South Australia

TRUSTEE (INVESTMENT POWERS) AMENDMENT ACT 1995

No. 32 of 1995

SUMMARY OF PROVISIONS

ANNO QUADRAGESIMO QUARTO

ELIZABETHAE II REGINAE

A.D. 1995

****

No. 32 of 1995

An Act to amend the Trustee Act 1936.

[*Assented to 27 April 1995*]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Trustee (Investment Powers) Amendment Act 1995*.

(2) The *Trustee Act 1936* is referred to in this Act as "the principal Act".

Commencement

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

Interpretation

3. Section 4 of the principal Act is amended by striking out the definitions of "**deposit**" and "**investment adviser**".

Substitution of Part 1

4. Part 1 of the principal Act is repealed and the following Part is substituted:

PART 1
INVESTMENTS

Application of Part

5. This Part applies to trusts created before or after the commencement of the *Trustee (Investment Powers) Amendment Act 1995*.

Power of trustee to invest

6. A trustee may, unless expressly forbidden by the instrument creating the trust—

(a) invest trust funds in any form of investment; and

(b) at any time, vary an investment or realise an investment of trust funds and reinvest money resulting from the realisation in any form of investment.

Duties of trustee in respect of power of investment

7. (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 of business would exercise in managing the affairs of other persons.

(2) A trustee must, in exercising a power of investment, comply with any provision of the instrument creating the trust that is binding on the trustee and requires the obtaining of a consent or approval or compliance with any direction with respect to trust investments.

(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.

Law and equity preserved

8. (1) Any rules and principles of law or equity that impose a duty on a trustee exercising a power of investment including, without limiting the generality of those duties, rules and principles that impose—

(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 or hazardous;

(c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries;

(d) a duty to take advice,

continue to apply except so far as they are inconsistent with this or any other Act, or the instrument creating the trust.

(2) 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.

(3) If a trustee is under a duty to take advice, the reasonable costs of obtaining the advice is payable out of trust funds.

Matters to which trustee must have regard in exercising power of investment

9. (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 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.

Powers of trustee in relation to securities

10. (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, the securities subject to the trust 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 to any person, including a beneficiary under the trust, the benefit of the right, or the title to the right, for the best consideration that can be reasonably obtained; or

(c) renounce the right.

(4) A trustee accepting or subscribing for securities under this section is, for 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 subsection (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 the *Trustee (Investment Powers) Amendment Act 1995* but subject to the instrument creating the trust.

Power of trustee as to calls on shares

11. 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.

Power to purchase dwelling house as residence for beneficiary

12. (1) Subject to the instrument creating the trust, a trustee may—

(a) purchase 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 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 beneficiary's interest 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 by 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 association with the use of a dwelling house.

Power of trustee to retain investments

13. A trustee is not liable for breach of trust by reason only of continuing to hold 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 Part as previously in force from time to time; or

(d) an investment authorised by any other Act or the general law.

Loans and investments by trustees not breaches of trust in certain circumstances

13A. (1) If a trustee lends money on the security of property, the trustee is not in breach of trust by reason only of the amount of the loan in comparison to the value of the property at the time when the loan was made—

(a) if it appears to the court—

(i) 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

(ii) that the amount of the loan did not exceed two-thirds of the value of the property as stated in the report; and

(iii) that the loan was made in reliance on the report; or

(b) if the trustee is insured by a prescribed body carrying on the business of insurance against all loss that may arise by reason of the default of the borrower.

(2) If a trustee lends money on the security of leasehold property, the trustee is not in breach of trust by reason only that the trustee dispensed, either in whole or in part, with the production or investigation of the lessee's title when making the loan.

(3) This section applies to transfers of existing securities as well as to new securities and to investments made before or after the commencement of the *Trustee (Investment Powers) Amendment Act 1995*.

Limitation of liability of trustee for loss on improper investments

13B. (1) If a trustee improperly lends trust money on a security that would have been a proper investment if the sum lent had been smaller than the actual sum lent, 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 the *Trustee (Investment Powers) Amendment Act 1995*.

Court may take into account investment strategy in action for breach of trust

13C. If a trustee has been charged with a 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 9 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.

Power of court to set off gains and losses arising from investment

13D. (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 subsection (1) is in addition to any other power or entitlement to set off all or part of any loss against any property.

Transitional provision

13E. 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 the investments authorised by the *Trustee Act 1936*, is to be read as if it empowered or required that person to invest that money according to the provisions of this Part as to the investment of trust funds.

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

ROMA MITCHELL Governor