



# TRUSTEE COMPANIES ACT, 1988

No. 102 of 1988

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A.D. 1988

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No. 102 of 1988

**An Act to consolidate and amend the law relating to trustee companies and to repeal the ANZ Executors & Trustees Company (South Australia) Limited Act, 1985, the Bagot's Executor Company Act, 1910, the Elder's Executor Company's Act, 1910, the Executors Company's Act, 1885 and the Farmers' Co-operative Executors Act, 1919.**

[Assented to 15 December 1988]

The Parliament of South Australia enacts as follows:

## PART I

### PRELIMINARY

#### Short title

1. This Act may be cited as the *Trustee Companies Act, 1988*.

#### Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

#### Interpretation

3. In this Act, unless the contrary intention appears—

“business day” means a day other than a Saturday or a Sunday or other public holiday:

“common fund” means a common fund established by a trustee company under section 15:

“the Court” means the Supreme Court of South Australia:

“estate”, in relation to a trustee company, includes any real or personal property committed to the administration or management of the trustee company whether as executor, administrator or in any other capacity authorized by this Act, but does not include money deposited with the trustee company for the purpose only of investment in a common fund:

“investor” in relation to a common fund, means an estate or person on whose behalf money is invested in the common fund:

“letters of administration” means letters of administration of the estate of a deceased person, with or without the will annexed:

“officer”, of a trustee company, means a director or manager of the company or some other officer or employee of the company designated by the board of directors as an officer for the purposes of this Act:

“the Registrar” means the Registrar of Probates and includes an acting or deputy Registrar of Probates:

“trustee” includes a bare trustee or custodian trustee:

“trustee company” *see schedule 1*:

“trustee investment” means an investment in which a trustee is authorized by law to invest trust funds:

“will” includes codicil.

## PART II

### POWERS OF TRUSTEE COMPANIES

#### **Trustee company may act as executor or administrator**

4. (1) A trustee company has the same powers as a natural person to act as the executor of the will, or the administrator of the estate, of a deceased person.

(2) A trustee company may apply for and obtain—

(a) probate of the will of a deceased person;

or

(b) letters of administration of the estate of a deceased person,

in the same circumstances as a natural person.

(3) A trustee company may, with the approval of the Court or the Registrar and the consent of the person entitled to probate of the will or a grant of administration of the estate of a deceased person, apply for and obtain—

(a) probate of the will of the deceased person;

or

(b) letters of administration of the estate of the deceased person,

(as the case requires).

(4) A trustee company may, with the approval of the Court, act on behalf, or in the place, of an executor of the will, or an administrator of the estate, of a deceased person, either on a permanent or a temporary basis.

#### **Trustee company may act as trustee, agent, attorney, manager or receiver**

5. A trustee company has the same powers as a natural person to act as trustee, agent, attorney, manager or receiver.

#### **Trustee company may act for children or persons who are unable to manage their affairs**

6. A trustee company may act—

(a) as the guardian of a child;

or

(b) as the administrator, committee, guardian or manager of the estate of a person who is unable to manage his or her own affairs.

**Officers may represent or make affidavits, etc., for company**

7. (1) Where a trustee company makes an application for probate or letters of administration or any other application under this Act or acts as executor, administrator or in any other capacity authorized by this Act, the company may be represented in any court or elsewhere by an officer of the company.

(2) Where in any circumstances referred to in subsection (1) an affidavit, declaration or statement is required to be made by a trustee company whether on oath or otherwise, the affidavit, declaration or statement may be made on behalf of the company by an officer of the company.

**Trustee company may act jointly**

8. (1) A trustee company may be appointed to act as executor, administrator, or in any other capacity authorized by this Act, either alone or jointly with another person.

(2) Where a trustee company is appointed to act jointly with another person—

(a) any property held or controlled by the company and that other person jointly may, with the consent in writing of the other person, be dealt with by the company alone;

and

(b) in that event the other person is exonerated from liability that might (but for this paragraph) have arisen from the company's subsequent dealing with the property.

**Commission chargeable by trustee company**

9. (1) Subject to this Act, a trustee company may charge against each estate committed (before or after the commencement of this Act) to its administration or management a commission at a rate fixed from time to time by the board of directors of the company but not in any case exceeding—

(a) 7.5 per cent of the income received by the company on account of the estate;

and

(b) 6 per cent of the capital value of the estate.

(2) For the purposes of subsection (1)—

(a) the capital value of an estate is the capital value of its assets as at the date of distribution by the company;

(b) no deduction need be made for debts or liabilities in determining capital value;

(c) the commission that may be charged is not diminished or affected by any entitlement of another person to commission or other remuneration in respect of the estate or part of it;

(d) the rate of the commission must not exceed that set out in the published scale of charges of the company when the commission becomes payable.

(3) Commission in respect of income received on account of an estate, or in respect of the capital value of assets of an estate, may be charged and paid out of, or deducted from, the estate after receipt of the income, or before or after distribution of the assets, but, where commission is charged in respect of assets before their distribution—

(a) the amount of the commission must be calculated on the capital value of the assets when they came under the administration or management of the company;

and

(b) on distribution of the assets, any necessary adjustment must be made so that the commission charged accords with the requirements of subsection (1).

**Fee for administering perpetual trust**

10. (1) A trustee company may charge against a perpetual trust administered by the company (whether the company commenced administering the trust before or after the commencement of this Act) an administration fee in respect of each month of the company's administration of the trust.

(2) The administration fee—

(a) must not exceed one-twelfth of one per cent of the value of the trust as at the first business day of the month;

and

(b) may be charged only against income received by the company on account of the trust.

(3) Where a trustee company charges an administration fee under this section against a perpetual trust, it may not charge commission under section 9 in respect of the capital value of property subject to the trust unless the property comprises or forms part of a deceased estate administered by the company.

**Additional remuneration**

11. (1) A trustee company may—

(a) charge against an estate the amount of any disbursement properly made in the administration or management of the estate;

(b) charge reasonable fees for the preparation and lodging of returns in respect of any tax, duty or fee imposed by law.

(2) A trustee company may, if authorized to do so—

(a) by the instrument by which an estate is committed to the administration or management of the company;

or

(b) by instrument in writing by the beneficiaries of an estate,

charge a commission or fee in addition to, or instead of, a commission or fee authorized by this Act, but any authorization on behalf of a beneficiary who is a minor or mentally incompetent is ineffective unless confirmed by the Court.

(3) Where, in the administration or management of an estate, a trustee company is authorized or required to carry on a business or undertaking either alone or in partnership, the Court may, on the application of the company, authorize some other form of remuneration in addition to, or instead of, commission authorized by this Act.

(4) A trustee company may not charge or receive in respect of services provided in the administration or management of an estate any commission, fee or other remuneration not authorized by or under this Act.

**Court may review company's charges**

12. Where the Court is of the opinion that the rate or amount of any commission, fee or other remuneration in respect of an estate is excessive, the Court may, on the application of any person who has a proper interest in the matter, review the rate or amount of the commission, fee or other remuneration and reduce it.

**Investment of trust funds**

13. Subject to the terms of any relevant instrument of trust, a trustee company may invest any money held in trust by the company—

(a) in a manner authorized by the instrument of trust;

(b) in a trustee investment;

or

(c) in a common fund established by the company.

**Money from several estates may be invested as one fund**

14. (1) Subject to section 13, a trustee company may invest money from more than one estate that it holds as trustee or in any other capacity authorized by this Act as one fund in one or more investments.

(2) Where money from more than one estate is invested under subsection (1), the company must—

(a) keep an account showing the current amount for the time being at credit in respect of each estate;

and

(b) after deduction of any charges—

(i) divide any income arising from investment of the money between the estates in proportion to the amounts invested and the period of each investment;

and

(ii) divide any profit or loss of a capital nature arising from investment of the money between the estates in proportion to the amounts invested.

**Common funds**

15. (1) A trustee company may establish one or more common funds.

(2) A common fund may not be invested in any investments other than investments of a class determined by the trustee company in relation to the common fund prior to its establishment.

(3) Money may not be invested in a common fund unless the classes of investment in which that money could be invested on separate account are the same as, or include, the classes of investment in which the common fund may be invested.

(4) Money not otherwise held in trust by the trustee company is while invested in a common fund held by the company in trust for the investor.

(5) A trustee company must keep an account showing the current amount for the time being at credit in the common fund on account of each investor.

(6) A trustee company may sell investments belonging to a common fund and may withdraw money from a common fund in the course of, or for the purpose, of its administration or management of an estate or as required or authorized by an investor in the fund.

(7) A trustee company may at any time withdraw from a common fund any amount at credit in the common fund on account of an estate and invest that money separately.

(8) After deduction of any charges—

(a) any income arising from investment of the fund must be divided between the investors in proportion to the amounts invested and the period of each investment;

and

(b) any profit or loss of a capital nature arising from investment of the fund must be divided between the investors in proportion to the amounts invested.

(9) A trustee company must value each common fund (including the investments in which the fund is invested) as at the first business day of each month and, if the company thinks fit, as at such other times as may be appropriate according to the nature of the particular fund.

(10) Investments in and withdrawals from a common fund must be effected on the basis of the valuation last made under subsection (9).

(11) A trustee company may charge against each common fund a management fee in respect of each month of the company's management of the fund.

(12) The management fee charged against money invested in a common fund on account of an estate must not exceed one-twelfth of one per cent of the value of the fund attributable to investment of the estate as at the first business day of the month.

(13) A trustee company may not increase a fee charged in respect of management of a common fund except after giving to each investor (other than an estate) not less than one month's notice in writing of the new fee.

(14) Nothing in this section limits or affects the operation of section 14.

**Power of trustee company acting in representative capacity to hold its own shares, etc.**

16. A trustee company may in the administration or management of an estate hold shares or other securities issued by the company itself or a related corporation within the meaning of the *Companies (South Australia) Code* and forming part of that estate, but it must not exercise any power that it has in that capacity to purchase any such shares or securities unless—

(a) it is authorized to do so by the terms on which the power is conferred;

or

(b) the shares or other securities form part of a new issue offered to existing holders of shares or securities in proportion to their existing holdings.

### PART III

#### DUTIES AND LIABILITIES OF TRUSTEE COMPANIES

**Returns to be made by trustee company**

17. (1) Subject to this section, a trustee company must lodge with the Corporate Affairs Commission during the prescribed months in each year a statement in the prescribed form together with such documents as may be prescribed.

Penalty: Division 8 fine.

(2) Statements may not be required to be lodged under this section more frequently than once every three months.

(3) The Commission may, in a particular case, extend the period for compliance with a requirement under this section.

(4) Any person may inspect a statement or document lodged with the Commission under this section.

**Minister may require information, etc.**

18. (1) The Minister may, by notice in writing to a trustee company, require the company to furnish within such period as is specified in the notice such written information as to the company's operations as is specified in the notice.

(2) A trustee company must not fail to comply with the requirements of a notice under subsection (1).

Penalty: Division 8 fine.

(3) Where it appears to the Minister necessary or advisable to do so, the Minister may order—

(a) a review of the operations of a trustee company;

(b) an audit of the accounts of a trustee company;

or

(c) both a review and audit.

(4) For the purpose of a review or audit under subsection (3), a trustee company must—

(a) deliver to the person appointed by the Minister to conduct the review or audit a list of all books, accounts and records kept by the company;

(b) produce its books, accounts and records to that person at any reasonable time when required to do so;

(c) afford that person all necessary information and facilities for the effective conduct of the review or audit.

Penalty: Division 8 fine.

(5) Unless the Minister otherwise determines, the cost of a review or audit under this section must be borne by the trustee company and may be recovered by the Minister in a court of competent jurisdiction as a debt due to the Crown.

#### Accounts, audits and information for investors in common funds

19. (1) A trustee company must—

(a) keep or cause to be kept proper books of account in relation to each common fund established by the company;

(b) cause those accounts to be audited at the end of each financial year by a registered company auditor;

and

(c) send or cause to be sent by post a statement of the accounts together with the report of the auditor on those accounts within two months of the end of the financial year to each investor (other than an estate) in the common fund.

Penalty: Division 8 fine.

(2) A trustee company must, on request in writing by any investor in a common fund established by the company, furnish to that person, as soon as practicable and without charge, copies of the accounts, auditor's report and other documents laid before the company at its last annual general meeting pursuant to the *Companies (South Australia) Code*.

Penalty: Division 8 fine.

(3) It is a defence to a charge of an offence against subsection (2) if it is proved that the defendant had, before the failure to which the charge relates, furnished a copy of the accounts and documents referred to in that subsection to the person in relation to whom the failure occurred.

(4) In this section—

“financial year”, in relation to a trustee company, means the period that is the financial year of the company within the meaning of the *Companies (South Australia) Code*.

“registered company auditor” means a person who is a registered company auditor within the meaning of the *Companies (South Australia) Code*.

#### Information for prospective investors in common funds

20. (1) Subject to this section, a trustee company must not accept money from any person for investment in a common fund established by the company unless the person has previously been furnished with the documents required under this section.

Penalty: Division 4 fine.



- (2) Subsection (1) does not apply in relation to—
- (a) money invested in a common fund by a trustee company in the course of the administration or management of an estate;
- or
- (b) money received for investment in prescribed circumstances.
- (3) The following documents must be furnished for the purposes of subsection (1):
- (a) a document containing the following information:
    - (i) the nature and the amount or rate of any fee that the trustee company charges in respect of investment in the common fund;
    - (ii) the extent (if any) to which a capital sum invested may be reduced to defray losses from investment of the common fund;
    - (iii) the class of investments in which the common fund may be invested;
    - (iv) the rights of an investor in the common fund to withdraw all or part of the person's investment in the fund and the period of notice (if any) that the investor is required to give the company in respect of such withdrawal;
- and
- (v) the terms governing distribution of income and profit or loss of a capital nature attributable to each investment in the common fund;
- (b) copies of the statement of accounts and auditor's report last prepared in relation to the common fund;
- and
- (c) copies of the accounts and auditor's report laid before the last annual general meeting of the company pursuant to the *Companies (South Australia) Code*.

#### **False or misleading statements as to common fund**

21. (1) A trustee company must not make or include in an advertisement or notice that it publishes or issues in relation to a common fund established or to be established by the company any statement that is false or misleading in a material particular.

Penalty: Division 4 fine.

(2) Any person who suffers loss by reason of a statement made or included in an advertisement or notice in contravention of subsection (1) may recover compensation in respect of the loss from the trustee company by action in a court of competent jurisdiction.

#### **Trustee company may be required to provide account in relation to estate**

22. (1) Subject to this section, a trustee company administering or managing an estate must, on application by any person with a proper interest in the matter, provide that person with an account of—

- (a) the assets and liabilities of the estate;
  - (b) the company's administration of the estate;
  - (c) any distribution made from the estate;
  - (d) any other expenditure from the estate.
- (2) Where—
- (a) a trustee company has provided an account to a person under this section;
- and

- (b) that person applies for a further account within three months from the date on which that person was provided with the previous account,

the company need not provide a further account in response to that application until the expiration of that period of three months.

(3) The company may charge a reasonable fee for providing an account under this section.

(4) If the company fails to provide a proper account under this section, the Court may, on application by the person who sought the account or any other person who has a proper interest in the matter, exercise one or both of the following powers—

- (a) it may order the preparation and delivery of proper accounts;
- (b) it may order an investigation of the administration of the estate by an officer of the Court or other person nominated in the order,

(and it may make any incidental or ancillary orders).

#### **Directors and managers responsible to the Court**

23. Where a trustee company is appointed or acts as executor, administrator, or in any other capacity under this Act, the manager and directors of the company are individually and collectively responsible to the Court in the same way and to the same extent as if they had been personally appointed to act in that capacity.

#### **Trustee company may be removed from office**

24. A trustee company appointed or acting as executor, administrator, or in any other capacity under this Act is subject to the same control by the Court as a natural person acting in that capacity and is similarly liable to removal by the Court.

#### **Appointment by Court of administrator of trustee company's affairs**

25. (1) Where it appears to the Court—

- (a) that proceedings to wind up a trustee company have commenced;
- (b) that a trustee company is not in a position to carry out its fiduciary duties;
- or
- (c) that a trustee company has committed serious breaches of its fiduciary duties such that the power conferred by this section should be exercised,

the Court may, on application by the Minister, appoint an administrator to administer the company's affairs insofar as they involve the performance of fiduciary duties.

(2) The Court may determine—

- (a) the powers and duties of an administrator appointed under this section;
- and
- (b) the terms and conditions on which the administrator is appointed.

(3) The Court may at any time terminate an appointment made under this section.

## **PART IV**

### **MISCELLANEOUS**

#### **False or misleading statements**

26. A trustee company must not make or include in any document required by or for the purposes of this Act any statement that is false or misleading in a material particular.

Penalty: Division 4 fine.

**Offences by trustee companies**

27. Where a trustee company is guilty of an offence against this Act, the manager and each director of the company is also guilty of an offence and liable to the same penalty as is prescribed for the principal offence unless it is proved that the manager or director exercised reasonable diligence to prevent commission of the offence.

**Evidentiary provision**

28. (1) A certificate under the seal of a trustee company certifying that a person named in the certificate is an officer of the company is to be accepted in any legal proceedings, in the absence of proof to the contrary, as proof that the person is an officer of the company.

(2) A certificate under seal of the company—

(a) certifying that the company is authorized to act as executor of the will, or administrator of the estate, of a deceased person, or in any other capacity authorized by this Act;

and

(b) including a photographic copy of the probate or letters of administration with or without the will annexed, or other order or document of appointment,

is, notwithstanding any other law, sufficient evidence that the company is authorized to act as executor of the will, or administrator of the estate, of the deceased person, or in that other capacity.

(3) A certificate under subsection (2) is equivalent, for registration purposes, to the probate, letters of administration, trust instrument or other order or document of appointment.

**Act not to affect other Acts or remedies**

29. (1) The provisions of this Act are in addition to, and do not derogate from, the provisions of any other Act.

(2) Nothing in this Act derogates from any right of action or other right or remedy that a person has apart from this Act.

**Summary offences**

30. The offences constituted by this Act are summary offences.

**Regulations**

31. (1) The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

(2) Any such regulation may prescribe a penalty, not exceeding a division 8 fine, for breach of or non-compliance with a provision of the regulations.

## SCHEDULE 1

## TRUSTEE COMPANIES

The following companies are trustee companies for the purposes of this Act:

ANZ Executors & Trustee Company Limited  
ANZ Executors & Trustee Company (South Australia) Limited  
Bagot's Executor and Trustee Company Limited  
Elder's Trustee and Executor Company Limited  
Executor, Trustee, and Agency Company of South Australia Limited  
Farmers' Co-operative Executors and Trustees Limited  
National Mutual Trustees Limited  
Perpetual Trustees Australia Limited

## SCHEDULE 2

## REPEAL OF CERTAIN ACTS AND TRANSITIONAL PROVISION

## 1. The following Acts are repealed:

*The ANZ Executors & Trustee Company (South Australia) Limited Act, 1985*

*The Bagot's Executor Company Act, 1910*

*The Elder's Executor Company's Act, 1910*

*The Executors Company's Act, 1885*

*The Farmers' Co-operative Executors Act, 1919.*

2. On a day six months after the commencement of this Act the Public Trustee must take whatever action is necessary to transfer or surrender any money or securities held by it pursuant to section 10 of the *Bagot's Executor Company Act, 1910*, section 17 of the *Elder's Executor Company's Act, 1910*, section 5 of the *Executors Company's Act, 1885* or section 17 of the *Farmers' Co-operative Executors Act, 1919*, to the trustee company which deposited that money or those securities.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

D. B. DUNSTAN, Governor