SOUTH AUSTRALIA

FORTIETH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

RELATING ON THE POWERS OF INVESTMENT OF TRUSTEES PURSUANT TO THE PROVISIONS OF THE TRUSTEE ACT

1976

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE JACOBS, *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE KING, *Deputy Chairman.*

B. R. COX, Q.C., S.-G.

D. W. BOLLEN, Q.C.

J. F. KEELER, *Dean of Faculty.*

K. T. GRIFFIN.

F. R. FISHER, Q.C. (*co-opted as additional member for reform of the Law of Trusts*).

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000

FORTIETH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA ON THE POWERS OF INVESTMENT OF TRUSTEES PURSUANT TO THE PROVISIONS OF THE TRUSTEE ACT

To:

The Honourable Peter Duncan, M.P.,
Attorney-General of South Australia.

Sir,

The Committee has been charged with the task of undertaking a comprehensive review of the law relating to trusts. It has decided that such review should be undertaken in sections. The first and most pressing section of the review is that relating to the powers of investment of trustees.

The investments authorised by the Trustee Act for the investment of trustee securities have been added to from time to time but there has not been a comprehensive review for many years. In New Zealand, Western Australia, Victoria, Queensland and the United Kingdom there have been reviews of the powers of trustees in relation to investments, and in consequence of those reviews the range of investments permitted by trustees has been extended considerably. The Committee is of the view that in South Australia the range of investments ought to be widened considerably in order that trustees may have powers to invest the funds of a trust for the benefit of all beneficiaries of the trust in a balanced way which will preserve the trust fund and enable it to keep pace with changing monetary values.

The Committee recommends that in widening the powers of investment the trustees should be required to take precautions not only in relation to a particular investment but in relation to the spread of investments within a trust fund.

The Committee circulated widely an early draft of this report and received many submissions and comments which have been drawn upon in completing the recommendations.

By reason of the need to state its recommendations with precision rather than as broad guidelines, and because extensive use has been made of legislation already in force elsewhere the Committee now presents its report in the form of drafted amendments to the Trustee Act which appear hereafter with notes appended to each subsection. There is some overlapping of existing provisions of the Trustee Act but it is not intended that the proposed amendments should be limited by those existing provisions. The recommendations are as follows:—

PART I

Subsection (1) of Section 5 of the principal Act is amended by inserting therein after the paragraph (Kl) the following paragraphs:—

"(1) In any one or more of the following namely:—

(1) On deposit in any bank carrying on business of banking in South Australia.

(2) On deposit in any savings bank authorised to carry on savings bank business under the Banking Act 1959 of the Commonwealth or under any Act passed in amendment of or in substitution for that Act.

(3) On deposit with any company carrying on life assurance business under the Life Insurance Act 1945 of the Commonwealth or under any Act passed in amendment of or in substitution for that Act;"

Comment:

Present Section 5 (1) (*e*) allows a trustee to invest in a deposit with the Savings Bank of South Australia, and Section 5 (1) (*f*) allows a deposit in any incorporated bank carrying on business in the State and proclaimed by the Governor as a bank in which deposits may be made by trustees.

The Committee is of the view that trustees should be allowed to deposit trust funds with any bank which carries on the business of *banking* in South Australia. A bank may carry on business in South Australia, but its business may not be that of banking, and in this instance a deposit with such a bank ought not to be a trustee investment under this proposed subsection.

It is not necessary to provide that deposits in a bank carrying on the business of banking should be allowed only if the Governor has made a proclamation in respect of that bank under the present Section 5 (1) (*f*). There are adequate safeguards for trustees without the requirement of a proclamation.

Deposits with an authorised savings bank (see paragraph (2) above) and with a company carrying on life assurance business (see paragraph (3) above) should be allowed because the charter for such bank or life assurance company to carry on business and the conduct of such business are subject to close scrutiny by Government. Deposits in life assurance companies are not necessarily included in (*p*) below because some companies do not issue shares.

In consequence of this amendment the word "fixed" will have to be deleted from Section 6.

"(*m*) With any dealer in the short term money market, approved by the Reserve Bank of Australia as an authorised dealer, and having established lines of credit with that Bank as a lender of last resort."

Cross References:

See New Zealand Act Section 4 (1) (ii), Western Australian Act Section 16 (*f*) and Victorian draft Section 4 (1) (*n*).

Comment:

The Victorian draft provision and the Western Australian provision are followed because of their simplicity. They state accurately all the requirements which are necessary to give security to the trustees who invest in such way. Subsection (*kl*) of the South Australian Trustee Act is in somewhat different terms which are not so clear as the provision in this subclause (*m*). The existing provision could be deleted.

"(*n*) Subject to the provisions of subsections (7), (8), (9), (10), (11) and (12) of this section in the purchase of the preference or ordinary stock or shares issued by a company or corporation which has been incorporated in a State or Territory of the Commonwealth, being stock or shares registered in a register in a State or Territory of the Commonwealth."

Cross References:

See Western Australian Act Section 16 (*k*), New Zealand Act Section 4 (1A) (*a*), Victorian draft Section 4 (1) (*s*) and English Act First Schedule Part III.

Comment:

Companies need not necessarily have been or be incorporated under the Companies Act. If it did this would exclude companies such as The Bank of Adelaide which is incorporated by statute.

The Victorian and Western Australian provisions are almost identical. The Committee has followed substantially those provisions. The New Zealand provision is simpler but does not deal with corporations incorporated by Statute and does not need to be concerned with States or Territories which the Committee has had to consider.

There will have to be a definition of "company" in the light of the following provisions if, as the Committee recommends, the investment extends to corporations. In the alternative, wherever "company" is referred to it could be extended by adding the words "or corporation".

"(*o*) Subject to the provisions of subsections (7) (*b*), (8), (9) and (10) of this section in debentures (including debenture stock and notes and whether constituting a charge on assets or not) issued by a company:

(1) in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares, or

(2) which is a wholly owned subsidiary of a company in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares, or

(3) which does not comply with the provisions of subsection (8) but the debentures of which are unconditionally guaranteed by a company in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares."

Cross References:

See Victorian draft Section 4 (*t*) as amended after consultation with Parliamentary Counsel, Western Australian Act Section 16 (1), New Zealand Section 4 (1A) (*b*) and English Act First Schedule Part II Item 6.

Comment:

The Committee has used what it regards to be the best of each of these provisions. Paragraph (1) follows broadly the provisions in the other States and countries' Acts or drafts but the Committee is of the view that the additional paragraphs (2) and (3) could be added without prejudicing the investment. For example, banks have established wholly owned subsidiaries as finance companies in which it may well be safe to invest but which do not otherwise satisfy the requirements of the Committee's proposed amendments. Paragraph (2) above covers this situation.

If a company in which it would be proper to invest in the purchase of ordinary stock or shares unconditionally guarantees the debentures of another company, whether or not it is a wholly owned subsidiary, the Committee is of the view that trust funds invested in those debentures would be protected. Paragraph (3) covers this.

"(*p*) Subject to the provisions of subsections (8), (9) and (10) of this section on deposit whether secured or unsecured at interest either for a fixed term not exceeding seven years or at call with a company:

(1) in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares, or

(2) which is a wholly owned subsidiary of a company in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares, or

(3) which does not comply with the provisions of subsection (8) of this section but the deposits of which are unconditionally guaranteed by a company in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares."

Cross References:

See Western Australian Section 16 (*m*), Victorian draft Section 4 (*u*) as amended after consultation with Parliamentary Counsel.

Comment:

The Committee's recommendation follows broadly these provisions but with the extensions referred to in paragraphs (2) and (3) about which comment has already been made in relation to clause (*o*).

"(*q*) Subject to the provisions of subsections (9) and (10) of this section in a Common fund established pursuant to the provisions of Section 22a of Bagot's Executor Company Act 1910-1972, Section 25a of Elder's Executor Company's Act 1910-1972, Section 16a of Executor Company's Act 1885-1972 or Section 25a of Farmers' Co-operative Executors Act 1919-1972 provided however that in each instance the moneys in the Common Fund are invested in the manner in which trust moneys may be invested by a trustee under this Act."

Comment:

This provision is inserted after consideration of requests by the Trustee Companies for it to be included. Provided the investments of the Common Funds satisfy the requirements of the Trustee Act the Committee is of the view that the provision is reasonable.

PART II

After subsection (6) of Section 5 of the principal Act there should be inserted the following new subsections:—

"(7) The stock shares and debentures mentioned in paragraphs (*n*) and (*o*) of subsection (1) of this section *do not include*:

(*a*) Any ordinary stock, or shares, the price of which is *not* quoted on the Stock Exchange of Adelaide Limited or a member Exchange of the Australian Associated Stock Exchanges;"

Cross References:

See Western Australian Act Section 16 (3) (*a*), New Zealand Act Section 4 (1B) (*a*), English Act Schedule 1 Part IV item 2 (*a*), and Victorian draft 4 (5) (*a*).

Comment:

The Committee's recommendation broadly follows the existing legislation referred to. "Member Exchanges" of the Australian Associated Stock Exchanges are the capital city Exchanges. Thus the Exchanges in provincial cities (i.e. Newcastle) are excluded. The Committee is of the view that provincial Exchanges ought not to be included.

"(*b*) Stock shares or debentures not fully paid up, except stock shares or debentures which, by the terms of issue are required to be fully paid up within nine months of the date of issue."

Cross References:

See Western Australian Act Section 16 (3) (*b*), New Zealand Section 4 (1B) (*b*), Victorian draft 4 (5) (*b*) and English Act First Schedule Part IV item 2 (*b*).

Comment:

The Committee's recommendation follows existing legislation referred to, although the New Zealand Act provides for a period of twelve months.

"(8) An investment under paragraphs (*n*), (*o*) and (*p*) of subsection (1) of this section shall not be made in any company that:

(*a*) has a paid up share capital of less than two million dollars;"

Cross References and Comment:

Western Australian Act section 16 (4) (a) requires $2 million, New Zealand Act Section 4 (1c)(*a*) provides for $2·5 million (N.Z.); English Act £1 million; Victorian draft Section 4 (6) (*a*) requires $2 million. The New Zealand section also requires that the company must have had a minimum of $2·5 million (N.Z.) paid up share capital during the whole of the preceding three years. The Committee is of the view that that extension is not necessary.

"or (*b*) Has not paid a dividend in each of the seven years immediately preceding the calendar year in which the investment is made on all the ordinary stock or shares issued by the company, excluding any shares issued after the dividend was declared and any shares which by their terms of issue do not rank for the dividend for that year; but for the purposes of this paragraph a company formed:—

(i) to take over the principal business undertaking of another company or other companies, or

(ii) to acquire a majority of the shares in another company or other companies,

and which has or is proceeding to carry such purpose into effect shall be deemed to have paid the requisite dividend in any year in which such a dividend was paid by the other company or all the other companies as the case may be."

Cross References and Comment:

Western Australian Act Section 16 (4) (*b*) requires a dividend in each of fifteen years. This is considered to be too long.

New Zealand Act Section 4 (1C)(*b*) and 4 (1D) stipulates five years.

The English Act First Schedule Part IV and Victorian draft Section 4 (6) (*b*) also require five years.

The Western Australian Act is not apt to cover the case of a company formed to acquire the "shares" as distinct from the "business" of an existing company but the English Act is. Therefore the English Act has been followed in preference to the Western Australian Act; otherwise good holding companies would be excluded until they had themselves established the requisite dividend record.

"(9) A trustee who proposes to make any investment under powers conferred by paragraphs (*n*), (*o*), (*p*) and (*q*) of subsection (1) of this section shall first obtain and consider proper advice in writing on the question whether the investment is satisfactory having regard:—

(1) to the need for ensuring that investments of the trust are, so far as circumstances allow, sufficiently diversified in respect of the descriptions of investments and, where diversification within a particular description would be prudent, in respect of the investments within that description;

(2) to the suitability to the trust both in the light of the existing investments thereof and otherwise of investments of the description of investments proposed and of the investment proposed as an investment of that description;

(3) to the need to ensure that the investment in the light of existing investments operates reasonably and equitably between all beneficiaries and classes of beneficiaries entitled under the trust."

Cross References:

See Western Australian Act Section 16 (5); New Zealand Section 4 (1E); English Act Section 6 (1) (2) and Victorian draft Section 4 (7).

Comment:

The New Zealand draft is shorter but uniformity with Western Australia and Victoria on this angle is suggested.

The Committee is of the view that paragraph (3), which does not appear in either the Western Australian section or the Victorian draft, ought to be a matter required to be considered by the trustee.

"(10) A trustee who retains any investment made under the power conferred by paragraphs (*n*), (*o*), (*p*) and (*q*) of subsection (1) of this section shall determine at what intervals being no longer than one year the circumstances, and in particular the nature of the investment, make it desirable to obtain the advice mentioned in subsection (9) to this section, and shall obtain and consider that advice accordingly."

Cross References:

See Western Australian Act Section 16 (6), English Act Section 6 (3) and Victorian draft Section 4 (8).

Comment:

The Committee is of the view that a trustee ought to consciously determine the intervals at which he must review trust investments. The Committee believes that intervals being no longer than one year are reasonable.

"(11) For the purposes of subsections (9) and (10) of this section, proper advice is the advice of an independent person who is not a trustee under the trust or an employee of a trustee under the trust and who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial matters and who carries on business as an investment adviser or a stock broker who is a member of a Stock Exchange recognised by the Australian Associated Stock Exchanges."

Cross References:

See Western Australian Act Section 16 (7); New Zealand Act Section 4 (1D); English Act Section 6 (4) and Victorian draft Section 4 (9).

Comment:

The Committee is of the opinion that the person must be independent of the trustee. Whilst some provisions allow an employee or officer of a trustee company to give this advice the Committee is of the view that such course is not desirable. Nor is it desirable for one of two or more trustees to give advice to his co-trustee or co-trustees on these matters.

PART III

At present, in the absence of any express power, a trustee does not have power to acquire a dwelling for the use of a beneficiary. The Committee believes that in dealing with the powers of investment it is also appropriate to deal with this matter also. Accordingly, the Committee recommends that a new section be enacted as follows:—

"5A. (1) Where a trustee is of the opinion that it is desirable to purchase a dwellinghouse for the use of any beneficiary under the trust, the trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in the purchase of a dwellinghouse in the State, and may permit the beneficiary to reside in the said dwellinghouse upon such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.

(2) A trustee purchasing a dwellinghouse in exercise of the power conferred by this section shall not be chargeable with breach of trust by reason only of the relation borne by the purchase price to the value of the dwellinghouse at the time when the purchase was made if it appears to the Court that:

(*a*) in making the purchase the trustee was acting upon a report as to the value of the dwellinghouse made by a licensed valuer whom he reasonably believed to be competent to give a report upon the value thereof instructed and employed independently of any owner of the dwellinghouse, whether that valuer carried on business in the locality where the dwellinghouse is situate or elsewhere;

(*b*) the purchase price did not exceed the value of the dwellinghouse as stated in the report;

(*c*) the valuer has stated in his report the net annual rental which the dwellinghouse produced or was capable of producing at the time of valuation; and

(*d*) that the purchase was made under the advice of the valuer expressed in the report.

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

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

(5) Where a trustee is of the opinion that it is desirable that a dwellinghouse that forms part of the trust shall be retained for the use of any beneficiary he may, notwithstanding any trust for conversion contained in the instrument creating the trust, retain the dwellinghouse and permit the beneficiary to reside therein, upon such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.

(6) For the purposes of this section "dwellinghouse" means a dwellinghouse on any land not exceeding one-half of an hectare in area and whether held for an estate in fee simple or leasehold from Her Majesty the Queen or on strata title or any estate in leasehold for any period of not less than fifty years and includes any building erected on any land as a dwellinghouse and any home unit or other self-contained dwelling area for which a strata title is issued or in relation to which there is a lease as aforesaid provided however that for the purposes of subsection (5) of this section the limitation of the area of land to one-half of an hectare shall not apply."

Cross References:

See existing Victorian Section 4 (3) and Western Australian Section 17.

Comment:

The Committee's proposal follows largely the Victorian provision, with the addition of a definition of dwellinghouse.

Supplementary Recommendations:

The Committee received a submission in the following terms:—

"I think our Act still lacks an express power of appropriation of specific assets at current value either for the purposes of distribution (full or partial) or to answer exclusively particular interests within the ambit of the whole trust. It may be useful on this occasion to introduce such a section (I think this has been done in other places) and to make sure by express words that the power extends to all investments for the time being authorised by Section 5."

The Committee supports this suggestion, and thinks it is appropriate to include it in this report, although it does not relate specifically to the investment powers of trustees.

Acknowledgments:

The Committee desires to acknowledge the work done by its Trusts Subcommittee (the Honourable Mr. Justice Jacobs and Messrs. F. R. Fisher, Q.C., J. F. Keeler and K. T. Griffin) in the preparation of this report.

We have the honour to be

HOWARD ZELLING

S. J. JACOBS

L. J. KING

B. R. COX

D. W. BOLLEN

J. F. KEELER

K. T. GRIFFIN

F. R. FISHER

Law Reform Committee of South Australia

1st October, 1976.

REFERENCES

N.Z. Act—The Trustee Act 1956-1974.

W.A. Act—The Trustees Act 1962-1972.

Qld. Act—The Trusts Act 1973.

U.K. Act—The Trustee Act 1925-1961.

N.Z. Act—The Trustee Act 1956-1974.

Vic. Act—The reference to the "Victorian draft" legislation is a reference to the Report of the Subcommittee of the Chief Justice's Law Reform Committee on Trustees' statutory powers of investment, expressed in the form of a draft bill to amend the Trustee Act 1958-1969.

300—12.76 H2163 D. J. CONIGRAVE, Acting Government Printer, South Australia