

TRUSTEE AMENDMENT BILL

EXPLANATORY NOTE

This Bill amends the Trustee Act 1956. It extends the class of authorised trustee investments, makes better provision in respect of powers of attorney in cases where trustees are incapacitated or going overseas, and clarifies and extends the jurisdiction of the Court to grant commission to trustees. The amendments spring mainly from recommendations made by the Property Law and Equity Reform Committee.

The additional powers of investment conferred on trustees by this Bill are subject to the provisions of subsections (4) and (5) of section 2 of the principal Act that these powers apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of the trust instrument.

Clause 1 relates to the Short Title.

Clause 2 authorises a trustee to invest trust funds with any dealer in the short-term money market approved by the Reserve Bank as a short-term money market dealer, and only so long as there are mortgaged to the trustee, or held by any bank on behalf of the trustee pursuant to a direction given, by that dealer investments authorised under the provisions of section 4 (1) of the principal Act, being investments that have, at the time of the making of the deposit, a redemption value not less than the amount so deposited.

Clause 3 authorises a trustee to invest trust funds in—

- (a) Preference or ordinary shares issued by a company incorporated in New Zealand;
- (b) Debentures (including debenture stock and bonds), and convertible notes, secured by a trust deed and issued by a company in which it would have been permissible for the trustee to invest in the purchase of ordinary stock or shares;
- (c) Any Group Investment Fund within the meaning of Part II of the Trustee Companies Act 1967, if all the investments in which the Fund may be invested are authorised trustee investments;
- (d) The Common Fund of the Public Trust Office.

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The following conditions will apply to the investment of funds in stock, shares, and convertible notes, and any such debentures of any company:

- (a) The stock or shares or convertible notes or debentures must be listed on stock exchanges affiliated to the Stock Exchange Association of New Zealand:
- (b) The stock, shares, convertible notes, or debentures must be fully paid up or by the terms of issue be required to be fully paid up within 12 months after the date of issue:
- (c) The company must have at the date of the investment by the trustee a paid-up share capital of not less than five million dollars, and must have had a paid-up share capital of at least that amount during the whole of the preceding 3 years:
- (d) The company must have paid a dividend on all its ordinary stock and shares of at least 5 percent in each of the 5 years preceding the investment:
- (e) The trustee must first obtain and consider proper advice as to the **suitability, in view of the terms of the trust, of the class of investments proposed and the suitability of the investment proposed as an investment of that class.** That advice must be obtained from a person who is reasonably believed by the trustee to be qualified to give it by reason of his profession or occupation and his personal expertise and experience in financial and investment matters.

Clause 4 extends the power of trustees to invest in mortgages of leases. At present, under section 4 (3) of the principal Act, a trustee may invest on first mortgage of the interest of a lessee or licensee of any Crown land or any other land administered by a Land Settlement Board or certain Maori Land provided the conditions specified in that subsection are complied with.

This clause authorises a trustee to invest trust funds on first mortgage of the interest of the lessee under a lease granted under the Public Bodies Leases Act 1969 which is perpetually renewable and in specified cases where the lessee is entitled to compensation for improvements. The trustee must act on the advice of an independent valuer whom he reasonably believes to be competent to value the lessee's interest, and the amount advanced must not exceed one-half of the value of the lessee's interest as stated in the report. The trustee must also obtain and consider advice as to the provisions of the lease which may affect the security of the proposed mortgage, which advice must be given by a person whom the trustee reasonably believes to be competent to give that advice.

Clause 5 inserts a new section 4A in the principal Act enabling a trustee to purchase an existing security as an investment.

Clause 6 makes the following amendments to section 5 of the principal Act relating to the power of a trustee to invest in redeemable stock the price of which is greater or less than the redemption value:

- (a) *Subclause (1) (a)* is consequential on the extended powers of investment conferred by *clause 3*:
- (b) *Subclause (1) (b)* repeals the proviso to section 5 (1), which restricts the power of a trustee to invest in redeemable stock (other than Government securities) at prices exceeding the redemption value of the stock:
- (c) *Subclause (1) (c)* repeals the proviso to section 5 (3). The effect of that proviso is re-enacted in an amended form by *subclause (2)* referred to below:

- (d) *Subclause (2)*: The effect of this subclause is that where the trustee buys redeemable stock at a premium or discount the adjustments required by section 5 (3) to be made between capital and income need not be made where the amount to be recouped or deducted from capital in any year is less than \$50. At present the adjustments need not be made if the amount to be recouped is less than \$2.

Clause 7 inserts a new section 11A in the principal Act permitting a trustee to release part of the mortgaged property from a mortgage, if there still remains sufficient value in the remainder of the property, at the time of the release, for it to be a proper security.

Clause 8 amends section 12 (4) of the principal Act so as to get rid of the requirement that the convertible notes contemplated in section 12 must be registered. This brings section 12 into line with the provisions set out in *clause 4* of the Bill so far as they relate to convertible notes.

Clause 9 is a savings provision, declaring that the extended powers of investment conferred by the Bill do not lessen any power of a Court to confer wider powers of investment on trustees.

Clause 10: The amendment substitutes the word "corporation" for the word "company" in paragraph (b) of subsection (2A) of section 29 of the principal Act so as to bring that paragraph into line with paragraph (a) of that subsection.

Clause 11 amends section 31 of the principal Act so as to make better provision for the appointment by a trustee of an agent in relation to the trust during any period for which the trustee may be absent from New Zealand or incapable of performing all his duties as a trustee. The present subsection (5) is unduly restrictive in providing without qualification that a power of attorney given by a trustee in any such case is deemed to be revoked by his return to New Zealand or his recovery of capacity.

Clause 12 removes the limit on the aggregate commission that the Court may allow to a trustee, and authorises the Court to allow what is just and reasonable having regard to the circumstances prescribed in the new subsection (1A). The Court is also given freedom to award compensation at any stage without waiting until the termination of the trust.

Hon. Dr Finlay

TRUSTEE AMENDMENT

ANALYSIS

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A BILL INTITULED

An Act to amend the Trustee Act 1956

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same,
5 as follows:

1. **Short Title**—This Act may be cited as the Trustee Amendment Act 1973, and shall be read together with and deemed part of the Trustee Act 1956* (hereinafter referred to as the principal Act).
- 10 2. **Investment in short-term money market**—Section 4 of the principal Act is hereby amended by inserting in subsection (1), after paragraph (i), the following paragraph:
“(ii) On deposit with any dealer in the short-term money market approved by the Reserve Bank of New

*Reprinted, 1968, Vol. 4, p. 3279
Amendment: 1969, No. 110

Zealand as a short-term money market dealer, and only so long as there are mortgaged to the trustee, or held by any bank on behalf of the trustee pursuant to a direction given, by that dealer investments authorised under the provisions of this subsection, being investments that have at the time of the making of the deposit, a redemption value of not less than the amount so deposited.” 5

3. Investment in company stock, shares, debentures, etc.— 10
Section 4 of the principal Act is hereby further amended by inserting, after subsection (1), the following subsections:

“(1A) In addition to the powers conferred by subsection (1) of this section, a trustee may, subject to the restrictions specified in subsections (1B) to (1D) of this section, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say: 15

“(a) In the acquisition of the preference or ordinary stock or shares issued by any company incorporated in New Zealand: 20

“(b) In debentures (including debenture stock and bonds), and convertible notes, whether constituting a charge on assets or not, secured by a trust deed and issued by any company in which at the time of investment it would have been permissible to invest in the purchase of ordinary stock or shares: 25

“(c) In any Group Investment Fund within the meaning of Part II of the Trustee Companies Act 1967 if all the investments in which the Fund may be invested are authorised investments: 30

“(d) In the Common Fund of the Public Trust Office.

“(1B) The stock, shares, convertible notes, and debentures mentioned in paragraphs (a) and (b) of subsection (1A) of this section do not include:

“(a) Any stock or shares, or convertible notes, or any such debentures, not officially listed on stock exchanges affiliated to the Stock Exchange Association of New Zealand; or 35

“(b) Any stock or shares, or any such debentures, not fully paid up, except such as are, by the terms of issue, required to be fully paid up within 12 months of the date of issue; or 40

“(c) Any convertible notes or any such debentures, under or in respect of which any liability to make further advances or payments will remain after the expiration of 12 months from the date of acquisition.

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“(1c) An investment under any of the provisions of paragraphs (a) and (b) of subsection (1A) of this section shall not be made in any company—

10 “(a) Unless the company has at the date of the investment by the trustee a paid-up share capital of not less than five million dollars, and has had a paid-up share capital of at least that amount during the whole of the preceding 3 years; and

15 “(b) If the company has not paid a dividend of at least 5 percent, in each complete financial year of the company the last day of which occurred within 5 years before the date of the investment, on all ordinary stock and shares issued by the company, excluding (in respect of the financial year of issue) 20 any stock or shares issued in that financial year after the dividend was declared and any stock or shares on which (in terms of their issue) no dividend or dividends of less than 5 percent are payable in the financial year; and for the purposes 25 of this paragraph a company formed to take over the whole of the business of another company or other companies shall be deemed to have paid the requisite dividend in any financial year, if such a dividend was paid by each such other company in 30 each financial year of that company any part of which fell within the relevant financial year of the company taking over the business.

35 “(1D) A trustee who proposes to exercise any of the powers conferred by subsection (1A) of this section shall first obtain and consider proper advice in writing as to the suitability, in view of the terms of the trust, of the class of investments proposed and of the investment proposed as an investment of that class; and for the purposes of this subsection proper advice is the advice of a person who is reasonably believed by the 40 trustee to be qualified to give it by reason of his profession or occupation and his personal expertise and experience in financial and investment matters, and, in the case of an

investment of any of the kinds specified in paragraph (a) or paragraph (b) of the said subsection (1A) is a person who is instructed and employed independently of the company and is neither an officer nor a servant nor a director of the company:

“Provided that where a trustee is a trustee corporation, the advice may be given to the corporation by an officer or a servant of the corporation who is so qualified, and the advice need not be in writing.”

4. Investment on mortgage of certain leasehold interests—

(1) Section 4 of the principal Act is hereby further amended by inserting in paragraph (b) of subsection (1), after the expression “subsection (3)”, the expression “or subsection (3A)”.

(2) Section 4 of the principal Act is hereby further amended by inserting, after subsection (3), the following subsections:

“(3A) In this section the term ‘real security’ also means a first mortgage of the interest of any lessee of any land where all the following terms and conditions are satisfied, that is to say:

“(a) That no advance shall be made except in respect of a lease which—

“(i) Is granted under any of the provisions of paragraphs (e), (f), and (g) of subsection (1) of section 7, or paragraph (b) of section 11, of the Public Bodies Leases Act 1969; and

“(ii) Is registered under the Land Transfer Act 1952; and

“(iii) Contains no right of forfeiture in the event of the lessee becoming bankrupt or (in the case of a corporation) being wound up, or on the taking in execution of the lessee’s interest; and

“(iv) Does not require periodic reviews of rental at intervals of less than 7 years; and

“(v) Being a lease granted under paragraph (f) or paragraph (g) of the Public Bodies Leases Act 1969, confers upon the outgoing lessee the right to payment in respect of the value of all buildings, fixtures, and other improvements (if any) on the land purchased or effected by the lessee, or in respect of which the lessee has paid compensation to an outgoing lessee:

“(b) That in making any advance under this subsection—

“(i) The trustee shall act upon a report as to the

5 value of the lessee's interest made by a person whom he reasonably believes to be competent to value the property, being a person instructed and employed independently of any lessor or lessee of the property, whether that valuer resides or carries on business in the locality where the property is situated or elsewhere:

10 "(ii) The amount of the advance shall not exceed one-half of the value of the lessee's interest as stated in that report:

15 "(iii) The trustee shall have obtained and considered advice in writing as to the provisions of the lease which may affect the security of the proposed mortgage given by a person who is reasonably believed by the trustee to be qualified to give the advice:

20 "Provided that the advice need not be in writing where it is given to his co-trustees by a trustee who is so qualified, or where it is given to a trustee corporation by an officer or servant of the corporation who is so qualified:

25 "(c) That any mortgage of the interest of the lessee of any land to which paragraph (a) of this subsection applies shall contain a provision that the mortgagee shall be deemed to have been irrevocably appointed as attorney of the lessee with full authority so long as any money remains owing under the mortgage to exercise on behalf of the lessee all the lessee's rights, powers, and options.

30 "(3B) Subsections (1) and (3) of section 10 of this Act shall not apply in any case where a trustee, pursuant to subsection (3A) of this section, lends money on the security of any property on which he can properly lend under the said subsection (3A)."

35 **5. Investments, loans, and advances**—The principal Act is hereby amended by inserting, after section 4, the following section:

40 "4A. Any reference in this Act to the investment, loan, or advance of trust funds or trust money by a trustee on the security of property shall be construed to include a reference to the investment, loan, or advance thereof on the acquisition of an existing security as well as on a new security."

6. Purchase of redeemable stock at a premium or discount—(1) Section 5 of the principal Act is hereby amended—

(a) By inserting in subsection (1), after the expression “subsection (1)”, the expression “or paragraph (b) of subsection (1A)”:

(b) By repealing the proviso to subsection (1):

(c) By repealing the proviso to subsection (3).

(2) Section 5 of the principal Act is hereby further amended by adding the following subsection:

“(4) Where the amount to be recouped to or deducted from capital in any year in accordance with paragraph (a) or paragraph (b) of subsection (3) of this section is less than \$50, it shall not be necessary for the trustee to comply with the provisions of that subsection.”

7. Release of part of security—(1) The principal Act is hereby amended by inserting, after section 11, the following section:

“11A. (1) Where any trust funds are invested on mortgage of any property, the trustee may release any part of the property from the mortgage, whether part of the debt is repaid or not, if the unreleased part of the property would at the time be a proper security in all respects for the amount remaining unpaid.

“(2) A subsequent purchaser of the released part of the property, or the District Land Registrar, shall not be concerned to inquire whether the requirements of subsection (1) of this section were fulfilled.”

(2) The following enactments are hereby consequentially repealed:

(a) Paragraph (dd) of section 20 of the principal Act:

(b) Section 8 of the Trustee Amendment Act 1968.

8. Powers in relation to company securities—Section 12 of the principal Act is hereby amended by omitting from subsection (4) the word “registered”.

9. Savings for power of Court—The enlargement of the investment powers of trustees by this Act shall not lessen any power of a Court to confer wider powers of investment on trustees, or affect the extent to which any such power is to be exercised.

10. Power to employ agents—Section 29 of the principal Act is hereby amended by omitting from paragraph (b) of subsection (2A), as inserted by section 11 of the Trustee Amendment Act 1968, the word “company”, and substituting
5 the word “corporation”.

11. Power to delegate trusts—(1) Section 31 of the principal Act is hereby amended by repealing subsection (1), and substituting the following subsection:

- “ (1) A trustee who—
- 10 “(a) Is for the time being out of New Zealand or is about to depart therefrom; or
- “(b) Expects that he may be absent from New Zealand from time to time during the administration of the trust; or
- 15 “(c) Is or may be about to become temporarily incapable, by reason of physical infirmity, of performing all his duties as a trustee; or
- “ (d) Expects that he may be from time to time temporarily incapable, by reason of physical infirmity,
20 of performing all his duties as a trustee,—
- “may, notwithstanding any rule of law or equity to the contrary, by power of attorney executed as a deed, delegate to any person the execution or exercise, during any period for which the trustee may be absent from New Zealand
25 or incapable of performing all his duties as a trustee, of all or any trusts, powers, authorities, and discretions vested in him as such trustee, whether alone or jointly with any other person or persons:
- “Provided that a person being the only other co-trustee and
30 not being a trustee corporation shall not be appointed to be an attorney under this subsection.”

(2) Section 31 of the principal Act is hereby further amended by inserting in subsection (5), before the words “shall be deemed”, the words “unless the deed otherwise
35 provides”.

12. Commission—(1) Section 72 of the principal Act is hereby amended by repealing subsection (2), and substituting the following subsections:

“(1A) In considering under subsection (1) of this section what commission or percentage is just and reasonable the Court shall have regard to the following circumstances, namely:

- “(a) The total amount that has already been paid to any trustee of the trust, whether pursuant to the trust instrument or to any earlier order of the Court; 5
- “(b) The amount and difficulty of the services rendered by the trustee;
- “(c) The liabilities to which the trustee is or has been exposed, and the responsibilities imposed on him; 10
- “(d) The skill and success of the trustee in administering the trust;
- “(e) The value of the trust property;
- “(f) The time and services reasonably required of the trustee; 15
- “(g) Whether any commission or percentage that might otherwise have been allowed should be refused or reduced by reason of delays in the administration of the trust that were occasioned, or that could reasonably have been prevented, by the trustee; 20
and
- “(h) All other circumstances that the Court considers relevant.

“(2) The Court may make any such allowance at any time, and from time to time, before or during the administration of the trust, or on the termination of the trust, and may, subject to such terms and conditions as the Court thinks fit, make any such allowance in respect of services to be rendered by the trustee during any specified period subsequent to the date of the order.” 30

(2) Section 72 of the principal Act is hereby further amended—

- (a) By repealing the proviso to subsection (1):
- (b) By inserting in subsection (3), before the words “the Court may”, the words “the amount so allowed shall be apportioned among the trustees as they mutually agree; and if there is no such agreement”. 35