

[AS REPORTED FROM THE STATUTES REVISION COMMITTEE]

House of Representatives, 18 October 1973

Words struck out by the Committee are shown in italics within bold round brackets, or with black rule at beginning and after last line; words inserted are shown in roman underlined with a double rule, or with double rule before first line and after last line.

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:
- 15 “(ii) On deposit with any dealer in the short-term money market approved by the Reserve Bank of New Zealand as a short-term money market dealer, and only so long as there are mortgaged to the

*Reprinted, 1968, Vol. 4, p. 3279
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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.—
Section 4 of the principal Act is hereby further amended by inserting, after subsection (1), the following subsections: 10

“(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:

“(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: 20

“(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: 25

“(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: 30

“(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 convertible notes, 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. 45

“(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—

5 “(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)* \$2,500,000, and has had a paid-up share capital of at least that amount during the whole of the preceding 3 years; and

10 “(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) 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

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20 payable in the financial year; and for the purposes 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 each financial year of that company any part of which fell within the relevant financial year of the company taking over the business.

New

30 payable in the financial year.

“(1CA) For the purposes of subsection (1c) of this section, a company (in this subsection referred to as the new company) formed to take over the whole of the business of any other company (in this subsection referred to as an acquired company) shall be deemed—

35 “(a) To have had a paid-up share capital of the requisite amount during any part of the relevant period if during that part any such acquired company had a paid-up share capital of at least that amount; and

40 “(b) To have paid the requisite dividend in any financial year if such a dividend was paid by each such acquired company in each financial year of that company any part of which fell within the relevant financial year of the new company.”

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“(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 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: 5 10 15

“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— 20

(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)”. 20

(2) Section 4 of the principal Act is hereby further amended by inserting, after subsection (3), the following subsections: 25

“(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: 25

“(a) That no advance shall be made except in respect of a lease which— 30

“(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 35

“(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 40

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

5 “(v) Being a lease granted under paragraph (f) or paragraph (g) of subsection (1) of section 7 of the Public Bodies Leases Act 1969, confers upon the outgoing lessee the right to payment (*in respect*), whether under section 10 of the Public Bodies Leases Act 1969 or otherwise, 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:

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

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

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

25 “(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:

30 “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:

35 “(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) irrevocably appointing the mortgagee, or declaring that the mortgagee shall
40 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.

“(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).” 5

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

“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.” 10

6. Purchase of redeemable stock at a premium or discount—(1) Section 5 of the principal Act is hereby amended— 15

(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). 20

(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.” 25

7. Release of part of security—(1) The principal Act is hereby amended by inserting, after section 11, the following section: 30

“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. 35

“(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.” 40

(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. 45

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 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—

“(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

“(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, 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 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 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 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: 5

“(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 or to any agreement or otherwise; 10

“(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; 15

“(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; 20

“(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; 25 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.” 35

(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”. 40