan"** means a loan—

- (a) made for any one or more of the following purposes, that is to say, of enabling the borrower—
  - (i) To acquire a prescribed interest in land and construct, or complete the construction of, a dwelling-house on the land;
  - (ii) To construct a dwelling-house, or complete the construction of a dwelling-house, on land in which the borrower has a prescribed interest;
  - (iii) To acquire a prescribed interest in land on which there is a dwelling-house;

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- (iv) To alter, improve or extend a dwelling-house constructed on land in which the borrower has a prescribed interest;
  - (v) To meet expenses or in respect of the provision or improvement of roads, kerbing, guttering or footpaths in connection with land in which the borrower has a prescribed interest; or
  - (vi) To discharge a mortgage, charge or other encumbrance over land in which the borrower has a prescribed interest, being land on which a dwelling-house is being constructed; and

- (b) the repayment of which is secured by security over the interest of the borrower in the land—

and, where the lender requires the borrower to meet the cost of the premium in respect of a contract of insurance entered into in respect of the loan, includes moneys advanced by the lender to enable the borrower to meet that cost, being moneys the repayment of which is secured by a security over the interest of the borrower in the land;

**"prescribed interest in land"** means—

- (a) an estate in fee simple;
- (b) an interest as lessee under a lease in perpetuity from the Crown in right of the Commonwealth or the State of Victoria; or
- (c) an interest as lessee under a lease for a term of years from the Crown in right

of the Commonwealth or the State of Victoria or from the owner of an estate in fee simple if the authorised insurer is satisfied that the term, covenants and conditions of the lease give reasonable security of tenure to the lessee for a substantial period.

S. 12F  
inserted by  
No. 104/1995  
s. 4.

**12F. *Transitional provision***

Any provision in an Act or any other instrument (whether or not creating a trust) that empowers or requires a person to invest money in investments authorised by the **Trustee Act 1958** is to be read as if it empowered or required that person to invest that money according to the provisions of Part I of that Act relating to the investment of trust funds.

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**PART II—GENERAL POWERS OF TRUSTEES AND  
PERSONAL REPRESENTATIVES**

**Division 1—General Powers**

**13. *Power of trustees to sell by auction etc.***

No. 5770 s. 13.

- (1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.
- (2) A trust or power to sell or dispose of land shall include a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way.
- (3) Where the power is not vested in the tenant for life or statutory owner this section shall not enable an express power to sell settled land to be exercised without his consent.<sup>3</sup>
- (4) If a trustee joins with any other person in selling trust property and other property, the purchase money shall be apportioned in or before the contract of sale, and a separate receipt shall be given by the trustee for the apportioned share; but a contravention of this sub-section shall not invalidate or be deemed to have invalidated any instrument intended to affect or evidence the title to the trust property, and no person being a purchaser, lessee, mortgagee, or other person who, in good faith and for valuable consideration,

acquires the trust property or an interest in it or charge over it, and neither the Registrar of Titles nor any other person certifying title shall be affected by notice of, or be concerned to inquire whether there has been, a contravention of this sub-section.

- (5) A power to postpone sale shall be implied in the case of every trust for sale of property.
- (6) <sup>4</sup>Where there is a power to postpone sale, the trustee shall not be liable in any way for postponing the sale, in the exercise of his discretion, for any indefinite period; nor shall a purchaser of a legal estate be concerned in any case with any directions respecting the postponement of a sale.
- (7) Trustees shall be deemed always to have had the powers and protection given by this section.

S. 13(7)  
amended by  
No. 6505 s. 2.

No. 5770 s. 14.

#### **14. *Duration of trust or power to sell***

- (1) Where the instrument creating a power to sell property does not expressly limit the duration of the power, then, notwithstanding any lapse of time or that all the beneficiaries are absolutely entitled to the property in fee-simple or full ownership in possession and are free of any incapacity, the trustee may, if so requested in writing by any beneficiary, sell the property, and shall be deemed to be a trustee for sale accordingly; but in all other respects the authority conferred by this section shall be subject to any restrictions to which the power created by the instrument is subject.
- (2) A purchaser of the property or the Registrar of Titles or other person registering or certifying title shall not be concerned to inquire whether the property was sold under the authority conferred by this section.

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- (3) Nothing in this section shall affect any trust or power to sell which is for the time being in existence under the instrument creating the power.

**15. *Power to sell subject to depreciatory conditions***

No. 5770 s. 15.

- (1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory unless it also appears that the consideration for the sale was thereby rendered inadequate.
- (2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract of sale was made.
- (3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon any of the grounds aforesaid.

**16. *Mortgage on sale of land***

No. 5770 s. 16.

- (1) On a sale of land for an estate in fee-simple by trustees or by a tenant for life, or statutory owner with the consent of the trustees of the settlement or order of the Court, the trustees, or the tenant for life or statutory owner may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding three-fifths, of the purchase money shall be secured by a mortgage of the land sold, with or without the security of any other property, and such mortgage shall, if any buildings or other improvements are comprised in the mortgage, contain a covenant by the mortgagor to keep them insured against loss or damage by fire to the full insurable value thereof.



- (2) The trustees shall not be bound to obtain any report as to the value of the land or other property to be comprised in such mortgage, or any advice as to the making of the loan, and shall not be liable for any loss which may be incurred by reason only of the security being insufficient at the date of the mortgage.
- (3) Where the sale referred to in sub-section (1) of this section is made under the order of the Court, the powers conferred by that sub-section shall apply only if and so far as the Court may by order direct.

No. 5770 s. 17.

**17. *Deferred payment on sale of land***

- (1) A trustee for sale or a trustee having a power of sale may sell land on terms of deferred payment.
- (2) The terms of deferred payment may provide that the purchase money shall be paid by instalments.
- (3) The terms upon which land is sold shall, in addition to such other provisions as the trustee may deem proper, include provisions for giving effect to the following—
  - (a) that the part of the purchase money to be paid by way of deposit shall not be less than the sum which a person acting with prudence would, if the land were his own, have accepted in the circumstances in order to sell the land to the best advantage, and in any case shall not be less than one-tenth of the purchase money;
  - (b) that the balance of the purchase money shall be payable by such instalments and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid at such rate as a person acting with prudence would, if the land were his own, have

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- accepted in the circumstances in order to sell the land to the best advantage, and in any case the whole purchase-money shall be payable within a period not exceeding ten years from the date of sale;
- (c) that if any instalment or interest or part thereof is in arrear and unpaid for six months, or for such less period as may be specified, the whole of the purchase money shall become due and payable;
  - (d) that the purchaser shall maintain and protect the property, and keep all buildings (if any) thereon insured against loss or damage by fire to the full insurable value thereof.
- (4) (a) Notwithstanding that the land has been sold on terms of deferred payment, the trustee may at any time after two-fifths of the purchase money has been paid convey the land and take a mortgage back to secure payment of the balance of the purchase money and interest with or without the security of any other property, and such mortgage shall include provisions to the like effect as those set out in sub-section (2) of section eleven of this Act.
- (b) The trustees shall not be bound to obtain any report as to the value of the land or other property to be comprised in such mortgage, or any advice as to the making of the loan, and shall not be liable for any loss which may be incurred by reason only of the security being insufficient at the date of the mortgage.
- (5) Where the sale is made under order of the Court, the provisions of this section shall apply unless the Court otherwise directs.

No. 5770 s. 18.

**18. Power to trustees to give receipts**

- (1) The receipt in writing of a trustee for any money, securities or other personal property or effects payable, transferable or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.
- (2) This section shall not, except where the trustee is a trustee company, or except so far as is otherwise enacted, enable a sole trustee to give a valid receipt for capital money arising under the **Settled Land Act 1958**.
- (3) This section shall apply notwithstanding anything to the contrary in the instrument (if any) creating the trust.

S. 18(2)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.4).

No. 5770 s. 19.

**19. Power to compound liabilities**

- (1) A personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trustee company, a sole acting trustee where by the instrument (if any) creating the trust, or by statute a sole trustee is authorized to execute the trusts and powers reposed in him, may, if and as he or they think 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 he or they think sufficient; or

S. 19(1)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.5).

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- (d) accept 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 testator's or intestate's estate or to the trust; or
  - (g) by writing waive or vary any right exercisable by him or them which arises from a failure to comply at or within the proper time with any term of any agreement for sale mortgage lease or other contract; or
  - (h) without prejudice to the generality of the foregoing powers, where a leasehold is vested in him, or them, and the property is subject to onerous covenants of such a nature that it would not be in the interests of the beneficiaries to retain the property, may surrender or concur in surrendering the lease—

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 him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

- (2) The powers conferred by this section shall apply both to property of whatever description that belonged to or was vested in a deceased person in succession to whom the property is held by a personal representative or trustee or trustees, and also to property of whatever description that becomes vested in a personal representative or

trustee or trustees in the course of the  
administration of an estate or trust.

No. 5770 s. 20.

**20. *Power to raise money by sale, mortgage etc.***

- (1) Where trustees are authorized by the instrument (if any) creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.
- (2) This section applies notwithstanding anything to the contrary contained in the instrument (if any) creating the trust, but 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 1958**, not being also the statutory owners.

No. 5770 s. 21.

**21. *Protection to purchasers and mortgagees dealing with trustees***

No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall 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.

No. 5770 s. 22.

**22. *Devolution of powers or trusts***

- (1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.
  - (2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees then of the last surviving or
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continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust.

- (3) This section shall take effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trustee company.
- (4) In this section "**personal representative**" does not include an executor who has renounced or has not proved.

S. 22(3)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.6).

**23. Power to insure**

No. 5770 s. 23.

- (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 he were acting for himself.
- (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) The premiums may be paid by the trustees out of any moneys subject to the trust but in the accounts of the trustee shall be charged first against the income of the property concerned and secondly against the income of any other property subject to the same trusts, to the extent of the income available without obtaining the consent of any person who may be entitled wholly or partly to the income.

**24. Application of insurance money where policy kept up under any trust power or obligation**

No. 5770 s. 24.

S. 24(2)  
amended by  
No. 7332 s. 2.

- (1) Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust or to a settlement within the meaning of the **Settled Land Act 1958**, whether by fire or otherwise, shall, where the policy has been kept up under any trust in that behalf or under any power statutory or otherwise, or in performance of any covenant or of any obligation statutory or otherwise, or by a tenant for life impeachable for waste, be capital money for the purposes of the trust or settlement, as the case may be.
  - (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.
  - (3) Any such money—
    - (a) if it was receivable in respect of settled land within the meaning of the **Settled Land Act 1958**, or any building or works thereon, shall be deemed to be capital money arising under that Act from the settled land, and shall be invested or applied by the trustees, or, if in court, under the direction of the Court, accordingly;
    - (b) if it was receivable in respect of personal chattels settled so as to devolve with or as nearly as may be with settled land<sup>5</sup> shall be deemed to be capital money arising under the **Settled Land Act 1958** and shall be applicable by the trustees, or, if in court, under the direction of the Court, in like manner as provided by that Act with respect
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- to money arising by a sale of chattels settled as aforesaid;
- (c) if it was receivable in respect of property held upon trust for sale, shall be held upon the trusts and subject to the powers and provisions applicable to money arising by sale under such trust;
  - (d) in any other case, shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.
- (4) Such money, or any part thereof, may also be applied by the trustees, or, if in court, under the direction of the Court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged, but any such application by the trustees 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, and, in the case of money which is deemed to be capital arising under the **Settled Land Act 1958**, be subject to the provisions of that Act with respect to the application of capital money by the trustees of the settlement.
- (5) Nothing contained in this section shall prejudice or affect the right of any person to require any such money or any part thereof to be applied in rebuilding, reinstating, or repairing the property lost or damaged, or the rights of any mortgagee, lessor, or lessee, whether under any statute or otherwise.

**25. *Deposit of documents with bankers for safe custody***

No. 5770 s. 25.



*Trustee Act 1958*  
*Act No. 6401/1958*

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- (1) Trustees may deposit any documents held by them relating to the trust, or to the trust property, with any banker or banking company or any other company whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of such deposit shall be charged against the income of the trust property.
- (2) Where there are two or more trustees of a trust and the trustees by writing under their hands authorize a banker—
  - (a) to pay bills of exchange drawn upon the banking account of the trustees by the trustee or trustees named in that behalf in the authority; or
  - (b) to recognize as a valid indorsement upon any bill of exchange payable to the order of the trustees the indorsement thereon by the trustee or trustees named in that behalf in the authority—

the banker acting in pursuance of such an authority shall not be deemed privy to a breach of trust in the ground only of notice that the persons giving such authority were trustees, or that the instrument (if any) by which the trust was created did not contain any express power to give such an authority.

This sub-section shall not affect any question of the liability of any trustee for breach of trust in so authorizing a banker as aforesaid; and in this sub-section "**bill of exchange**" has the like meaning as in the Commonwealth Act known as the Bills of Exchange Act 1909–1936 or any amendment thereof.

- (3) Whenever any payment received by a trustee in respect of a sale of trust property being securities bearing interest at a fixed rate is or includes
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payment for the right to receive any interest accrued from such securities at the time of such sale though such interest may not then be due the amount of such accrued interest shall for the purposes of the trust be deemed to have been received by the trustee as interest in respect of the period during which such interest so accrued.

- (4) Whenever any payment made by a trustee out of trust money in respect of a purchase of any securities bearing interest at a fixed rate is or includes payment for the right to receive any interest accrued from such securities at the time of such purchase though such interest may not then be due, the amount of such accrued interest when received on account of the trust shall for the purposes of the trust be deemed to have been so received as purchase money repaid.

**26. *Reversionary interests and valuations***

No. 5770 s. 26.

- (1) Where trust property includes any share or interest in property not vested in the trustees, or the proceeds of the sale of any such property, or any other thing in action, the trustees on the same 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 they think fit;
  - (b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which they think fit, any authorized investments;
  - (c) allow any deductions for duties, costs, charges and expenses which they think proper or reasonable;

- (d) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release—

without being responsible in any such case for any loss occasioned by any act or thing so done by them in good faith.

- (2) The trustees shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission—

- (a) to place any notice in the nature of a *distringas* notice or apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action as aforesaid 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 such securities or other property or any of them or any part thereof 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 their satisfaction for payment of the costs of any proceedings required to be taken:

Provided that nothing in this sub-section shall relieve the trustees of the obligation to get in and obtain payment or transfer of such share or interest or other thing in action on the same falling into possession.

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- (3) Trustees 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 any statute, from time to time (by persons reasonably believed by the trustees to be competent valuers) ascertain and fix the value of any trust property in such manner as they think proper, and any valuation so made in good faith shall be binding upon all persons interested under the trust.

**27. *Audit***

No. 5770 s. 27.

- (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 person who publicly carries on the business of an accountant, and shall for that purpose produce such vouchers and give such information to that person as he 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 one way and partly in the other, as the trustee may in his absolute discretion think fit.
- (3) In default of any direction, in any special case, by the trustee to the contrary, costs attributable to capital shall be borne by capital and those attributable to income by income.
- (4) Where the trustee or one of the trustees is an incorporated company, nothing in this section shall, except in the case of a business forming part of the trust property, authorize 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 such costs or fee being paid out of or borne by such capital or income.

S. 27(4)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.7).

**28. *Power to employ agents***

No. 5770 s. 28.

- (1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a barrister and solicitor, banker, stockbroker, or other person, to transact any business or to do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, 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 if employed in good faith.
- (2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering any property, real or personal, moveable or immovable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside Victoria or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.
- (3) Without prejudice to such general power of appointing agents as aforesaid—
  - (a) <sup>6</sup>a trustee may appoint a barrister and solicitor or a banker to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the barrister and solicitor or banker to have the custody of, and to

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produce, a deed or instrument under the **Transfer of Land Act 1958**, having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed or instrument being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;

- (b) a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed or instrument by the barrister and solicitor or banker shall have the same statutory validity and effect as if the person appointing the barrister and solicitor or banker had not been a trustee;
- (c) a trustee may appoint a barrister and solicitor or a banker to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the barrister and solicitor or banker to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

In this sub-section "**instrument**" includes a discharge of mortgage and "**banker**" means a person acting in his official capacity as general manager or manager of any company solely or chiefly engaged in the ordinary business of banking or as the manager conducting for such company the business of any branch bank.

- (4) Nothing in the last preceding sub-section shall exempt a trustee from any liability which he

would have incurred if this Act or any corresponding previous enactment had not been passed, in case he permits any such money, valuable consideration or property to remain in the hands or under the control of the barrister and solicitor or banker for a period longer than is reasonably necessary to enable the barrister and solicitor or banker (as the case may be) to pay or transfer the same to the trustee.

No. 5770 s. 29.

**29. Power to concur with others**

Where an undivided share in the proceeds of sale of land directed to be sold, or in any other property, is subject to a trust, or forms part of the estate of a testator or intestate, the trustees or personal representatives may (without prejudice to the trust for sale affecting the entirety of the land and the powers of the trustees for sale in reference thereto) execute or exercise any trust or power vested in them in relation to such share in conjunction with the persons entitled to or having power in that behalf over the other share or shares, and notwithstanding that any one or more of the trustees or personal representatives may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity.

No. 5770 s. 30.

**30. Power to delegate trusts during absence abroad<sup>7</sup>**

S. 30(1)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.8).

- (1) Where a trustee has never resided in Victoria, or is absent from Victoria, or is about to depart from Victoria, he may, notwithstanding any rule of law or equity to the contrary, by power of attorney delegate to any person (including a trustee company) the execution or exercise while he is out of Victoria of all or any trusts, powers and discretions vested in him as trustee, either alone or jointly with any other person or persons:

Provided that a person being the only other co-trustee and not being a trustee company shall not be appointed to be an attorney under this subsection.

S. 30(1)  
(Proviso)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.8).

- (2) The donor of a power of attorney given under this section shall be liable for the acts and defaults of the donee in the same manner as if they were the acts or defaults of the donor; and the donee shall be subject to the jurisdiction and powers of any court so far as respects the execution of the trusts powers and discretions delegated to him in the same manner as if he were the trustee.
- (3) A power of attorney given pursuant to this section—
  - (a) if the donor is out of Victoria when he executes it—shall, subject to this section, come into operation forthwith after its receipt in Victoria;
  - (b) if the donor is in Victoria when he executes it—shall, subject to this section, come into operation when the donor leaves Victoria; and
  - (c) if the donor comes into Victoria after it has come into operation—shall cease to operate while the donor remains in Victoria, but from time to time shall, unless the instrument otherwise provides, come into operation again whenever the donor is out of Victoria.

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S. 30(4)–(7)  
repealed by  
No. 9421  
s. 5(3).

- (8) For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the



transfer of any inscribed stock, himself to delegate to an attorney power to transfer but not including the power of delegation conferred by this section.

- (9) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.
- (10) In this section "**trustee**" includes a tenant for life and a statutory owner.

No. 5770 s. 31.

**31. *Trustee's power of appropriation***<sup>8</sup>

- (1) A trustee may appropriate any part of the property subject to the trust, or any part of the estate of a testator or intestate, in its actual condition or state of investment, in or towards satisfaction of any legacy, share, or interest in the property or estate, whether settled or not, as to the trustee may seem just and reasonable, according to the respective rights of the persons interested in the property or estate:

Provided that—

- (a) the appropriation shall not be made so as to affect prejudicially any specific gift;
- (b) if any consent is required by this section the appropriation shall be made with such consent;
- (c) in making the appropriation the trustee shall have regard to the rights of any person who may thereafter come into existence or who cannot be found or ascertained at the time of the appropriation, or as to whom it is

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- uncertain at that time whether he is living or dead, and to the rights of any other person whose consent is not required by this section.
- (2) The power of appropriation conferred by this section shall extend and apply to—
- (a) property over which a testator exercises a general power of appointment;
  - (b) setting apart a fund to answer an annuity by means of the income of the fund or otherwise;
  - (c) setting apart a sum of money in or towards the satisfaction of a legacy share or interest.
- (3) For the purpose of an appropriation under this section the trustee—
- (a) may ascertain and fix the value of the respective parts of the property or estate subject to the trust and the liabilities to which the property or estate is subject, as the trustee may think fit; and
  - (b) shall for that purpose employ a person reasonably believed by the trustee to be a competent valuer in any case where such employment may be necessary.
- (4) When an appropriation is made pursuant to this section—
- (a) the appropriation shall bind all persons who are or may become interested in the property or estate, including persons whose consent is not required, persons who are not sui juris, and persons who are not yet ascertained; and
  - (b) to the extent to which the appropriation is made in or towards satisfaction of any legacy share or interest, the rights to which any person is entitled in virtue of the legacy share or interest—
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*Trustee Act 1958*  
*Act No. 6401/1958*

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- (i) shall be restricted to the part of the property or estate so appropriated; and
  - (ii) shall not extend to any other parts thereof.
- (5) Except as is otherwise provided by this section an appropriation of property, whether it is or is not an investment authorized by law or by the instrument (if any) creating the trust for the investment of money, shall not be made under this section for the benefit of a person absolutely and beneficially entitled in possession unless, if that person is of full age and capacity he consents in writing, or if he is not of full age and capacity, or if he is a person whom the trustee at the time of the appropriation has been unable to find or who cannot be ascertained, or as to whom it is uncertain whether he is living or dead, consent is given as provided by sub-section (7) hereof.
- (6) Except as is otherwise provided in this section, an appropriation shall not be made thereunder in respect of any settled legacy share or interest, unless consent in writing thereto is given—
- (a) by the trustee thereof (if any) not being also the trustee making the appropriation; or
  - (b) by the person for the time being entitled to the income provided he is of full age and capacity; or
  - (c) in the manner provided in sub-section (7) hereof.
- (7) If the person absolutely and beneficially entitled in possession or in the case of any settled legacy share or interest the person for the time being entitled to the income—

- (a) is a minor—the consent may be given by his parents or parent with whom he resides or in whose custody he is (as the case may be) or by his testamentary or other guardian, or by the Court;
  - (b) is incompetent to manage his own affairs or incapable of managing his own affairs—the consent may be given by any person having power by law to give the consent, or by the Court;
  - (c) is a person whom the trustee has been unable at the time of the appropriation to find or who cannot be ascertained, or as to whom it is uncertain at that time whether he is living or dead—the consent may be given by the Court.
- (8) If the appropriation is of an investment authorized by law, or by the instrument (if any) creating the trust for the investment of money subject thereto, no consent shall be required—
- (a) on behalf of a minor, where there is no parent or guardian;
  - (b) on behalf of a person who is incompetent to manage his own affairs or incapable of managing his own affairs, where there is no person having power by the law to give the consent; or
  - (c) on behalf of a person whom the trustee has been unable at the time of the appropriation to find or who cannot be ascertained, or as to whom it is uncertain at that time whether he is living or dead—

**S. 31(7)(a)**  
amended by  
**Nos 9075**  
**s. 5(1), 9427**  
**s. 5.**

**S. 31(8)**  
amended by  
**Nos 9075**  
**s. 5(1), 9427**  
**s. 5.**

save that if there is a trustee of the legacy share or interest his consent shall be required.

- (9) Notwithstanding anything contained in any other sub-section of this section, where a fund is set apart to answer an annuity (not being an annuity in respect of which the trustee is liable to pay or provide, in addition to the annuity, any moneys by way of tax or otherwise) by means of the income of the fund or otherwise, the consent of the annuitant shall not be necessary if—
- (a) the fund at the time of appropriation would be sufficient, if it were invested in securities of the Government of the Commonwealth of Australia at par, to provide an income exceeding the annuity by at least twenty per centum thereof; and
  - (b) the fund is actually invested in such securities.
- (10) Where an appropriation is made under this section in respect of a settled legacy share or interest, the property appropriated shall be subject to all trusts for sale and powers of leasing disposition management and varying investments which would have been applicable thereto or to the legacy share or interest in respect of which the appropriation is made, if no such appropriation had been made:
- Provided that nothing in this section shall relieve the trustee of the settled legacy share or interest, where he is not the trustee making the appropriation, from the obligation to obtain payment or transfer of the property appropriated, if or when the same is so payable or transferable.
- (11) The trustee may make any conveyance or assent which may be necessary for giving effect to an appropriation under this section.
- (12) Any appropriation or disposition of property—
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- (a) made in purported exercise of the powers conferred by this section; or
  - (b) in respect of which the trustee making the appropriation or disposition states in writing that the appropriation or disposition has been made in exercise of those powers—

shall, in favour of a person who in good faith and for valuable consideration purchases, or takes a lease or mortgage of, or otherwise takes or deals for, the property or any interest in it, be deemed to have been made in accordance with the requirements of this section, and after all requisite consents (if any) have been given.

The protection afforded by this sub-section shall extend to the Registrar of Titles when registering titles and to every other person registering or certifying title.

- (13) In this section "**settled legacy share or interest**" means—

- (a) a legacy share or interest settled by the trust instrument (if any) or by any other instrument;
- (b) an annuity, whether or not at the time of appropriation any person is absolutely and beneficially entitled to the income; and
- (c) any legacy share or interest to which at the time of appropriation no person is absolutely and beneficially entitled in possession.

- (14) This section shall not prejudice any other power of appropriation conferred by law or by the instrument (if any) creating the trust, and shall take effect with any extended powers conferred by that instrument; and the powers conferred by this section shall be in addition to any other power.

**Division 2—Indemnities**

No. 5770 s. 32.

**32. *Protection against liability in respect of rents and covenants***

- (1) Where a personal representative or trustee liable as such for—
- (a) any rent, covenant or agreement reserved by or contained in any lease; or
  - (b) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rentcharge; or
  - (c) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraphs—

satisfies all liabilities under the lease or grant which may have accrued, and been claimed up to the date of the conveyance hereinafter mentioned, and where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative or trustee may convey the property demised or granted to a purchaser, legatee, devisee or other person entitled to call for a conveyance thereof and thereafter—

- (i) he may distribute the residuary real and personal estate of the deceased testator or intestate, or as the case may be, the trust estate other than the fund (if any) set apart as aforesaid to or amongst the persons entitled thereto without appropriating any part, or any further part (as the case may be) of the estate of the deceased or of the trust estate to

meet any future liability under the said lease or grant;

- (ii) notwithstanding such distribution he shall not be personally liable in respect of any subsequent claim under the said lease or grant.
- (2) This section shall operate without prejudice to the right of the lessor or grantor or the persons deriving title under the lessor or grantor, to follow the assets of the deceased or the trust property into the hands of the persons amongst whom the same may have been respectively distributed, and shall apply notwithstanding anything to the contrary in the will or other instrument (if any) creating the trust.
- (3) In this section "**lease**" includes an under-lease and an agreement for a lease or under-lease and any instrument giving any such indemnity as aforesaid or varying the liabilities under the lease; "**grant**" applies to a grant whether the rent is created by limitation, grant, reservation or otherwise, and includes an agreement for a grant and any instrument giving any such indemnity as aforesaid or varying the liabilities under the grant; "**lessee**" and "**grantee**" include persons respectively deriving title under them.

**33. Protection by means of advertisements**

- (1) (a) <sup>9</sup>With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, or persons who have made application to the registrar of probates for a grant of representation may give notice by advertisement in the

Nos 5770  
s. 33, 5896  
s. 2.

S. 33(1)(a)  
amended by  
S.R. No.  
380/1973  
reg. 2(a).



Government Gazette, and in a daily newspaper, published in Melbourne and also if the property includes land not situated within 80 kilometres of the City of Melbourne in a newspaper published at least once a week in the district in which the land is situated, and such other like notices, including notices elsewhere than in Victoria, as would in any special case have been directed by the Court in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives or persons who have made application to the registrar of probates for a grant of representation within the time not being less than two months, fixed in the notice or where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.

- (b) Notice by advertisement for the purposes of this sub-section given by any personal representative or by any trustee or by any person who has made an application for a grant of representation as aforesaid shall so far as regards the contents of the advertisement be deemed to be sufficient if given in the form in the Second Schedule to this Act or to the like effect.

S. 33(2)  
amended by  
S.R. No.  
380/1973  
reg. 2(b),  
55/1987  
s. 57(3).

- (2) <sup>10</sup>In any case where the real and personal property of a testator or intestate are sworn not to exceed \$2000 or where the State Trust has filed an election to administer the estate of a testator or intestate notice by advertisement for the purposes of sub-section (1) of this section shall as regards publication be deemed to be sufficient if inserted

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once in a daily newspaper published in Melbourne, and also, where the testator or intestate resided or carried on business in any place or district in Victoria situated more than 40 kilometres from Melbourne, in a daily or weekly newspaper (if any) published or circulating in such place or district.

- (3) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims whether formal or not, of which the trustees or personal representatives then had notice, and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution; but nothing in this section shall—
- (a) prejudice the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who has received it; or
  - (b) free the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain.

In this sub-section "**personal representatives**" means any personal representatives who have (whether as such or as applicants for a grant of representation) complied with the requirements of sub-section (1) of this section or (where the case allowed) with the requirements of that sub-section as modified by sub-section (2) of this section.

- (4) This section applies notwithstanding anything to the contrary in the will or other instrument (if any) creating the trust.
- (5) In this section "**representation**" means the probate of a will or letters of administration.

No. 5770 s. 34.

**34. *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 such deceased person as soon as such 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 such registration whether made by the company or its directors or by its liquidators in a winding up, but nothing herein contained shall affect any right which the company or its liquidator may have to follow the assets of such deceased person into the hands of any persons to or amongst whom the same have been transferred or distributed.

No. 5770 s. 35.

**35. *Protection in regard to notice when a person is trustee etc. of more than one estate or trust***

- (1) A trustee or personal representative acting for the purposes of more than one trust or estate shall not, in the absence of fraud be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.
  - (2) A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by
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reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power if this fact was not known to the trustee at the time of his so acting or paying:

Provided that—

- (a) nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made;
- (b) the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee;
- (c) nothing in this section shall repeal or prejudice the provisions of any Act now or hereafter to be in force relating to powers of attorney and in particular where the power of attorney is filed under the **Instruments Act 1958** nothing in this section shall apply to any act done or payment made by a trustee after revocation of the power has been registered under that Act.

**36. *Implied indemnity of trustees***

No. 5770 s. 36.

- (1) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, 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 same happens through his own wilful default.

- (2) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.

### Division 3—Maintenance Advancement and Protective Trusts

No. 5770 s. 37.

#### 37. *Power to apply income for maintenance etc. and to accumulate surplus income during a minority*

S. 37(1)  
amended by  
No. 9075  
s. 6(1)(2).

- (1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—

(a) during the minority of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian (if any) or otherwise apply for or towards his maintenance, education, advancement, or benefit, the whole or such part (if any) of the income of that property as may in all the circumstances be reasonable, whether or not there is—

(i) any other fund applicable to the same purpose; or

(ii) any person bound by law to provide for his maintenance or education; and

S. 37(1)(b)  
amended by  
No. 9075  
s. 5(2).

(b) if such person on attaining the age of eighteen years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under sub-section (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

*Trustee Act 1958*  
*Act No. 6401/1958*

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Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the minor and his requirements and generally to the circumstances of the case, and in particular to what other income (if any) is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the Court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

- (2) During the minority of any such person, if his interest so long continues, the trustees 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 authorized investments, and shall hold those accumulations as follows:

**S. 37(2)**  
**amended by**  
**No. 9075**  
**s. 5(2).**

(a) If any such person—

**S. 37(2)(a)**  
**amended by**  
**Nos 9075**  
**s. 5(1), 9427**  
**s. 5.**

- (i) attains the age of eighteen years, or marries under that age, and his interest in such income during his minority or until his marriage is a vested interest; or
- (ii) on attaining the age of eighteen years or on marriage under that age becomes entitled to the property from which such income arose in fee-simple, absolute or determinable, or absolutely, or for an entailed interest—

the trustees 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

made under any statutory powers during his minority, and so that the receipt of such person after marriage, and though still a minor, shall be a good discharge; and

- (b) In any other case the trustees 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 one fund with such capital for all purposes, and so that if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom—

but the trustees may, at any time during the minority of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

- (3) <sup>11</sup>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 Five per centum per annum. 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 sub-section be

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deemed notwithstanding the protective trust to carry the intermediate income.

- (4) This section shall apply to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the minority of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.
- (5) This section shall not apply where the instrument (if any) under which the interest arises came into operation before the commencement of this Act, but in cases of instruments coming into operation before such commencement section thirty-four of the **Trusts Act 1915** (as amended by section nine of the **Real Property Act 1918**) and section thirty-five of the **Trusts Act 1915** or section thirty-one of the **Trustee Act 1928** or section thirty-seven of the **Trustee Act 1953** (as the case requires) shall notwithstanding the repeal of those Acts continue to apply to such instruments.

S. 37(4)  
amended by  
No. 10087  
s. 3(1).

**38. *Use of capital for maintenance education advancement and benefit of beneficiaries***

No. 5770 s. 38.

- (1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustees, in such manner as they in their absolute discretion think fit, may from time to time out of that capital pay or apply for the maintenance education advancement or benefit of that person, an amount not exceeding in all \$2000 or half that capital (whichever is the greater) or with the consent of the Court an amount greater than that amount.



- (2) The power conferred by this section may be exercised whether the person is entitled absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and notwithstanding that the interest of the person so entitled is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs.
- (3) The power conferred by this section may be exercised whether the person is so entitled in possession or in remainder or reversion.
- (4) If the person is or becomes absolutely and indefeasibly entitled to a share in the trust property, the money so paid or applied shall be brought into account as part of that share.
- (5) No payment or application pursuant to this section shall be made so as to prejudice any person entitled to any prior life or other prior interest, whether vested or contingent, in the money paid or applied unless that person is in existence and of full age and consents in writing to the payment or application.
- (6) For the purposes of this section the trustees may raise money by sale, mortgage or exchange of the trust property.

No. 5770 s. 39.

### **39. *Protective trusts***

- (1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called "the principal beneficiary") for the period of his life or for any less period,

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then, during that period (in this section called the "trust period") the said income shall, without prejudice to any prior interest, be held on the following trusts, namely—

- (a) upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;
- (b) if the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance education advancement or benefit of all or of any one or more exclusively of the other or others of the following persons (that is to say)—
  - (i) the principal beneficiary and his or her wife or husband (if any), and his or her children or more remote issue (if any); or
  - (ii) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust

S. 39(1)(b)  
amended by  
No. 10087  
s. 3(1).

property or the income thereof or to the annuity fund (if any), or arrears of the annuity, as the case may be—

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

- (2) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.
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**PART III—APPOINTMENT AND DISCHARGE OF TRUSTEES**

**40. *Limitation of the number of trustees***

No. 5770 s. 40.

- (1) Where, at the commencement of this Act, there are more than four trustees of a settlement of land, or more than four trustees holding land on trust for sale, no new trustees shall (except where on the appointment the number is four or less) be capable of being appointed until the number is reduced to less than four, and thereafter the number shall not be increased beyond four.
- (2) In the case of settlements and dispositions on trust for sale of land—
  - (a) the number of trustees thereof shall not in any case exceed four and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;
  - (b) the number of the trustees shall not be increased beyond four.
- (3) This section applies only to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply—
  - (a) in the case of land vested in trustees for charitable, religious, or public purposes; or
  - (b) where the net proceeds of the sale of the land are held for like purposes; or
  - (c) <sup>12</sup>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 land.

No. 5770 s. 41.

#### **41. *Power of appointing new or additional trustees***

S. 41(1)  
amended by  
Nos 6867 s. 2,  
9075 s. 5(1),  
9427 s. 5.

- (1) Where a trustee is dead, or remains out of Victoria for more than one year without having properly delegated the execution of the trust, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him or refuses or is unfit to act therein, or is incapable of acting therein, or is a minor, then, subject to the restrictions imposed by this Act on the number of trustees—
- (a) the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust; or
  - (b) if there is no such person or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee—

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of Victoria, desiring to be discharged, refusing, or being unfit, or being incapable, or being a minor as aforesaid.

- (2) Where a trustee has been removed under a power contained in the instrument creating the trust, then a new trustee or new trustees may be appointed in the place of the trustee who is removed as if he were dead, or in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of this section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees.

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- (3) Where a corporation being a trustee is or has been dissolved, either before or after the commencement of this Act, then, for the purposes of this section and of any corresponding previous enactment, the corporation shall be deemed to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation.
- (4) The power of appointment given by sub-section (1) of this section or any corresponding previous enactment to the personal representatives of a last surviving or continuing trustee shall be and shall be deemed always to have been exercisable by the executors for the time being (whether original or by representation) of such surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of such trustee without the concurrence of any executor who has renounced or has not proved.
- (5) But a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce, shall have and shall be deemed always to have had power, at any time before renouncing probate, to exercise the power of appointment given by this section, or by any corresponding previous enactment, if willing to act for that purpose and without thereby accepting the office of executor.
- (6) Where in the case of any trust, there are not more than three trustees (none of them being a trustee company)—
- (a) the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust; or

**S. 41(6)**  
**amended by**  
**Nos 55/1987**  
**s. 57(3),**  
**45/1994**  
**s. 42(Sch.**  
**item 12.9).**

(b) if there is no such person, or no such person able and willing to act, the trustee or trustees for the time being—

may, by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument (if any) creating the trust, or any statutory enactment provides to the contrary, nor shall the number of trustees be increased beyond four by virtue of any such appointment.

- (7) Every new trustee appointed under this section as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument (if any) creating the trust.
- (8) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.
- (9) If a person who is a patient within the meaning of the **Mental Health Act 1986** is a trustee of property and is entitled in possession to some beneficial interest in the property no appointment of a new trustee in his or her place can be made by the continuing trustee or trustees under this section unless leave has been given—
- (a) in the case of a represented person within the meaning of the **Guardianship and Administration Act 1986**, by the guardian or administrator; or

S. 41(9)  
substituted by  
Nos 7332 s. 2,  
59/1986  
s. 143(2).

S. 49(1)(a)  
amended by  
No. 52/1998  
s. 311(Sch. 1  
item 98).

(b) in any other case, by the Court.

- (10) The provisions of this section relative to a person nominated for the purpose of appointing new trustees apply, whether the appointment is to be made in a case specified in this section or in a case specified in the instrument (if any) creating the trust, but where a new trustee is appointed under this section in a case specified in that instrument, the appointment shall be subject to the terms applicable to an appointment in that case under the provisions of that instrument.

**42. *Supplemental provisions as to appointment of trustees***

No. 5770 s. 42.

- (1) On the appointment of a trustee for the whole or any part of trust property—
- (a) the number of trustees may, subject to the restrictions imposed by this Act on the number of trustees, be increased; and
  - (b) a separate set of trustees, not exceeding four, may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or, if only one trustee was originally appointed, then, save as hereinafter provided, one separate trustee may be so appointed; and
  - (c) it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed,

S. 42(1)(c)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.11).



and a sole trustee when appointed will be able to give valid receipts for all capital money<sup>13</sup>, a trustee shall not be discharged from his trust unless there will be either a trustee company or at least two individuals to act as trustees to perform the trust; and

- (d) any assurance or thing requisite for vesting the trust property, or any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done.

S. 42(2)  
amended by  
No. 55/1987  
s. 57(3).

- (2) <sup>14</sup>Nothing in this Act shall authorize the appointment of a sole trustee, not being the State Trust or a trustee company, where the trustee when appointed would not be able to give valid receipts for all capital money arising under the trust.

No. 5770 s. 43.

#### 43. *Evidence as to vacancy in a trust*

- (1) A statement contained in any instrument by which a new trustee is appointed, to the effect that a trustee—
- (a) is dead; or
  - (b) has remained out of Victoria for more than one year without having properly delegated the execution of the trust; or
  - (c) desires to be discharged from all or any of the trusts or powers reposed in or conferred upon him; or
  - (d) refuses or is unfit to act, or is incapable of acting in all or any of the trusts or powers reposed in or conferred on him; or
  - (e) is a minor; or
  - (f) is not entitled to a beneficial interest in the trust property in possession—

S. 43(1)(e)  
amended by  
No. 9427  
s. 6(1).

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shall, in favour of a subsequent purchaser in good faith, be conclusive evidence of the matter stated.

- (2) In favour of any subsequent purchaser in good faith any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, depending on the appointment, shall be valid.
- (3) The protection afforded to a purchaser by this section shall extend to the Registrar-General, Registrar of Titles, 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.

**44. *Retirement of trustee without a new appointment***

No. 5770 s. 44.

- (1) This section applies where a trustee declares by writing that he is desirous of being discharged from all or any of the trusts reposed in him, and after his discharge there will be either a trustee company or at least two individuals to act as trustees to perform the trusts 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 he has declared he desires to be discharged; and
  - (b) subject to sub-section (3) of this section, shall, by the writing by which consent is given to his discharge, be discharged from the trusts under this Act—

S. 44(1)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.12).

without any new trustee being appointed in his place.

- (3) Any conveyance requisite for vesting in the continuing trustees alone the property subject to the trusts from which the retiring trustee is to be discharged shall be executed or done; and in respect of any part of the trust property for the vesting of which in the continuing trustees a conveyance is necessary, the retiring trustee shall not be discharged until that part is duly conveyed.

No. 5770 s. 45.

**45. *Vesting of trust property in new trustee or continuing trustees***

- (1) Where a new trustee is appointed the execution of the instrument of appointment shall, subject to this section without any conveyance vest in the persons who become and are the trustees, as joint tenants and for the purposes of the trust, the trust property for which the new trustee is appointed.
- (2) In any case to which the last preceding section applies the execution of the instrument of discharge shall, subject to this section, without any conveyance vest in the continuing trustees alone, as joint tenants and for the purposes of the trust, all the property subject to the trusts from which the retiring trustee has declared that he is desirous of being discharged.
- (3) Sub-sections (1) and (2) of this section shall not apply—
- (a) to land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock;
  - (b) to land held under a lease which contains any covenant condition or agreement against assignment or disposing of the land without licence or consent unless—

- (i) before the execution of the instrument of appointment or instrument of discharge (as the case may be) the requisite licence or consent has been obtained; or
- (ii) by virtue of any statute or rule of law such application would not operate as a breach of covenant or give rise to a forfeiture;
- (c) to any property (including property subject to the operation of the **Transfer of Land Act 1958**) which is only transferable in books kept by a company or other body or in manner directed by or under an Act of Parliament.

S. 45(3)(b)(i)  
amended by  
No. 10087  
s. 3(1).

In this sub-section "**lease**" includes an under-lease and an agreement for a lease or under-lease.

- (4) In the case of any property referred to in the last preceding sub-section the execution of the instrument of appointment of a new trustee or of the instrument of discharge (as the case may be) shall for the purposes of the trust vest in the persons who become and are the trustees or in the continuing trustees (as the case may be) the right to call for a conveyance of the property and to sue for and recover the property.
- (5) For the purposes of registration under Part 1 of the **Property Law Act 1958**—
  - (a) in the case of an instrument of appointment of a new trustee the appointor shall be deemed the conveying party and the conveyance shall be deemed to be made by him under a power conferred by this Act; and

(b) in the case of an instrument of discharge the retiring trustee and any person consenting in such instrument to his discharge shall be deemed the conveying parties and the conveyance shall be deemed to be made by them under a power conferred by this Act.

(6) In this section—

**"instrument of discharge"** means an instrument containing the consent or consents referred to in sub-section (2) of section forty-four of this Act and executed in a case to which section forty-four applies; and

**"continuing trustees"** and **"retiring trustee"** have the same meaning as in sub-section (3) of section forty-four of this Act.

No. 5770 s. 46.

**46. *Disclaimer of trusts on renunciation of probate***

- (1) If a person who is 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 disclaimer of the trust contained in the will.
- (2) Where any person who is appointed by will both executor and trustee thereof renounces probate, or after being duly cited or summoned fails to apply for probate, or dies before probate is granted to him, 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.

No. 5770 s. 47.

**47. *Trustee company obtaining grant to become trustee***

*Trustee Act 1958*  
*Act No. 6401/1958*

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- (1) Where a trustee company has pursuant to the provisions of any Act obtained a grant of probate of a will or letters of administration with the will annexed (as the case may be) upon the authority of any person who has been appointed by the will of a deceased person to be both executor and trustee thereof then by virtue of the grant and without further appointment the trustee company shall be deemed to be appointed trustee of the will in the place of the person by whose authority the trustee company applied for the grant.
- S. 47(1)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item  
12.13(a)(b)).
- (2) Where any person who is appointed by will both executor and trustee thereof, and who has obtained a grant of probate, appoints by power of attorney pursuant to section 16 of the **Trustee Companies Act 1984** a trustee company to act as executor in his stead, the trustee company while so acting shall, by virtue of this section and without further appointment, be deemed in the place of that person to have all the powers and discretions of that person as a trustee of the will; and section 16 of the **Trustee Companies Act 1984** shall apply with respect to every act of the trustee company acting as trustee of the will within the powers conferred by this sub-section in like manner as they apply with respect to every act of the trustee company acting as executor of the will.
- S. 47(2)  
amended by  
Nos 10168  
s. 3, 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.14(a)-  
(d)).
- (3) Where any person who is appointed by will to be both executor and trustee thereof, and who has obtained a grant of probate, appoints pursuant to section 17 of the **Trustee Companies Act 1984** a trustee company to perform and discharge all the acts and duties of that person as executor, the trustee company shall by virtue of this section and without further appointment be deemed to be appointed trustee of the will in the place of that
- S. 47(3)  
amended by  
Nos 10168  
s. 3, 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.15(a)-  
(d)).

person; and section 17 of the **Trustee Companies Act 1984** shall apply with respect to every act of the trustee company acting as trustee of the will in like manner as they apply with respect to every act of the trustee company acting as executor of the will.

S. 47(4)  
amended by  
Nos 55/1987  
s. 57(3),  
45/1994  
s. 42(Sch.  
item 12.16).

- (4) This section shall apply only if and so far as a contrary intention is not expressed in the will or instrument of appointment or power of attorney pursuant to which the trustee company obtains authority to act.
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**PART IV—POWERS OF THE COURT**

**Division 1—Appointment of New Trustees**

**48. *Power of Court to appoint new trustees***

No. 5770 s. 48.

- (1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

S. 48(1)  
amended by  
Nos 9576  
s. 11(1),  
55/1987  
s. 57(3).

In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who is convicted on indictment or presentment of any offence, or is a patient within the meaning of the **Mental Health Act 1986**, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.

- (2) Nothing in this section gives power to appoint an executor or administrator.

**49. *Effect of order under the preceding section***

No. 5770 s. 49.

An order under the last preceding section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

**50. *Powers of new trustee appointed by the Court***

No. 5770 s. 50.

Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance or



otherwise, vested in him, have the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument (if any) creating the trust.

### Division 2—Vesting Orders

No. 5770 s. 51.

#### 51. *Vesting orders*

- (1) The Court may make an order, in this Act called a vesting order, which shall have effect as provided in section fifty-eight of this Act.
- (2) A vesting order may be made in any of the following cases, namely—
  - (a) where the Court appoints or has appointed a new trustee;
  - (b) where a new trustee has been appointed out of court under any statutory or express power;
  - (c) where a trustee retires or has retired;
  - (d) where a trustee is a minor;
  - (e) where a trustee is a patient within the meaning of the **Mental Health Act 1986**;
  - (f) where a trustee is out of the jurisdiction of the Court;
  - (g) where a trustee cannot be found;
  - (h) where a trustee being a corporation is dissolved;
  - (i) where a trustee neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue for or recover any property according to the direction of the person absolutely entitled to

S. 51(2)(d)  
amended by  
Nos 9075  
s. 5(1), 9427  
s. 5.

S. 51(2)(e)  
substituted by  
No. 59/1986  
s. 143(2).

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- the same for twenty–eight days next after a request in writing has been made to him by the person so entitled;
- (j) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any property;
  - (k) where, as to the last trustee known to have been entitled to or possessed of any property, it is uncertain whether he is living or dead;
  - (l) where there is no personal representative of the last trustee who was entitled to or possessed of any property or where it is uncertain who is the personal representative of such trustee or where the personal representative of such a trustee cannot be found;
  - (m) where any person neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue for or recover any property in accordance with the terms of an order of the Court;
  - (n) where the Court might have made a vesting order if this Act had not been passed;
  - (o) where property is vested in a trustee and it appears to the Court to be expedient to make a vesting order.
- (3) The provisions of sub-section (2) of this section where applicable 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.

**52. *In whom property to be vested etc.***

No. 5770 s. 52.

- (1) Where the making of a vesting order is consequential on the appointment of a new trustee, the property shall be vested in the persons who, on the appointment, are the trustees.
- (2) Where the making of such order is consequential on the retirement of one or more of a number of trustees, the property may be vested in the continuing trustees alone.
- (3) Subject to the provisions of sub-section (1) of this section, a vesting order may vest the property in any such person in any such manner and for any such estate or interest as the Court may direct, or may release or dispose of any contingent right to such person as the Court may direct.
- (4) The fact that a vesting order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned or referred to in section fifty-one of this Act shall be conclusive evidence of the matter so alleged in any Court upon any question as to the validity of the order.
- (5) Nothing in this Act shall prevent the Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained, or from making a further vesting order.
- (6) Where by reason of the dissolution of a corporation either before or after the commencement of this Act a legal estate in any property has determined, the Court may by order create a corresponding estate and vest the same in the person who would have been entitled to the estate which determined, had it remained a subsisting estate.

Where any property is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the property on any trust, the Court may make an order releasing the property from the contingent right or may make an order vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the property.

**54. *Vesting order in place of conveyance by minor or mentally ill mortgagee***

Where any person entitled to or possessed of any property by way of mortgage is a minor or a patient within the meaning of the **Mental Health Act 1986** the Court may make an order vesting or releasing or disposing of the property in like manner as in the case of a trustee under like disability.

No. 5770 s. 54.  
S. 54  
amended by  
Nos 9075  
s. 5(1), 9427  
s. 5, 59/1986  
s. 143(2).

**55. *Vesting orders in relation to minor's beneficial interests***

Where a minor is beneficially entitled to any property the Court may, with a view to the application of the capital or income thereof for the maintenance, education, advancement or benefit of the minor, make an order—

- (a) appointing a person to convey such property;  
or
- (b) in the case of stock, or a thing in action, vesting in any person the right to transfer or call for a transfer of such stock, or to receive the dividends or income thereof, or to sue for and recover such thing in action, upon such terms as the Court thinks fit.

No. 5770 s. 55.  
S. 55  
amended by  
Nos 9075  
s. 5(1), 9427  
s. 5.

**56. *Vesting order consequential on order for sale or***

No. 5770 s. 56.

***mortgage of land***

Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of any interest in the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed (as the case may be) as a trustee for the purposes of this Act, and the Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate or interest as the Court thinks fit in the purchaser or mortgagee or in any other person.

No. 5770 s. 57.

**57. *Vesting order consequential on judgment for specific performance etc.***

Where a judgment is given for the specific performance of a contract concerning any interest in land, or for partition or sale in lieu of partition or exchange of any interest in land, or generally where any judgment is given for the conveyance of any interest in land either in cases arising out of the doctrine of election or otherwise, the Court may declare—

- (a) that any of the parties to the action are trustees of any interest in the land or any part thereof within the meaning of this Act; or
- (b) that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any deceased person who was during his lifetime a party to the contract or transaction concerning which the judgment is given, are the interests of persons who, on coming into

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existence, would be trustees within the meaning of this Act—

and thereupon the Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

**58. *Effect of vesting order***

No. 5770 s. 58.

- (1) In the case of a vesting order consequential on the appointment of a new trustee, or the retirement of a trustee, the vesting order shall have the same effect as if the persons who before the appointment or retirement were the trustees (if any) had duly executed all proper conveyances of the property for such estate or interest as the Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity, and had duly executed all proper conveyances of the property for such estate or interest as the Court directs.
- (2) In every other case the vesting order shall have the same effect as if the trustee or other person or description or class of persons to whose rights, or supposed rights, the provisions of this Part respectively relate, had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.
- (3) In the case of land subject to the operation of the **Transfer of Land Act 1958** the land shall not vest until the appropriate recordings are made in accordance with the provisions of that Act.
- (4) In the following cases the vesting order shall vest in the person named in the order the right to transfer or call for a transfer of the property or security, that is to say, in the case of—

S. 58(3)  
amended by  
No. 18/1989  
s. 13(Sch. 2  
item 93).

- (a) any property that does not come within subsection (3), but a transfer of which is required to be registered by or under any Act, whether of this State or otherwise;
  - (b) any security that is only transferable in books kept by a corporation company or other body, or in manner directed by or under any Act, whether of this State or otherwise.
- (5) In the case of any security or chose in action the vesting order shall vest in the person named in the order the right to receive the dividends or income thereof, and to sue for or recover the chose in action.
- (6) The person in whom the right to transfer or call for the transfer of any property or security is so vested may transfer the property or security to himself or any other person according to the order, and all corporations companies associations and persons shall obey the order.
- (7) After notice in writing of the vesting order it shall not be lawful for any company association or person to transfer any property or security to which the order relates, or to pay any dividends thereon except in accordance with the order.

No. 5770 s. 59.

**59. *Directions etc. as to manner of transferring stock etc.***

The Court may make declarations and give directions concerning the manner in which the right to transfer any stock or thing in action vested under the provisions of this Act is to be exercised.

No. 5770 s. 60.

**60. *Power to appoint person to convey***

In all cases where a vesting order can be made under any of the foregoing provisions, the Court may, if it is more convenient, appoint a person to convey the property or release any right, and a

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conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

**61. *Vesting orders of charity property***

No. 5770 s. 61.

The powers conferred by this Act as to vesting orders may be exercised for vesting any property in any trustee of a charity or society over which the Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the Court under its general or statutory jurisdiction.

**62. *Commission concerning persons of unsound mind***

No. 5770 s. 62.

Upon any application under this Act concerning a person alleged to be of unsound mind the Court may, if it thinks fit, direct that the Master of the Supreme Court shall personally examine such person and shall take such evidence and call for such information as to such Master seems necessary in order to enable him to report to the Court whether such person is of unsound mind and the Court may postpone making any order until such report is made.

**Division 3—Jurisdiction to Make Other Orders**

**63. *Power of Court to authorize dealings with trust property***

No. 5770 s. 63.

- (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by law, the Court may by



order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions (if any) as the Court thinks fit and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income.

- (2) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order.
- (3) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

S. 63A  
inserted by  
No. 6915 s. 2.

**63A. *Power of Court to vary trusts***

- (1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any will settlement or other disposition, the Court may if it thinks fit by order approve on behalf of—
  - (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of minority or other incapacity is incapable of assenting; or
  - (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class (as the case may be) if the said date had fallen or the said event had happened at the date of the application to the Court; or

S. 63A(1)(a)  
amended by  
No. 9427  
s. 6(1).

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- (c) any person unborn; or
  - (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined—

any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees or managing or administering any of the property subject to the trusts:

Provided that except by virtue of paragraph (d) of this sub-section the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

- (2) In the foregoing sub-section "**protective trusts**" means trusts specified in paragraphs (a) and (b) of sub-section (1) of section thirty-nine of this Act or any like trusts, "**the principal beneficiary**" has the same meaning as in the said sub-section (1) and "**discretionary interest**" means an interest arising under the trust specified in paragraph (b) of the said sub-section (1) or any like trust.
- (3) Notice of an application to the Court for an order pursuant to sub-section (1) of this section shall be given to such persons as the Court may direct.
- (4) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by Act of Parliament.
- (5) Nothing in this section shall limit the powers conferred by section sixty-three of this Act section sixty-four of the **Settled Land Act 1958** or

section one hundred and seventy-one of the  
**Property Law Act 1958.**

No. 5770 s. 64.

**64. *Persons entitled to apply for orders***

- (1) An order under this Act for the appointment of a new trustee or concerning any property, subject to a trust, may be made on the application of any person beneficially interested in the property, whether under disability or not, or on the application of any person duly appointed trustee thereof.
- (2) An order under this Act concerning property subject to a mortgage may be made on the application of any person beneficially interested in the property subject to the mortgage, whether under disability or not, or of any person interested in the money secured by the mortgage.

No. 5770 s. 65.

S. 65  
amended by  
No. 35/1996  
s. 453(Sch. 1  
item 85).

**65. *Persons entitled to apply for trustee***

Where in any action the Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the action and give judgment therein against that person in his character of a trustee as if he had been duly served, or had entered an appearance in the action, and had also appeared by his legal practitioner at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

No. 5770 s. 66.

**66. *Power to charge costs or to order payment***

The Court may order the costs and expenses of an incident to any application for an order appointing a trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer

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in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court seems just.

**67. *Power to relieve trustee from personal liability***

No. 5770 s. 67.

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 he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same.

**68. *Indemnity for breach of trust*<sup>15</sup>**

No. 5770 s. 68.

Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary the Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman restrained from anticipation, make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him.

This section applies to breaches of trust committed as well before as after the commencement of this Act.

**Division 4—Payment into Court**

**69. *Payment into court by trustees***

No. 5770 s. 69.

- (1) Trustees or the majority of trustees having in their hands or under their control money or securities subject to a trust may pay the same into court; and the same shall, subject to rules of court, be dealt with according to the orders of the Court.
- (2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.
- (3) Where money or securities are vested in any persons as trustees and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the Court may order the payment into court to be made by the majority without the concurrence of the other or others.
- (4) Where any such money or securities are deposited with any banker broker or other depositary, the Court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.
- (5) Every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.
- (6) Notwithstanding the repeal of the **Trusts Act 1915** where moneys have been paid or securities transferred or deposited under the provisions of sections sixty-one and sixty-two of the said Act the Court may on application by any person interested make any such order as is authorized by section sixty-three or section sixty-four of the said Act and every such order shall have the same effects and consequences as if formerly made under such sections or the Court may make such

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other order as it thinks fit and in particular may make an order that such moneys or securities shall be paid into court so as to come under the provisions of the preceding sub-sections of this section or any of them.

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**PART V—GENERAL PROVISIONS**

No. 5770 s. 70.

**70. *Application of Act to Settled Land Act trustees***

- (1) <sup>16</sup>All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, apply to and include trustees for the purposes of the **Settled Land Act 1958**, and trustees for the purpose of the management of land during a minority, whether such trustees are appointed by the Court or by the settlement or under provisions contained in any instrument.
- (2) Where, either before or after the commencement of this Act, trustees of a settlement have been appointed by the Court for the purposes of the **Settled Land Act 1958**, or any corresponding previous enactment, then after the commencement of this Act—
  - (a) the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the settlement, though not trustees for the purposes of the said Act or enactment where thereby appointed; or
  - (b) if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being for the purposes of the said Act or enactment or the personal representatives of the last surviving or continuing trustee for those purposes—

shall have the powers conferred by this Act to appoint new or additional trustees of the settlement for the purposes of the said Act or enactment.

**71. Appointment of certain corporations as custodian trustees**

No. 5770 s. 71.

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S. 71(1)  
repealed by  
No. 55/1987  
s. 57(3).

- (2) For the purposes of this section "**approved corporation**" means any body corporate which—
- (a) has been formed for the purpose of—
    - (i) promoting art science religion education charity or any other useful object; or
    - (ii) acting as trustee in respect of any trusts for the benefit of any body which has for or included in its principal objects the promotion of art science religion education charity or any other useful object; and
  - (b) applies its profits (if any) or other income in promoting all or any of such purposes; and
  - (c) is approved by Order of the Governor in Council published in the Government Gazette as a corporation which may be appointed custodian trustee pursuant to this section.
- (3) The State Trust or an approved corporation may be appointed custodian trustee by—
- (a) the trust instrument; or
  - (b) any person having power to appoint new trustees; or
  - (c) order of the Court on the application of a beneficiary or of any person on whose application the Court would have power to appoint a new trustee.

S. 71(3)  
inserted by  
No. 55/1987  
s. 57(3).



*Trustee Act 1958*  
*Act No. 6401/1958*

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s. 71

S. 71(3A)  
inserted by  
No. 45/1994  
s. 42(Sch.  
item 12.17).

(3A) State Trustees may consent to be appointed custodian trustee whether or not the number of trustees has been reduced below the original number.

S. 71(4)  
inserted by  
No. 55/1987  
s. 57(3).

(4) The following apply if the State Trust or an approved corporation is appointed custodian trustee—

- (a) the trust property is to be transferred to the custodian trustee as sole trustee;
- (b) the management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust remain vested in the trustees other than the custodian trustee as managing trustees;
- (c) the custodian trustee has custody of all securities and documents of title relating to the trust property but the managing trustees have free access to the securities and documents and are entitled to take copies or extracts;
- (d) the custodian trustee must concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them unless the matter is a breach of trust or involves a personal liability;
- (e) if the custodian trustee does not concur the custodian trustee is not liable for any act or default on the part of a managing trustee;
- (f) any sum payable to or out of the income or capital of the trust property is to be paid to or by the custodian trustee;
- (g) the custodian trustee may allow the dividends and other income derived from the

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- trust property to be paid to the managing trustees or as they direct;
- (h) if paragraph (g) applies the custodian trustee is not answerable for any loss or misapplication of that income;
  - (i) the power of appointing a new trustee when exercisable by any continuing trustee is to be exercised by the managing trustees alone;
  - (j) the State Trust or an approved corporation has the same power to apply to the Court for the appointment of a new trustee as any other trustee;
  - (k) if the custodian trustee acts in good faith the custodian trustee is not liable for accepting as correct and acting upon any written statements by the managing trustees as to any matter of fact upon which the title to any trust property may depend or acting upon any legal advice obtained by the managing trustees independently of the custodian trustee;
  - (l) any matter in dispute between the custodian trustee and any managing trustee may be submitted in a summary manner to the Court whose decision is final and binding;
  - (m) the custodian trustee, a managing trustee or any beneficiary may apply to the Court to terminate the custodian trusteeship;
  - (n) if the Court is satisfied that the custodian trusteeship should be terminated the court may make any orders and give any directions it considers appropriate.

**72. *Trust estates not affected by trustee becoming a convict***<sup>17</sup>

No. 5770 s. 72.

s. 74

*Trustee Act 1958*  
*Act No. 6401/1958*

Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the **Crimes Act 1958** vest in any such curator as may be appointed under that Act, but shall remain vested in the trustee or mortgagee, and shall on his death pass to his co-trustee in right or survivorship or devolve on his personal representative as if he had not become a convict:

Provided that this enactment shall not affect the title to the property so far as it relates to any beneficial interest therein of any such trustee or mortgagee.

S. 73  
repealed by  
No. 7750  
s. 20(1).

\* \* \* \* \*

No. 5770 s. 74.

**74. *Application of income of settled residuary estate***

- (1) Where, under the provisions of the will of a person, in this section called "the deceased", who dies on or after the first day of January One thousand nine hundred and fifty-four, any real or personal estate included (either by specific or general description) in a residuary gift is settled by way of succession, no part of the income of that property shall be applicable in or towards the payment of the debts and liabilities which have accrued at the date of death or in payment of the funeral, testamentary and administration expenses, or of any legacies bequeathed by the will.
- (2) The income of the settled property shall be applicable in priority to any other assets in payment of the interest (if any) accruing due on the debts, liabilities, funeral, testamentary and administration expenses, and legacies after the date of the death of the deceased and up to the payment thereof, and the balance of the income

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shall be payable to the person for the time being entitled to the income of the property.

- (3) Where, after the death of the deceased, income of assets which are ultimately applied in or towards payment of the debts, liabilities, funeral, testamentary and administration expenses, and legacies, arises pending such application, that income shall, for the purposes of this section, be deemed income of the residuary estate of the deceased.
- (4) In this section "**administration expenses**" includes duty payable under the **Administration and Probate Act 1958** and estate duty payable under any Commonwealth Act and any other duty payable in any State or country outside Victoria 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.
- (5) This section shall only affect the rights of beneficiaries under the will as between themselves, and shall not affect the rights of creditors of the deceased.
- (6) This section shall have effect subject to the provisions (if any) to the contrary contained in the will and to the provisions of any Act as to charges on property of the deceased.

**75. *Certain periodical payments to be applied as income***

No. 5770 s. 75.

- (1) Unless a contrary intention appears in the will, this section shall apply to—
  - (a) every payment of an annuity contributed for or purchased by for or on behalf of a deceased person who dies on or after the first day of January One thousand nine hundred and fifty-four; and

(b) every periodical payment howsoever described paid in terms of or pursuant to a policy of insurance on the life of a deceased person who dies on or after the first day of January One thousand nine hundred and fifty-four and providing for payments to be made thereunder for a period of years or until a specified date or on the occurrence of a specified event or for the life of any person—

which is received as part of the estate of the deceased person by the executor or administrator with the will annexed of the deceased person or by the trustee of his estate.

(2) Every payment to which this section applies shall be paid or applied as if it were income of the estate of the deceased person received on the date on which that payment is received, and so that the dispositions trusts and powers applicable in the administration of the estate with respect to income received on that date shall apply with respect to that payment.

No. 5770 s. 76.

**76. *Payment to representative official on behalf of residents or subjects of countries outside Australia***

With respect to moneys and personal chattels payable or deliverable by any trustee to a resident or subject of any country outside Australia the Governor in Council may, if in his opinion it is difficult or impracticable for the trustee to pay or deliver such moneys or chattels to the person entitled thereto, by notice published in the Government Gazette, notify that such moneys or chattels may be paid or delivered to a specified representative official of such country in Victoria on behalf of such resident or subject; and the receipt in writing of such specified representative

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official shall be a good discharge to the trustee therefor.

**77. *Commission allowable to trustee of a settlement***

No. 5770 s. 77.

It shall be lawful for the Court or the Master of the Court to allow out of the trust funds to the trustee of a settlement such commission or percentage not exceeding five per centum for his pains and trouble as is just and reasonable.

**78. *Indemnity to banks etc.***

No. 5770 s. 78.

The foregoing provisions of this Act, and every order purporting to be made by the court under the said provisions shall be a complete indemnity to all chartered and incorporated banking companies and all other companies and associations whatsoever, and all persons for any acts done pursuant thereto, and it shall not be necessary for any company association or person to inquire concerning the propriety of the order, or whether the Court had jurisdiction to make it.

S. 78  
amended by  
Nos 10087  
s. 3(1),  
29/1988  
s. 57(18)(c)(i)  
(ii), 94/1990  
s. 40(14)(b)  
(i)(ii).

**SCHEDULES**

**FIRST SCHEDULE**

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<i>Number of Act</i>	<i>Title of Act</i>	<i>Extent of Repeal</i>
5770	<b>Trustee Act 1953</b>	So much as is not already repealed
5896	<b>Statute Law Revision Act 1955</b>	Item in Schedule referring to <b>Trustee Act 1953</b>
5914	<b>Limitation of Actions Act 1955</b>	Clause 43 of Schedule
5967	<b>Home Finance Act 1956</b>	Section 4(4)

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**SECOND SCHEDULE**

A.B., late of [set out the usual residence and addition or other description of the deceased]. Creditors, next of kin, and others having claims in respect of the estate of the deceased, who died [set out the date of death with such accuracy as the information of the trustee, personal representative, or applicant for grant of representation permits] are required by the trustee [or personal representative or applicant for grant of administration], of

[set out name and address of trustee or personal representative or applicant for grant of administration] to send particulars to him by the \* day of 19 after which date the trustee [or personal representative or applicant for grant of administration] may convey or distribute the assets, having regard only to the claims of which he then has notice.

[Date]

**\* A date not less than two months from date of advertisement.**



**NOTES**

**1. General Information**

The **Trustee Act 1958** was assented to on 30 September 1958 and came into operation on 1 April 1959: Government Gazette 18.3.59 page 893.

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## 2. Table of Amendments

This Version incorporates amendments made to the **Trustee Act 1958** by Acts and subordinate instruments.

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### **Statute Law Revision Act 1959, No. 6505/1959**

*Assent Date:* 5.5.59  
*Commencement Date:* 1.4.59: s. 1(2)  
*Current State:* All of Act in operation

### **Trustee (Amendment) Act 1959, No. 6511/1959**

*Assent Date:* 12.5.59  
*Commencement Date:* 12.5.59  
*Current State:* All of Act in operation

### **Local Government (Amendment) Act 1959, No. 6535/1959**

*Assent Date:* 19.5.59  
*Commencement Date:* 10.6.59: Government Gazette 10.6.59 p. 1668  
*Current State:* All of Act in operation

### **Trustee (Mortgages) Act 1959, No. 6580/1959**

*Assent Date:* 8.12.59  
*Commencement Date:* 8.12.59  
*Current State:* All of Act in operation

### **Statute Law Revision Act 1962, No. 6867/1962**

*Assent Date:* 16.4.62  
*Commencement Date:* 16.4.62  
*Current State:* All of Act in operation

### **Trustee (Variation of Trusts) Act 1962, No. 6915/1962**

*Assent Date:* 20.11.62  
*Commencement Date:* 20.11.62  
*Current State:* All of Act in operation

### **Trustee (Mortgages) Act 1962, No. 6963/1962**

*Assent Date:* 18.12.62  
*Commencement Date:* 18.12.62  
*Current State:* All of Act in operation

### **Statute Law Revision Act 1965, No. 7332/1965**

*Assent Date:* 14.12.65  
*Commencement Date:* 14.12.65: s. 3  
*Current State:* All of Act in operation

### **Strata Titles Act 1967, No. 7551/1967**

*Assent Date:* 17.3.67  
*Commencement Date:* S. 50 on 1.7.67: Government Gazette 24.5.67 p. 1754  
*Current State:* This information relates only to the provision/s amending the **Trustee Act 1958**

### **Perpetuities and Accumulations Act 1968, No. 7750/1968**

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*Trustee Act 1958*  
*Act No. 6401/1958*

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*Assent Date:* 10.12.68  
*Commencement Date:* 10.12.68  
*Current State:* All of Act in operation

**Trustee (Amendment) Act 1969, No. 7791/1969**

*Assent Date:* 15.4.69  
*Commencement Date:* 15.4.69  
*Current State:* All of Act in operation

**Trustee (Authorized Investments) Act 1969, No. 7833/1969**

*Assent Date:* 20.5.69  
*Commencement Date:* 20.5.69  
*Current State:* All of Act in operation

**Victorian Development Corporation Act 1973, No. 8428/1973**

*Assent Date:* 17.4.73  
*Commencement Date:* 8.5.73: Government Gazette 8.5.73 p. 1009  
*Current State:* All of Act in operation

**Age of Majority Act 1977, No. 9075/1977**

*Assent Date:* 6.12.77  
*Commencement Date:* 1.2.78: Government Gazette 11.1.78 p. 97  
*Current State:* All of Act in operation

**Port of Melbourne Authority Act 1978, No. 9178/1978**

*Assent Date:* 8.11.78  
*Commencement Date:* 8.11.78  
*Current State:* All of Act in operation

**Trustee (Authorized Investments) Act 1978, No. 9204/1978**

*Assent Date:* 5.12.78  
*Commencement Date:* 5.12.78  
*Current State:* All of Act in operation

**Instruments (Powers of Attorney) Act 1980, No. 9421/1980**

*Assent Date:* 20.5.80  
*Commencement Date:* 1.7.80: Government Gazette 25.6.80 p. 2123  
*Current State:* All of Act in operation

**Statute Law Revision Act 1980, No. 9427/1980**

*Assent Date:* 27.5.80  
*Commencement Date:* 27.5.80: s. 6(2)  
*Current State:* All of Act in operation

**Victorian Economic Development Corporation Act 1981, No. 9574/1981**

*Assent Date:* 26.5.81  
*Commencement Date:* 1.7.81: Government Gazette 3.6.81 p. 1778  
*Current State:* All of Act in operation

**Crimes (Classification of Offences) Act 1981, No. 9576/1981**

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*Assent Date:* 26.5.81  
*Commencement Date:* 1.9.81: Government Gazette 26.8.81 p. 2799  
*Current State:* All of Act in operation

**Trustee (Authorized Investments) Act 1981, No. 9653/1981**

*Assent Date:* 15.12.81  
*Commencement Date:* 15.12.81  
*Current State:* All of Act in operation

**Companies (Consequential Amendments) Act 1981, No. 9699/1981**

*Assent Date:* 5.1.82  
*Commencement Date:* S. 23 on 1.7.82: s. 2(1)  
*Current State:* This information relates only to the provision/s amending the **Trustee Act 1958**

**Trustee (Authorized Investments) Act 1982, No. 9816/1982**

*Assent Date:* 14.12.82  
*Commencement Date:* 7.12.83: Government Gazette 7.12.83 p. 3886  
*Current State:* All of Act in operation

**Water and Sewerage Authorities (Restructuring) Act 1983, No. 9895/1983**

*Assent Date:* 7.6.83  
*Commencement Date:* 7.6.83  
*Current State:* All of Act in operation

**Statute Law Revision Act 1983, No. 9902/1983**

*Assent Date:* 15.6.83  
*Commencement Date:* 15.6.83: s. 2(2)  
*Current State:* All of Act in operation

**Water and Sewerage Authorities (Further Restructuring) Act 1984, No. 10048/1984**

*Assent Date:* 8.5.84  
*Commencement Date:* Ss 5(2), 12(1), 14(4) on 1.7.84: Government Gazette 27.6.84 pp 2068, 2076, 2086  
*Current State:* This information relates only to the provisions amending the **Trustee Act 1958**

**Statute Law Revision Act 1984, No. 10087/1984**

*Assent Date:* 22.5.84  
*Commencement Date:* 22.5.84: s. 3(2)  
*Current State:* All of Act in operation

**Trustee (Amendment) Act 1984, No. 10143/1984**

*Assent Date:* 13.11.84  
*Commencement Date:* 1.12.84: Government Gazette 21.11.84 p. 4143  
*Current State:* All of Act in operation

**Trustee Companies Act 1984, No. 10168/1984**

*Trustee Act 1958*  
*Act No. 6401/1958*

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*Assent Date:* 20.11.84  
*Commencement Date:* 5.12.84: Government Gazette 5.12.84 p. 4329  
*Current State:* All of Act in operation

**Trustee (Secondary Mortgage Market Amendment) Act 1985, No. 10230/1985**

*Assent Date:* 10.12.85  
*Commencement Date:* 10.12.85  
*Current State:* All of Act in operation

**Building Societies Act 1986, No. 8/1986**

*Assent Date:* 8.4.86  
*Commencement Date:* 1.5.86: Government Gazette 30.4.86 p. 1114  
*Current State:* All of Act in operation

**Courts Amendment Act 1986, No. 16/1986**

*Assent Date:* 22.4.86  
*Commencement Date:* S. 24 on 1.7.86: Government Gazette 25.6.86 p. 2180  
*Current State:* This information relates only to the provision/s amending the **Trustee Act 1958**

**Mental Health Act 1986, No. 59/1986**

*Assent Date:* 3.6.86  
*Commencement Date:* S. 143(2) on 1.10.87: Government Gazette 30.9.87 p. 2585  
*Current State:* This information relates only to the provision/s amending the **Trustee Act 1958**

**Supreme Court Act 1986, No. 110/1986**

*Assent Date:* 16.12.86  
*Commencement Date:* 1.1.87: s. 2  
*Current State:* All of Act in operation

**Trustee (Amendment) Act 1986, No. 112/1986 (as amended by No. 65/1988)**

*Assent Date:* 16.12.86  
*Commencement Date:* Ss 1–3, 5 (except sub-sections (1)(b) and (2)) on 1.11.87: Government Gazette 28.10.87 p. 2880; ss 4, 5(1)(b)(2), 6 on 7.6.88: s. 2(2)  
*Current State:* All of Act in operation

**State Trust Corporation of Victoria Act 1987, No. 55/1987**

*Assent Date:* 20.10.87  
*Commencement Date:* 2.11.87: Government Gazette 28.10.87 p. 2925  
*Current State:* All of Act in operation

**Stamps (Secondary Mortgage Market) Act 1988, No. 17/1988 (as amended by No. 17/1993)**

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*Assent Date:* 11.5.88  
*Commencement Date:* Ss 4, 5, 7–9 on 7.6.88: Special Gazette (No. 48),  
7.6.88 p. 1  
*Current State:* This information relates only to the provision/s  
amending the **Trustee Act 1958**

**State Bank Act 1988, No. 29/1988**

*Assent Date:* 17.5.88  
*Commencement Date:* 9.6.88: Government Gazette 8.6.88 p. 1582  
*Current State:* All of Act in operation

**Subdivision Act 1988, No. 53/1988** (as amended by No. 47/1989)

*Assent Date:* 31.5.88  
*Commencement Date:* 30.10.89: Government Gazette 4.10.89 p. 2532  
*Current State:* All of Act in operation

**Transfer of Land (Computer Register) Act 1989, No. 18/1989**

*Assent Date:* 16.5.89  
*Commencement Date:* 3.2.92: Government Gazette 18.12.91 p. 3488  
*Current State:* All of Act in operation

**Trustee (Amendment) Act 1989, No. 45/1989**

*Assent Date:* 6.6.89  
*Commencement Date:* 30.8.89: Government Gazette 30.8.89 p. 2211  
*Current State:* All of Act in operation

**Water (Consequential Amendments) Act 1989, No. 81/1989**

*Assent Date:* 5.12.89  
*Commencement Date:* 1.11.90: Government Gazette 15.8.90 p. 2473  
*Current State:* All of Act in operation

**Mineral Resources Development Act 1990, No. 92/1990**

*Assent Date:* 18.12.90  
*Commencement Date:* S. 128(Sch. 1 item 30) on 6.11.91: Government  
Gazette 30.10.91 p. 2970  
*Current State:* This information relates only to the provision/s  
amending the **Trustee Act 1958**

**State Bank (Succession of Commonwealth Bank) Act 1990, No. 94/1990**

*Assent Date:* 18.12.90  
*Commencement Date:* S. 40(14) on 1.1.91: Special Gazette (No. 73)  
31.12.90 p. 1  
*Current State:* This information relates only to the provision/s  
amending the **Trustee Act 1958**

**State Trust Corporation of Victoria (Amendment) Act 1991, No. 84/1991**

*Assent Date:* 10.12.91  
*Commencement Date:* 1.1.92: Government Gazette 18.12.91 p. 3488  
*Current State:* All of Act in operation

**Rural Finance (VEDC Abolition) Act 1993, No. 115/1993**

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*Assent Date:* 7.12.93  
*Commencement Date:* 7.12.93  
*Current State:* All of Act in operation

**State Trustees (State Owned Company) Act 1994, No. 45/1994**

*Assent Date:* 7.6.94  
*Commencement Date:* Pt 1(ss 1–3), s. 27 on 7.6.94: s. 2(2); rest of Act on 1.7.94: Special Gazette (No. 36) 23.6.94 p. 1  
*Current State:* All of Act in operation

**Valuation of Land (Amendment) Act 1994, No. 91/1994**

*Assent Date:* 6.12.94  
*Commencement Date:* S. 36(11) on 1.1.95: s. 2(2)  
*Current State:* This information relates only to the provision/s amending the **Trustee Act 1958**

**Trustee and Trustee Companies (Amendment) Act 1995, No. 104/1995**

*Assent Date:* 5.12.95  
*Commencement Date:* 1.1.96: s. 2  
*Current State:* All of Act in operation

**Legal Practice Act 1996, No. 35/1996**

*Assent Date:* 6.11.96  
*Commencement Date:* S. 453(Sch. 1 item 85) on 1.1.97: s. 2(3)  
*Current State:* This information relates only to the provision/s amending the **Trustee Act 1958**

**Public Sector Reform (Miscellaneous Amendments) Act 1998, No. 46/1998**

*Assent Date:* 26.5.98  
*Commencement Date:* S. 7 (Sch. 1) on 1.7.98: s. 2(2)  
*Current State:* This information relates only to the provision/s amending the **Trustee Act 1958**

**Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998, No. 52/1998**

*Assent Date:* 2.6.98  
*Commencement Date:* S. 311(Sch. 1 item 98) on 1.7.98: Government Gazette 18.6.98 p. 1512  
*Current State:* This information relates only to the provision/s amending the **Trustee Act 1958**

**Metric Conversion (Trustee Act) Regulations 1973 S.R. No. 380/1973**

*Date of Making:* 18.12.73  
*Date of Commencement:* 18.12.73

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### 3. Explanatory Details

<sup>1</sup> S. 3A(2)(a): Section 37 of the **Valuation of Land (Amendment) Act 1994**, No. 91/1994 reads as follows:

**37. Transitional provision concerning references to registered valuers in contracts etc.**

- (1) This section applies to any contract, deed or other document that is in force on 1 January 1995 and that contains a reference to a registered valuer.
- (2) Unless the parties to the contract, deed or other document otherwise agree, a reference to a registered valuer in the contract, deed or document is to be read as a reference to a person who holds the qualifications or experience specified under section 13DA(1A) of the **Valuation of Land Act 1960**.

<sup>2</sup> S. 3A(2)(b): See Note 1.

<sup>3</sup> S. 13(3): Section 108(2) of the **Settled Land Act 1958**, No. 6367/1958 reads as follows:

- (2) In case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life or statutory owner exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life or statutory owner shall by virtue of this Part be necessary to the exercise by the trustees of the settlement or other persons of any power conferred by the settlement exercisable for any purpose provided for in this Act: Provided that where two or more persons constitute the tenant for life or statutory owner the consent of one only of such persons is to be deemed necessary for the exercise of any such power.



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<sup>4</sup> S. 13(6): Section 32(1) of the **Property Law Act 1958**, No. 6344/1958 reads as follows:

**32. *Power to postpone sale***

- (1) A power to postpone sale shall, in the case of every trust for sale of land, be implied unless a contrary intention appears.

<sup>5</sup> S. 24(3)(b): Section 67 of the **Settled Land Act 1958**, No. 6367/1958 reads as follows:

**67. *Sale and purchase of heirlooms under order of court***

- (1) Where personal chattels are settled so as to devolve with settled land, or to devolve therewith as nearly as may be in accordance with the law in force at the date of settlement, or are settled upon trusts declared by reference to the trusts affecting land, a tenant for life of the land with the consent of the trustees of the settlement or the order of the Court may sell the chattels or any of them.
- (2) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.
- (3) A sale or purchase of chattels under this section shall not be made without the consent of the trustees of the settlement or an order of the Court.

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<sup>6</sup> S. 28(3)(a): Section 69 of the **Property Law Act 1958**, No. 6344/1958 reads as follows:

**69. Receipt in deed or indorsed authority for payment to solicitor**

- (1) Where a banker or a barrister and solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, or produces a duly executed instrument under the **Transfer of Land Act 1958** the deed or instrument (as the case may be) shall be a sufficient authority to the person liable to pay or give the same for his paying or giving the same to the banker or barrister and solicitor, without the banker or barrister and solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt or instrument.
- (2) This section shall apply whether the consideration was paid or given before or after the commencement of this Act.
- (3) In this section "**instrument**" includes a discharge of mortgage and "**banker**" means a person acting in his official capacity as general manager or manager of any company solely or chiefly engaged in the ordinary business of banking or as the manager conducting for such company the business of any branch bank.

<sup>7</sup> S. 30: Compare section 36 of the **Property Law Act 1958**, No. 6344/1958 which reads as follows:

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**36. *Delegation of powers of management by trustees for sale***

- (1) The powers of and incidental to leasing, accepting surrenders of leases and management, conferred on trustees for sale whether by this Part or otherwise, may, until sale of the land, be revocably delegated from time to time, by writing, signed by them, to any person of full age (not being merely an annuitant) for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period; and in favour of a lessee such writing shall, unless the contrary appears, be sufficient evidence that the person named therein is a person to whom the powers may be delegated, and the production of such writing shall, unless the contrary appears, be sufficient evidence that the delegation has not been revoked.
- (2) Any power so delegated shall be exercised only in the names and on behalf of the trustees delegating the power.
- (3) The persons delegating any power under this section shall not, in relation to the exercise or purported exercise of the power, be liable for the acts or defaults of the person to whom the power is delegated, but that person shall, in relation to the exercise of the power by him, be deemed to be in the position and to have the duties and liabilities of a trustee.
- (4) Where, at the commencement of this Act, an order made under section one hundred and thirty-six of the **Settled Estates and Settled Land Act 1915** or any corresponding previous enactment, is in force, the person on whom any power is thereby conferred shall, while the order remains in force, exercise such power in the names and on behalf of

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the trustees for sale in like manner as if the power had been delegated to him under this section.

<sup>8</sup> S. 31: See section 46 of the **Administration and Probate Act 1958**, No. 6191/1958 which has not been reproduced here because of its length.

<sup>9</sup> S. 33(1)(a): Section 30 of the **Administration and Probate Act 1958**, No. 6191/1958 reads as follows:

**30. *Executors and administrators may serve notice on claimant***

- (1) A personal representative, having notice, whether under the provisions of section thirty-three of the **Trustee Act 1958** or otherwise, that any claim has been or may be made against the estate of which he is the personal representative, may serve upon any person making or possibly entitled to make such claim a notice requiring such person to take within a period of three months from the date of receiving such notice all proceedings proper to enforce or to establish such claim and to duly prosecute the same.
- (2) After the expiration of the said period of three months such personal representative may apply to the Court for an order to some such effect as hereinafter in this section mentioned.
- (3) Upon the hearing of such application the Court, if not satisfied that such proceedings as aforesaid have been taken and are being duly prosecuted, may—
  - (a) order that the said period be extended; or
  - (b) order that the claim of any person so served with notice of the application be for all purposes barred; or
  - (c) make any further or other order enabling the estate to be distributed or dealt with without regard to the claim; and

- (d) in any case impose such conditions and give such directions including a direction as to the payment of the costs or incidental to the application as to the Court seems just.

<sup>10</sup> S. 33(2): Section 6 of the **State Trustees (State Owned Company) Act 1994**, No. 45/1994 reads as follows:

**20. *State Trustees to be preferred to creditor as administrator***

Unless a creditor applying in that capacity proves to the satisfaction of the Court or the registrar that it would be more beneficial to the estate that it be administered by the creditor, State Trustees is entitled to a grant of administration of the estate of a deceased person in preference to the creditor.

<sup>11</sup> S. 37(3): Section 33 of the **Wills Act 1958**, No. 6416/1958 reads as follows:

**33. *Contingent and future testamentary gifts to carry the intermediate income***

In any will coming into operation after the commencement of this Act a contingent or future specific devise or bequest of property whether real or personal and a contingent residuary devise of freehold land and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall subject to the statutory provisions relating to accumulations carry the intermediate income of that property from the death of the testator except so far as such income or any part thereof may be otherwise expressly disposed of.

<sup>12</sup> S. 40(3)(c): See section 125 of the **Property Law Act 1958**, No. 6344/1958, which has not been reproduced here because of its length.

<sup>13</sup> S. 42(1)(c): See section 18(2) where certain moneys for which a sole trustee cannot give a valid receipt are stated.

<sup>14</sup> S. 42(2): See Note 13.

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<sup>15</sup> S. 68: See Pt VIII of the **Marriage Act 1958**, No. 6306/1958 which has not been reproduced here because of its length.

<sup>16</sup> S. 70(1): See section 102 of the **Settled Land Act 1958**, No. 6367/1958 which has not been reproduced here because of its length.

<sup>17</sup> S. 72: See sections 545, 547, 548, 562–565 of the **Crimes Act 1958**, No. 6231/1958.