TRUSTEES' STATUTORY POWERS OF INVESTMENT—MISCELLANEOUS POWERS SECOND REPORT

report of the
Property Law
and Equity Reform
Committee

NEW ZEALAND

REPORT

OF THE

PROPERTY LAW AND EQUITY REFORM COMMITTEE

Presented to the Minister of Justice

in November 1984

SECOND REPORT ON TRUSTEES' POWERS OF INVESTMENT

MISCELLANEOUS POWERS

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MISCELLANEOUS POWERS

To : The Minister of Justice

Terms of Reference and Methodology

1.1 In 1981 you referred to us a number of specific proposals for amendment or extension of the various classes of authorised trustee investments. The approach adopted by the Committee was to circularise a number of organisations societies and persons believed to have an interest in these matters with details of these proposals inviting comment. Information was also sought on two additional points viz:

- whether, to the respondent's knowledge, extensive use has been made of powers of investment contained in wills or other trust instruments which were wider or more extensive than the statutory powers

- in what areas of investment had the funds available to trustees with such powers been invested?

The purpose of seeking this additional information was to ascertain whether the initial impression of the Committee, that the existing statutory list of authorised trustee investments might already provide avenues of investment sufficient to satisfy the needs of the majority of trustees, and that there was no pressing need to change the law, was well founded.

1.2 Following receipt of replies to this circular, and to a subsequent request for comment on the proposal for permitting investment on mortgages secured over "cross lease" home ownership units, the Committee issued a Working Paper. This Paper was circulated for comment. After considering the suggestions received in response to the Working Paper, and in some cases, discussions with interested parties, the Committee has reached certain conclusions which it now places before you for consideration.

1.3 A copy of the Working Paper is attached to this report as Appendix I. The names of those who replied to the initial circular, or who responded to the Working Paper, are set out in Parts A and B respectively of Appendix II. The Committee also wishes to record that it has had the advantage of studying reports from two Commonwealth Law Reform Commissions in the course of its deliberations. These were the Working Paper on Trustees' Powers of Investment issued in December 1981 by the Law Reform Commission

of the State of Western Australia, and the 1982 report of the Manitoba Law Reform Commission entitled "Investment Provisions under the Trustee Act". The final report of the Western Australian Commission became available when this report was in the final stages of preparation.

General Approach

2.1 Although the terms of reference, containing as they did a number of specific proposals for extension of the statutory list of authorised investments, presuppose a continuation of the legal list approach to trustee investment, the Committee felt justified in reviewing the question of whether that approach remained appropriate to New Zealand conditions. Both the Manitoba and Western Australia Law Reform Commissions had dealt with this question in the reports which have been referred to, as indeed did this Committee when it reported in 1970 on proposals for reform of the statutory powers of investment.

2.2 The two quite different approaches to trustee investment, the "legal list" approach, where trustees are provided with a defined list of authorised investments, and the "prudent man rule" approach, which substitutes general criteria within which investment activities should be conducted, are outlined in the Working Paper. That Paper also identifies some of the arguments in favour and against a change from the legal list approach which presently characterises the law in New Zealand. The Committee concluded that the list approach should be continued, albeit with some amendments, but sought comment.

2.3 The responses to the Working Paper indicated there is no great pressure or support for an immediate change, although the New Zealand Law Society suggested that a full investigation and study of the various forms of the prudent man approach would be of greater long term benefit than repeated tinkerings with a legal list. The 1970 Report of this Committee rejected the prudent man approach on the grounds it offered too little guidance to trustees who were not expert in investment matters. To a very large extent both the 1970 Report and the current Working Paper were written in the context of investment by trustees of private estates and trusts, and the subsistence of a strong New Zealand tradition of selecting such trustees for family or other reasons, not necessarily related to business or investment expertise.

2.4 However, the Committee recognises that there have been some changes since 1970 which might throw doubt on the continuing validity of this justification for the legal list approach. There appears to be an increasing tendency to define the powers of investment of private or public sector institutions, some of which invest on a large scale, either wholly or in party by reference to the legal list authorised for trustees generally. Examples include the Accident Compensation Corporation in the public sector and approved superannuation schemes in the private sector. Although this often may provide a convenient "shorthand" method of conferring or limiting investment powers where that is desirable, it can also lead to some confusion as to the basis on which the list of authorised investments should be extended or amended, or

indeed retained. The investment objectives of the larger official or private institutions whose powers are so circumscribed, will almost certainly be quite different from those of trustees of private trusts or estates.

2.5 Another consequence of the list approach is the implication that the modes of investment included in the list are safer than those not so included. Whilst there is nothing new in this comment some institutions have suggested that there may be very real commercial advantages in gaining or retaining trustee status for a particular class of investment. For example the Finance Houses Association has pointed out that the number of finance companies whose debentures qualify for trustee status has been steadily reduced since 1974 by takeovers or amalgamations. It is well recognised in the industry that there is a distinction between debentures having, and being publicly advertised as having, trustee status and those which do not, at least in the eyes of the less sophisticated investor. A result can be pressure arising for changes to the list, the justification for which is derived from a desire from borrowers to obtain or share these commercial advantages, rather than from considerations affecting the trustee lender.

2.6 This highlights an aspect of the matter which has given rise to some unease amongst the Committee. Additions to, or deletions from, the list of authorised investments may have wider implications than purely legal ones. The economic or social consequences of authorising trustees to invest in some new or different mode may be substantial and perhaps unpredictable. Whilst the Committee has, on this occasion, had the benefit of submissions from the Reserve Bank, it does not consider itself properly fitted to identify and take such possible consequences into account, even assuming that it is proper for it to do so.

2.7 Nevertheless the Committee confirms the tentative conclusion expressed in the Working Paper that the legal list approach should be continued in the meantime. As will appear later, the Committee has reservations as to whether the investment criteria for debt securities are still appropriate and intends to explore that issue and distribute a further working paper. It seems inevitable therefore that debate on the practical and economic utility of the legal list approach will continue. Without foreshadowing what the outcome of that debate may be, we believe that if there is to be any move in the direction of the prudent man rule, this should follow only after a wide process of consultation and further study of the law and its operation in other jurisdictions.

Proposed Amendments to the List of Authorised Investments

3.1 The Committee has studied 11 specific proposals for additions to the list. Seven of these were discussed in varying detail in the Working Paper, the others being referred to more briefly as being under consideration.

3.2 During the study, the Committee has endeavoured to formulate some basis by which the case for recommending proposals for additions or variations to the legal list can be evaluated. Some factors e.g. questions of security and prudence, must loom large in any consideration of these matters. The Committee are all agreed on that. Opinions can, and have, differed on other aspects such as the extent of the "demand" for a particular change. For example, whilst the Committee accepts, as will be seen, that a proposal for authorising trustees to invest in certain overseas companies can be justified on the grounds of security and prudence, it became obvious from the replies to the circulars and working paper issued that there was no great pressure for this change. Nor was there any real evidence that this, or the other proposals which met the tests of prudence and security set by the Committee, were necessary in the sense that the range of qualifying investments under the existing law was such as to unreasonably limit the investment opportunities of trustees relying on the statutory powers.

3.3 Paragraph 2.6 of this report mentions unease in the Committee as to the desirability for it, and indeed its competence, to take such "extra legal" factors into account. Consequently the Committee has proceeded on the basis that once it has satisfied itself a particular proposal is:

(a) one which would commend itself to prudent trustees, and

(b) of a nature that conferral of a general power is warranted

then it has recommended the appropriate addition or amendment to the list. The significance of the presence or lack of "demand" for the change has been largely related to the second of the above criteria.

3.4 Those proposals which the Committee recommends for immediate implementation are the following:

(a) Authorising trustees to invest in the stock shares convertible notes and debentures of overseas companies. Reference is made to paragraphs 3.2 to 3.7 of the Working Paper. The effect of section 4(1A)(a) Trustee Act is to exclude every company incorporated outside New Zealand from gaining trustee status under New Zealand law, even although a particular company, such as BHP, may easily meet the capital structure and dividend criteria specified in the Act and on all other counts be a secure and desirable investment for trustees. The Committee therefore recommends an amendment which removes the need for trustee status companies to be incorporated in New Zealand. The present requirement in section 4(1B)(a) for shares or securities to be officially listed on the New Zealand Stock Exchange to be eligible and the capital and dividend criteria specified in Section 4(1C) should be retained.

(b) Permitting trustees to invest on first mortgages secured over "cross lease" titles to residential flats and apartments. This mode of investment is discussed in paragraphs 3.8 to 3.13A of the Working Paper. Whilst the Committee recognised when preparing that Paper there was wide support for the principle of this proposal, it took the view that there was a need to provide quite detailed guidelines to trustees as to which of the numerous forms of these titles would be acceptable for trustee investment status. It foresaw practical problems in formulating these guidelines, and moreover, in keeping those guidelines up-to-date and relevant having regard to changes in legal and marketing practices.

We have reconsidered our stance after studying the responses to the Working Paper. Although we are still of the view that the existing means by which trustees can invest on mortgages secured over residential flats and apartments are probably satisfactory, the majority of the Committee acknowledge there is a case for giving trustees generally comparable powers, with some restrictions, to those presently enjoyed by the Trustee Savings Banks and some other institutions. In addition further study has convinced the majority there are means of providing proper safeguards other than through our original approach of detailed legislative guidelines.

The majority view of the Committee is to recommend that a provision, modelled on the former section 24(7) Trustee Savings Banks Act 1948, be included in the Trustee Act with the following changes:

(i) Replacement of the requirement in s.24(7) to meet conditions approved by the Minister, by an obligation, based on section 4(3A)(b)(iii) Trustee Act to obtain proper advice as to the suitability of the title including the terms of the lease. This would be in addition to any advice required in terms of section 10 Trustee Act.

(ii) Restricting the amount of any loan that may be made to one half of the value of the owner's interest. This is in line with the restriction in section 4(3A)(b)(ii) for mortgages secured over certain leasehold property.

(iii) Replacing the reference in section 24(7)(a)(ii) to a term of 99 years to one relating to an unexpired term of 60 years.

Insurance of cross lease titles can present some practical problems and difficulties and the Committee has considered whether some condition as to insurance, or the obtaining of advice as to insurance, should also be a prerequisite to trustees investing on mortgage secured over those titles.

The Committee noted that the existing statutory powers to invest on mortgage over interests in land, with the exception of strata titles under the Unit Titles Act, are not subject to such a condition or requirement presumably on the basis that insurance is regarded as a matter which falls within the trustees' duty to exercise due prudence. The majority of the Committee sees no reason to change this general approach in respect of cross lease titles and regards the requirement for mortgage redemption insurance in the case of mortgages of unit titles as a special case which reflects the statutory limitations on the interest a mortgagee has in the principal insurance policy over a unit title development.

(c) Authorising investment in Bills of Exchange. Paragraphs 3.26 to 3.29 record the Committee's tentative conclusion that trustees should be permitted to invest in Bills of Exchange accepted by banks. We now recommend that authority be given to invest in Bills either endorsed or accepted by a bank. We no longer consider there is any need to restrict the maximum permissible time to maturity of eligible Bills, a proposal suggested in the Working Paper which found no support in the responses to it.

If our recommendation is accepted, statutory provision will be required for the apportionment between income and capital of the proceeds of Bills in which trust funds have been invested. The reasons for this are set out in paragraph 3.29 of the Working paper.

(d) Clarification of the authority of trustees to purchase or acquire certificates of deposit issued by the banks. The current position is discussed in paragraph 3.25B of the Working Paper. Apart from statutory amendments aimed at putting beyond question the authority of trustees to purchase such certificates from a bank, we recommend trustees also be permitted to effect an investment in transferable or similar certificates of deposit issued by banks by means of purchase from third parties.

(e) Permitting trustees to invest in the purchase of rights or options to take up shares or securities issued by companies in those cases where investment in the shares or securities subject to the right or option is authorised.

The 1970 report of this Committee recommended a similar provision but limited to options and other rights trustees may be entitled to exercise by virtue of their existing investments. No express provision was made in the 1974 amending legislation to implement that recommendation presumably on the basis the existing statutory powers (e.g. section 12) were sufficient. We consider the limitation proposed in the 1970 report is unduly restrictive and are satisfied a general power to invest in rights or options to take up "authorised" company securities is proper and appropriate.

(f) Removal of the requirement in section 4(3A)(a)(iv) Trustee Act that for a lease to qualify as security for a mortgage advance under those provisions, the terms and conditions of the lease may not require periodic reviews of rental at intervals of less than seven years. Leases which qualify under these provisions are restricted to those which are perpetually renewable and granted under certain provisions of the Public Bodies Leases Act. The 1970 Report of this Committee did not recommend that leases granted by local authorities under other powers should qualify and we would not recommend any extension of existing categories. However, the Committee has been informed it is permissible, and indeed financially desirable or even necessary from the point of view of the leasing authority, to provide for rent reviews at shorter intervals down to the five year minimum currently prescribed by section 22 Public Bodies Leases Act. As the law now stands such leases would not be acceptable security for trustee mortgage advances.

According to the advice the Committee has received, the length of the period between rent reviews is a factor taken into account in determining the value of the lessee's interest. It is not relevant to the suitability of a perpetually renewable lease as security. In any event there is an existing requirement for trustees to obtain advice in writing as to the provisions of the lease which may affect the security of the proposed mortgage - section 4(3A)(b)(iii). We consider this, in conjunction with the existing requirement to obtain a report on the value of the lessee's interest, is a sufficient safeguard and therefore recommend that section 4(3A)(a)(iv) be repealed.

(g) At a late stage the Committee was referred a further suggestion aimed at increasing the maximum amount a trustee may lend on mortgage of leasehold estates from one half to two thirds of the value of the lessee's interest. This would in effect place leasehold and freehold interests on the same footing for security purposes. We are still of the opinion there is a difference between these two classes of security, one of the more obvious being the effect a lessee's default may have on the value of a leasehold security. Accordingly, although the margin for security on eligible leasehold securities currently prescribed may well have been fixed in an arbitrary manner, we do not recommend any change.

3.5 A proposal which attracted a number of submissions is that covered in paragraphs 3.20 to 3.23 of the Working Paper viz. whether trustees should be permitted to invest in the debenture stock, bonds or debentures of wholly owned subsidiary companies where only the parent company and not the issuing company, enjoys trustee status. As the law stands, trustees may only invest in the "debt" securities of a company under the statutory powers where investment in the shares of that company is also authorised. In effect this means that both the shares and the debt securities must, amongst other things, be listed on the Stock Exchange before the statutory powers may be exercised. It is not enough that the debt securities alone be so listed.

3.6 This has considerable practical and commercial significance for the finance industry and perhaps other sectors of business. The Finance Houses Association has pointed out that a number of finance companies which met the investment criteria specified in s.4(1B) and (1C) Trustee Act when first introduced in 1974 now no longer do so because they have become subsidiaries of larger groups and their shares, although not their debentures or other debt securities, have ceased to be listed. The result of the takeover or amalgamation can be to strengthen the standing and stability of the finance company concerned. It was submitted to the Committee that in most cases it cannot seriously be contended the security offered to trustee investors has been diminished, yet the companies concerned have ceased to qualify for trustee investment status.

3.7 As can be seen from the Working Paper, the Committee canvassed a range of possible solutions to this problem and came to the tentative conclusion that it would favour a proposal which would permit investment in the listed debenture stock, bonds, or debentures of a company where either:

(a) the existing requirements of s.4(1B) and (1C) Trustee Act are met in full by the issuing company, or

(b) repayment is unconditionally guaranteed by another company which itself meets those requirements.

Item (b) represents an extension of the current law. Comment was invited especially on whether the guarantee requirement was unduly restrictive where the issuing company is a wholly owned subsidiary of a company enjoying trustee investement status.

3.8 Again the Committee received some helpful submissions and also took the opportunity of discussing the implications of the proposal with representatives of interested parties. In the result, it has come to the conclusion that what is required is a general review of the criteria by which the suitability of debentures or other debt securities, issued by any class of companies, as a mode for investment by trustees, should be judged. It is now the view of the Committee that the proposal put forward in the Working Paper represents a piecemeal approach to a problem which extends beyond the finance houses and at most could only provide an interim solution.

3.9 Accordingly the Committee now recommends that no action be taken at present on this proposal. The Committee will prepare a further Working Paper dealing with investment in debentures and debt securities by trustees and will, where necessary, seek expert advice. It should be noted that since, as we have already pointed out, the criteria for "debt" and "equity" securities issued by companies are linked, some review of the criteria for the latter may also be involved in this further study.

3.10 The other proposals dealt with in the Working Paper will, if this recommendation of the Committee is accepted, also be deferred for further consideration. One is the suggestion that trustees should be empowered to invest money on deposit with companies having trustee investment status, or with the wholly owned subsidiaries of such companies. As pointed out in the Working Paper, these classes of investment are authorised in some states of the Commonwealth of Australia. The Committee sees this proposal being linked with the debenture and debt securities issue and considers they should be dealt with together.

3.11 The second additional item the Committee wishes to defer for further consideration is the proposal, supported by the New Zealand Law society and others, to authorise trustee investment in contributory mortgages, perhaps limited to those arranged through solicitors' nominee companies. The Committee is unable at present to make any definite recommendation on this proposal and intends discussing it further with the Securities Commission and other interested parties. It also intends outlining any conclusions it reaches in the further Working Paper it proposes to issue.

3.12 There were two further matters considered by the Committee viz:

(a) Should trustees be empowered to invest generally in land - paragraphs 3.14 to 3.19 of the Working Paper.

(b) Ought trustees be permitted to invest in policies of life assurance - para 4.4(b) of the Working Paper.

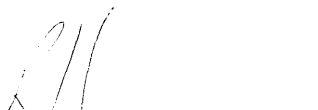
The Committee does not recommend any amendment to the existing law in respect of either of these proposals.

Draft Bill

4.1 A draft of a proposed Trustee Amendment Bill, to give effect to the recommendations of the Committee, is annexed to this Report as Appendix III.

4.2 Further legislation may ultimately be required should the Committee recommend amendments to the law in respect of the proposals it has reserved for further consideration. Study and consultation over these proposals may take some time. The Committee sees no reason for deferring action on the matters it has recommended in paragraph 3.4 for immediate attention until that process has been completed.

For the Committee



Chairman

Members of the Committee

Professor R. J. Sutton (Chairman)
Mr B. J. Blacktop
Mr R.G.F. Barker
Professor F. M. Brookfield
Mr A. J. Forbes
Mr W. B. Greig
Mr A. J. Forbes
Mr J. H. Zohrab
Mr B. J. Cameron
Miss J. M. Finnigan (Secretary)

APPENDIX I

Introduction

1.1 The Committee has had referred to it by the Minister of Justice certain proposals for amendment or extension of the list of investments authorised by the Trustee Act 1956. The last major review by the Committee of trustee investments was made in 1970 and a number of the suggestions for reform contained in its report of that year ("the 1970 report") were eventually enacted into law by the Trustee Amendment Act 1974.

1.2 The particular proposals referred to the Committee were that:-

(a) Trustees should be permitted to invest in companies incorporated overseas, particularly Australian companies, that otherwise comply with the criteria for trustee investment status.

(b) Trustees should be permitted to invest on mortgages secured over home ownership units held under the "cross lease" system i.e. where all the owners have a share in the fee simple estate and lease the units to particular owners in perpetuity.

(c) Trustees should be empowered to invest in land to protect against depreciation of the trust fund during inflationary times.

(d) Trustees should have power to invest in the debenture stock, bonds or debentures issued by a wholly owned subsidiary of a company whose shares presently qualify as a trustee investment, on meeting certain criteria similar to those already provided (e.g. the obtaining of written advice) before the trustee can so invest.

(e) Trustees should have power to invest money on deposit with companies having trustee investment status or with their wholly owned subsidiaries.

(f) Trustees should have power to invest in other forms of investment e.g. commercial bills of exchange, unconditionally guaranteed by a company having trustee investment status.

A number of organisations, societies and persons were asked for comment on these proposals and for information on two additional points viz:-

- whether, to the respondent's knowledge, extensive use has been made by trustees of wider powers of investment contained in wills and trust instruments

- in what areas of investment have the funds available to trustees with such powers been invested?

1.3 Twenty one replies were received. Following preliminary consideration by the Committee, additional comment was invited on certain aspects of the proposal for investment on mortgage of "cross lease" home ownership units. This Working Paper records the tentative conclusions of the Committee and invites further discussion and comment.

General Approaches to Trustee Investments

2.1 As pointed out in the 1970 Report, two quite different approaches have been adopted in the main. One is that currently in vogue in England, all of the States in Australia and New Zealand, for the provision of a list of investments which trustees are authorised to make. This is the "legal list" approach. The other is to provide not a defined list, but rather general criteria within which trustees must conduct their investment activities. This second approach is usually known as "the prudent man rule" and has been adopted in varying forms by most jurisdictions in the United States of America, in three Canadian jurisdictions viz. New Brunswick, the Northwest Territories, and the Yukon Territory, and has been recommended for adoption by the 1982 report of the Manitoba Law Reform Commission on "Investment Provisions under the Trustee Act".

2.2 In its preliminary investigations in 1970, the Committee rejected "the prudent man rule" approach on the ground that it offered too little guidance to trustees who were not experienced in making investments. The recommendations of the Committee, enacted in 1974, continued the legal list approach in a manner it was hoped would provide greater flexibility yet protect trustees from liability for loss if the guidelines in the extended list were observed. The need to again review the list may be some indication that the flexibility objective was not wholly attained.

2.3 It is of interest to observe that the recommendations in the 1970 Report for extension of the list of authorised investments were based largely on Part III of the Trustee Act 1962 of Western Australia. The Law Reform Commission of that State is also currently reviewing trustees' powers of investment and issued a Working Paper in December 1981. One of the principal questions posed in that Paper was whether the list approach or the prudent man rule was appropriate for Western Australia in today's investment climate.

2.4 The Manitoba and Western Australian Law Reform Commissions have identified a number of arguments for and against a change from the legal list to the prudent man rule approach. The arguments in favour of change include:-

(a) The legal list approach has as a basic objective the preservation of the capital invested - one of the fundamental duties of trustees. Trustees generally also have a quite distinct duty of holding a balance between the interests of income and capital. These two duties were readily compatible in times of stable money values, but in times of inflation they often produce conflict. Whilst an extension of the legal list approach might help resolve this conflict, the extra flexibility of the prudent man rule is claimed to assist trustees (particularly professional trustees or those having experience in investment matters) to achieve a fairer balance between preservation of capital and generation of a reasonable income.

(b) The general unspecified powers of investment, which are inherent in the prudent man rule approach, may mean that honest and diligent trustees making prudent investments in good faith are less likely to commit technical breaches of trust by accident. In this connection the Manitoba Law Reform Commission has suggested that support for the legal list approach is sometimes founded on two misconceptions. One is that trustees following a legal list will automatically be immune from being sued if a loss is incurred. The other is that under the prudent man rule approach, trustees will be obliged to make good the loss every time there is a bad investment. Neither of these propositions can be supported in law either in Manitoba or New Zealand.

(c) As and when new forms of investment arise, or old forms return to popularity, adoption of the prudent man rule removes any need to amend a list in the Trustee Act before trustees without appropriate powers in the trust instrument can take advantage of them. A legal list, wide or narrow, is fixed, and pressures on legislative time may prevent timely amendments being made.

However, the arguments against the prudent man rule approach which influenced the New Zealand Property Law and Equity Reform Committee in 1970, and latterly the Western Australian Law Reform Commission, still have considerable force. Wide powers of investment in unspecified terms, which may be suitable for professional trustees, offer too little guidance to those not experienced in investment matters. There is still a strong tradition in New Zealand for appointing trustees for family or other reasons and it seems undesirable to distinguish between the statutory powers of investment of professional and other trustees. It is always open to the creator of the trust to confer wide powers of investment if so desired, and, no doubt, the competence and the experience of the trustees selected by the creator of the trust have some bearing on the extent of the powers conferred.

2.5 The Committee has come to the conclusion that the legal list approach should be continued in New Zealand, but would welcome any comment on this issue. If the list approach is continued it is evident that there is some pressure for extension and it is to these this Working Paper now turns.

Discussion on the Particular Proposals before the Committee

3.1 The proposals to be discussed in this part of the Paper are set out in paragraph 1.2. It is convenient to take each of them separately and in the order in which they appear in that paragraph.

Overseas Companies

3.2 Proposal (a) is aimed at permitting investment in overseas companies that otherwise comply with the criteria laid down in the Trustee Amendment Act 1974. Those criteria presently include the requirement that eligible companies be incorporated in New Zealand. Additionally, trustees may only invest in the stock, shares, notes or debentures of an eligible company which are officially listed on a stock exchange affiliated to the Stock Exchange Association of New Zealand.

3.3 There was considerable support for varying versions of this proposal particularly in relation to companies incorporated in Australia. It is to be noted, however, that simply removing the requirement for incorporation of a company in New Zealand will not of itself achieve the desired objective. There is also the present statutory insistence of listing on an affiliated New Zealand stock exchange, a requirement which the Committee sees good reason to retain.

3.4 One of the original objectives of the insistence on listing on a New Zealand exchange was to ensure saleability of the investments in this country. Another was to take advantage of the protection afforded to investors by the listing requirements of the affiliated New Zealand stock exchanges. These advantages include, for example, the considerable volume and extent of information required to be made publicly available by listed companies. The listing requirements in this respect are more wide ranging than the statutory disclosure rules and, according to advice given to the Committee, the supplementary information provided through stock exchanges is of considerable significance in giving a total picture of a company to investors. There is also the point that the listing requirements are policed and enforced by the Stock Exchange Association and are within control by New Zealand authorities.

3.5 On the basis that these New Zealand listing requirements are the minimum thought to be necessary as part of the framework for a general power of investment by trustees in company securities - it cannot be emphasised too strongly that

creators of trusts may grant more extensive powers of investment if desired or appropriate - any change aimed at permitting investment in securities or equities listed on exchanges outside New Zealand should ensure comparable protection is provided for the trustee investor. Two elements appear to be involved. One is the nature of the listing requirements promulgated by the overseas exchange and the extent of any need to compare these requirements with New Zealand listing requirements. It has been suggested that the Stock Exchange Association of New Zealand could provide a means of satisfying this element by providing a list of overseas exchanges it recognises for the purposes of its own listing requirements. The second element concerns the procedures in the overseas country for ensuring compliance with the listing requirements of stock exchanges in that country. It is considered these procedures should be at least as effective as those in New Zealand but it is not apparent how trustees could readily ascertain whether this element is satisfied.

3.6 It is also of interest to observe that Part III of the Western Australian Trustee Act - the basis for the 1974 extension of the New Zealand list of trustee investments - limits investments in companies to those incorporated in a State or Territory of the Commonwealth of Australia and to securities or equities listed on an Australian stock exchange. The 1981 Working Paper of the Western Australian Law Reform Commission does not suggest extension to overseas companies or to companies listed on overseas exchanges.

3.7 The Committee is not convinced there is any real case for extension of the list of authorised investments to the equities or securities of companies incorporated outside New Zealand. However should such an extension be favoured - perhaps limited to companies incorporated in either Australia or England - then the Committee sees it as desirable that the present statutory requirement for listing of the shares, stock or securities on one of the New Zealand stock exchanges be retained.

Mortgages Secured Over "Cross Lease" Titles

3.8 The "cross lease" system is a well recognised and common method of holding title to a flat, townhouse or apartment, but nonethless trustees are not generally authorised to invest on mortgage of such titles. The Committee notes that some institutions, whose powers of investment are otherwise comparable to those of trustees, have express authority to lend on mortgage of cross lease titles.

3.9 An example is the Trustee Savings Banks. Section 24(5) Trustee Savings Banks Act 1948 authorises investment on mortgage of an estate or interest in a cross lease residential unit that is self-contained. The power is exercisable subject to such conditions as the Minister

determines from time to time. One of the Savings Banks provided the Committee with some very useful information on the procedures it adopts for lending on this class of security. Not every residential unit held under this system of title, i.e. where the undivided shares as tenants in common in the fee simple estate of the land on which residential units are erected are all held by the lessees of the units, is regarded as suitable. The Bank will not lend on other than free-standing units because of insurance problems. Moreover, the terms of the leases for individual units are carefully perused by experienced staff or solicitors to ensure that the mortgagee is adequately protected. These leases do not follow a standard form, particularly in the case of older units, and many are not regarded as satisfactory.

3.10 Whilst a power to invest on mortgage of cross lease titles in wide terms may be acceptable for institutions or professional trustees, it is evident that if such a power is adopted for trustees generally quite detailed guidelines as to the acceptability of particular units for lending purposes may be required to assist inexperienced trustees. Moreover as the form of these titles is being constantly updated and improved the guidelines may need frequent revision.

3.11 The Public Trustee has pointed out that a means already exists whereby trustees may safely and legally invest on mortgage secured over residential units held under the cross lease system. Section 23(6) Housing Corporation Act 1974 authorises the advance of moneys (including trust funds) on the security of a mortgage of land if repayment of the advance or of the excess over the amount that might otherwise be advanced, is secured by a guarantee or indemnity provided by the Corporation. The Corporation will provide such guarantees, free of charge at present, for cross lease residential units which meet certain criteria. These are broadly similar to those applied by the Trustee Savings Bank referred to in paragraph 3.9.

3.12 In considering this proposal the Committee has also taken into account that there are other systems of title to residential units. These include holdings of shares in flat-owning companies coupled with licences to occupy which may or may not be registered under the Companies Amendment Act 1964. Should mortgages over these also be considered for trustee investment status? One purpose of the Unit Titles Act 1972 was to provide a means whereby a secure guaranteed title could be made available to prospective trustees or other morgtagees, and thus avoid what were perceived to be the disadvantages and defects of the several systems of title then in vogue. Unfortuntely use of this Act has not been as widespread as anticipated.

3.13 Although there was a good deal of support for the principle of this proposal, many respondents recognised the wide variations that exist in the form and content of the lease and other documents forming the basis of these titles make it highly desirable trustees be given some assistance in determining whether a particular title is satisfactory. The Committee notes especially the problems of:

(a) ensuring adequate insurance cover

(b) enforcing the mutual obligations of the several owner/lessees.

There would probably need to be quite detailed guidelines and the Committee foresees considerable difficulty both in formulating guidelines and in keeping them up to date - see paragraph 3.10.

3.13A For these reasons the Committee has somewhat reluctantly come to the conclusion that the practical problems entailed in this proposal are such that it seems doubtful whether it should be pursued further. It is not as if there are no existing means by which trustees may invest on mortgages secured over flats or apartments. Strata titles under the Unit Titles Act are acceptable subject to certain insurance requirements and there is the Housing Corporation guarantee route mentioned in paragraph 3.11. The real question is whether there should be an addition to these means and moreover one which could require quite complex and detailed legislation. The Committee has so far been unable to devise adequate legislature safeguards, but remains ready to consider any workable solution.

Investment in Land

3.14 There is no general statutory power for trustees in New Zealand to invest in land. The position is the same in England and in the majority of the Australian States. Queensland provides a general power to invest in the purchase of the fee simple estate of land in any State or Territory in Australia, and in certain leasehold estates within Queensland, subject to the general requirement of the trustees obtaining and acting on the advice of a valuer. The Victorian legislation empowers trustees to invest not more than one third of the trust fund in the purchase of the fee simple estate of land within the State. The land must be substantially improved and a valuer's advice must be obtained. In Tasmania there is power to invest in the purchase of an estate in fee simple in land in the State. The restrictions on this power include:-

(a) The purpose of the investment must be to obtain income from letting buidings on the land.

(b) The trust estate must exceed $20,000 in value and the total invested in the land under this power may not exceed 50 percent of the value of the trust estate.

(c) The advice of a valuer must be obtained and acted upon.

3.15 New Zealand trustees presently have quite extensive powers to purchase land for specific purposes. They may purchase land adjoining that already held by them where the purpose of the purchase is to better develop or use the existing land holding, or to improve the carrying on of a business on that land which they are empowered to carry on. In addition trustees may purchase a dwellinghouse for occupation by a person entitled to the income of the money spent. This power extends to the erection of a dwellinghouse on land either already held or purchased for the purpose, and to the acquisition of a flat or apartment, title to which is taken by any means considered appropriate by the trustees. Nevertheless it is recognised there is a clear distinction between these powers to purchase for specific purposes and a power to purchase land simply as a mode of investing the trust fund.

3.16 There is some support for proposal (c) in paragraph 1.2 that trustees be permitted to invest in land, but in nearly every case the support is qualified. The qualifications range from suggested requirements for valuation and advice and restricton of the power to larger trusts or professional trustees, to the exclusion of power to purchase land which is not income producing and purchases for purely speculative purposes. If conferment of a general power to purchase land for investment is to be seriously considered then these suggested qualifications, together with a number of other subsidiary matters, would need consideration and refinement. The other subsidiary matters the Committee thinks worthy of consideration include whether only estates in fee simple may be purchased, and, if so, whether the purchase of undivided interests in such estates would be permitted. If purchase of leasehold estates is to be permitted are those estates to be restricted as to the nature and type of lease involved, perhaps in the same way as the present restrictions on leasehold estates qualifying as security for mortgage investments by trustees.

3.17 This proposal, as is apparent from the manner in which it is expressed, is aimed at preserving the real value of the capital of the trust fund. Prior to 1974 the classes of authorised investments were such that the nominal value of the capital of the fund could only be preserved, never enhanced. In practice this led to trustees being concerned mainly with the production of income when making investment decisions. Although that may not have been the principal purpose, the 1974 amendment, in permitting investment in certain company stocks and shares, provided the first means by which an attempt could be made to protect the real value

of the funds invested. The resulting concept of trustees investing for capital appreciation was accompanied, incidentally, by new problems for trustees of balancing the often opposing interests of income and capital. The question for the Committee is whether this concept should be extended by adding to the classes of authorised investments affording the opportunity of capital growth.

3.18 The rationale for such an addition is that investment in land offers a further or better means of protecting trust funds against the effects of inflation. Whether this is true of all classes of land at all times may be questionable. One of the general comments on this proposal was that the risky nature of investment in land, with potentially significant fluctuations in market value, makes investment in land an undesirable activity for trustees. The Securities Commission made a similar point when mentioning that while the rewards from investing in land are sometimes high, so too are the risks. The Committee is aware that according a particular class of investment trustee status may be perceived by the non-expert investor as granting it a seal of approval. There is a resulting danger that proper investment investigations may be neglected, yet, as pointed in paragrapah 3.16, most respondents agreed that investment in land is really something for the expert or professional.

3.19 The Committee has therefore tentatively concluded there ought not to be a general statutory power for trustees to invest in land. It is considered the existence of a power to invest in land should still be a matter for choice by the settlor or creator of the trust. There is no evidence that the inclusion of such a power in trust instruments has now become so commonplace that inclusion in the statutory "list" is sensible and convenient.

Investment in Subsidiary Companies

3.20 Proposal (d) in paragraph 1.2 is to permit investment in the debenture stock, bonds or debentures of wholly owned subsidiaries of companies where the parent company itself enjoys trustee status. The rationalisation which has occurred amongst the finance houses since the passage of the Trustee Amendment Act 1974 illustrates the basis for this proposal. Three companies, Broadlands Dominion Group Limited, General Finance Limited, and U.D.C. Group Holdings LImited, each originally met the criteria for trustee investment status specified in sections 4(1B) and (1C) Trustee Act. These companies then became part of separate groups as wholly owned subsidiaries and as a result the shares of each ceased to be listed. Consequently, investment in the debentures and other securities issued by these companies also ceased to be authorised under the 1974 Trustee Amendment Act, although the debentures, unlike the shares, remained and still remain listed on the Stock Exchange.

3.21 Most of those consulted by the Committee supported this proposal provided the debenture stock, bonds or debentures are listed and are unconditionally guaranteed by a company which itself qualifies for trustee investment status. Some indeed would go further and suggest that investment be permitted in either:-

(a) The listed debentures etc of a company which meets all of the requirements specified in Sections 4(1B) and (1C) Trustee Act other than that its stock or shares be listed on the Stock Exchange.

(b) The listed debentures of any company.

Others questioned whether the proposal need be restricted to wholly owned subsidiaries where a suitable guarantee is available.

3.22 As regards suggestion (b) in paragraph 3.21 above, one respondent made the point that the worth of a debenture, and consequently the protection it affords to the investor flows from the financial viability of the issuing company. That in turn is not dependent on the listing of the shares of the company on the Stock Exchange but on management performance and stability of the company. Furthermore, it was suggested, the current requirements in the Trustee Act for maintenance of a minimum divided record on share capital is not necessarily a proper measure of the financial stability of a company and is not therefore particularly relevant when considering the desirability of investing in the debentures of the company. A company which retains a large proportion of its profits creates reserves which tends to increase the margin of security available to debenture holders. This respondent would substitute a different set of criteria to qualify the securities of companies, as opposed to their equities, for trustee investment status. In essence these would, apart from the listing requirement for debentures,

- prescribe minimum levels of both paid up capital and shareholders' funds

- prescribe borrowing and servicing limitations which the debenture trust deed must meet.

A somewhat similar suggestion was considered in 1970 but rejected on the basis that such criteria are more a matter for those giving investment advice to consider and arbitrary directions should not be imposed by Statute. It was also desired to keep the criteria as simple and clear as possible. The present Committee shares these views and does not intend recommending any wholesale changes to the investment criteria. However comments on the points raised are invited.

3.23 Some minor changes are supported. The Committee favours a proposal which permits investment in debenture stock, bonds or debentures where either the existing requirements of Sections 4(1B) and (1C) Trustee Act are met in full by the issuing Company itself or where repayment is unconditionally guaranteed by another company which meets those requirements. In each case listing of the securities on a New Zealand stock exchange would be a prerequisite. However, further comment on this proposal is invited and in particular the Committee would welcome comment on whether the requirement for guaranteeing of the securities may be unduly restrictive where the issuing company is a wholly owned subsidiary of a company enjoying trustee investment status.

Investments on Deposit with Qualifying Companies and Subsidiaries

3.24 There was not a great deal of support for the proposal that trustees should have power to invest money on deposit with companies having trustee investment status or with the wholly owned subsidiaries of such companies. In Western Australia, trustees may make deposits, secured or unsecured, at interest either for a fixed term not exceeding 7 years, or at call, in any company in which they may properly invest in the purchase of shares. The position is the same in the Northern Territory. South Australia permits deposits with companies satisfying the requirements as to capital and payment of dividends specified in the Trustee Act or where repayment is guaranteed by such a company.

3.25 The Committee does not support this proposal. It is troubled by the implications of a "listed" trustee investment which comprises no more than an unsecured debt. Admittedly, as some respondents suggest, a debenture is not defined for the purposes of Section 4(1A)-(1D) Trustee Act. It may be possible by appropriate documentation to give the form of debentures to what are really no more than unsecured deposits and thus accord them trustee investment status. The Committee has no evidence this has actually occurred in practice but would be interested in hearing of any examples.

3.25A In considering this and the Bills of Exchange proposal to be discussed shortly, the Committee has examined the avenues open to a trustee acting under the statutory powers to invest moneys by way of deposit. Deposits are currently authorised on banks, in certain building societies and with authorised short term money market dealers. Any dissatisfaction with the current law appears to centre on the lower interest rates paid by these traditional institutions in comparison with other competing forms of investment, rather than on the range of deposit facilities available to trustees.

3.25B The power to invest on deposit in any bank is thought to be wide enough to include the purchase from a bank of the more sophisticated forms of certificates of deposit which have been developed in recent years. These include convertible, negotiable and transferrable certificates of deposit. There may be some doubt whether the purchase of these certificates of deposit from third parties is authorised as it can be argued the trustee is not investing on deposit but purchasing an investment. In such a case the trust moneys used for the acquisition go to the former holder of the certificate and not to the issuing bank. The Committee considers the position should be clarified and favours authorising trustees to invest in any certificates of deposit issued by banks whether by direct acquisition from the issuing bank or by purchase from a third party.

Bills of Exchange

3.26 When the 1970 report was commenced Bills of Exchange were not as well recognised a form of investment as is the case now. Because of the risks involved, which are reflected in the comparatively high rates of return available, the Committee does not regard commercial Bills of Exchange generally as a suitable form of authorised investment for trustees. However, it recognises that "Bank Bills" can reasonably be regarded as being in a separate category so far as risk is concerned. By "Bank Bills" is meant Bills of Exchange which are either endorsed or accepted by a bank. In theory, acceptance or endorsement by a bank should make a Bill of Exchange safe, because the bank thereby agrees to honour the Bill it has accepted, or to pay the Bill should the acceptor default in those cases where the bank has endorsed the Bill.

3.27 Victoria permits trustees to invest in bank accepted Bills of Exchange which have at the date of acquisition a maturity date of not more than 200 days. Queensland authorises investment on bank accepted Bills without restrictions on maturity. No other Australian State or England permits such investments by trustees, which are also not authorised under the existing New Zealand law.

3.28 Having regard to the level of support it has received, the Committee supports the proposal to permit trustees to invest in commercial Bills accepted by banks. Comment is sought on whether the proposal should be widened to include Bills endorsed by banks or Bills accepted or endorsed by companies having trustee investment status. Comment is also invited on whether restrictions should be placed on the maximum permissible time to maturity of eligible Bills. The value of a Bill depends on prevailing rates of interest and the longer the period to maturity the more likely it is fluctuations of interest rates may diminish the return on the Bill or even cause a loss. The Committee favours a restriction which is fixed having regard to the "normal" period of maturity of first class Bills in New Zealand. Some investigations on this point will be required.

3.29 If this proposal proceeds the Committee sees a need to clarify the rights of the life tenant and remaindermen to the "profits" on a Bill of Exchange. This profit arises from the fact that a Bill is acquired at a discount on face value and the holder either then receives the face value by retaining the Bill until maturity, or sells the Bill prior to maturity at a discount small than he purchased it at. The position is comparable to the purchase of redeemable stocks at a discount for which provision is made in Section 5 Trustee Act. Appropriate statutory provision should be made for the apportionment of the proceeds of Bills of Exchange if investment in them is to be authorised.

Other Proposals

4.1 A number of other proposals for extension of the list of authorised investments were made. One which the Committee favours is to permit trustees to purchase "rights" to take up shares or securities issued by companies in whose shares or securities trustees are authorised to invest. Trustees presently have power under Section 12 Trustee Act 1956 to take up such "rights" offered to them in respect of shareholdings in any company (this power is not restricted to companies having trustee investment status) but are not authorised to purchase such "rights".

4.2 On occasions, the purchase of "rights" offers a cheaper means of acquiring a shareholding or securities in a company and the Committee sees no reason why trustees should not be permitted to use this method of investing in authorised companies. A similar proposal was recommended in the 1970 Report and has also been recommended for Western Australia by the Law Reform Commission of that State.

4.3 Authority for trustees to invest in contributory mortgages has also received consideration. There was some support for such a proposal, although generally restricted to investment through solicitors' nominee companies. The Committee has deferred this matter pending the outcome of the review being conducted by the Securities Commission into contributory mortgage investments and investing through nominee companies.

4.4 Other related matters which have been or are being considered by the Committee include:

(a) A suggestion trustees be authorised to invest in policies of life assurance

(b) A reduction in the minimum period between rent reviews specified in section 4(3A)(a)(iv) Trustee Act from 7 years to 3 years.

4.5 Comments and suggestions on the proposals and suggestions referred to in this Working Paper are now invited, to be addressed to:

Miss J. M. Finnigan
Secretary
Property Law and Equity Reform Committee
Department of Justice
Private Bag
Postal Centre
WELLINGTON

APPENDIX II

PART A

The following responded to the Committee's initial circular:

Perpetual Trustees Estate and Agency Co. of N. Z. Ltd.
The South British Guardian Trust Co. Ltd.
The New Zealand Insurance Co. Ltd, Trust Department.
Pyne Gould Guinness Ltd.
New Zealand Institute of Valuers.
The Trustees Executors and Agency Co. of N. Z. Ltd.
The Public Trustee.
Treadwell Gordon and Co., Wanganui.
Nelson District Law Society.
Canterbury District Law Society.
Jack Riddet Young and Partners, Wanganui.
Stock Exchange Association of New Zealand.
N.Z.I. Finance Limited.
Life Offices' Association of New Zealand Inc.
New Zealand Society of Accountants.
Marlborough District Law Society.
Auckland District Law Society.
Taranaki District Law Society.
Reserve Bank of New Zealand.
McKay Roebuck Rockel and Waite, Waipawa.
New Zealand Finance Houses Association (Inc.).
Associated Trustee Banks.
Hamilton District Law Soceity.
CBA Finance Holdings Ltd.
Securities Commission.
Francis Allison Symes & Co., Wellington.
Southland District Law Society.
The Provident Life Assurance Co. Ltd.
Government Life Insurance Office.
Auckland Savings Bank.
Wellington Savings Bank.
The New Zealand South British Group Limited.
Building Societies Association (NZ) Inc.
Dale and Oldham, Christchurch.
Petersen Snyer Hubbard and Thomson, Palmerston North.

PART B

Those who responded to the working paper were:

Harbours Association of New Zealand.
New Zealand Law Society.
General Finance Ltd.
New Zealand Merchant Banks Association.
UDC Group Holdings Ltd.
Finance Houses Association Inc.
New Zealand Society of Accountants.
Northland Harbour Board.
Thorne Dallas Parkinson and McGregor, Whangarei.
Lynch and Atkins, Whangarei.
Public Trust Office.
Canterbury District Law Society.
New Zealand Stock Exchange.
Jack Riddet Young and Partners, Wanganui.
Building Societies Association (NZ) Inc.
The Life Offices Association of New Zealand Inc.
Pukeiti Trust Fund.
Otago District Law Society.
Securities Commission.
Reserve Bank of New Zealand.
Provident Life Assurance Co. Ltd.
Perpetual Trustees Estate and Agency Company of New Zealand Ltd.
Associated Trustee Banks.

APPENDIX III

TRUSTEE AMENDMENT

Analysis

A BILL INTITULED

An Act to amend the Trustee Act 1956 relating to trustees powers of investment

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

1. Short Title and commencement - (1) This Act may be cited as the Trustee Amendment Act 1984, and shall be read together with and deemed part of the Trustee Act 1956* (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the 28th day after the day on which it receives the Governor-General's assent.

*Reprinted 1977, Vol. 4, p. 3607

Amendments : 1982, No. 50; 1982, No. 106;
1983, No. 31; 1983, No. 116

2. Certificates of deposit issued by banks - section 4(1) of the principal Act is hereby further amended by inserting, after paragraph (h), the following paragraph:

"(ha) In certificates of deposit issued by any bank, whether by purchase directly from the bank or from any other person:".

3. Stock, shares, convertible notes, and debentures of overseas companies - Section 4(1A) of the principal Act (as inserted by section 3 of the Trustee Amendment Act 1974) is hereby amended by inserting in paragraph (a), before the words "incorporated in New Zealand", the words, "whether or not".

4. Rights and options to take up shares and other securities - Section 4(1A) of the principal Act (as inserted by section 3 of the Trustee Amendment Act 1974) is hereby amended by inserting, after paragraph (b), the following paragraph:

"(ba) In the acquisition of rights and options issued by any company to take up the preference or ordinary stock or shares of the company, if, at the time of investment, it would have been permissible to invest in the purchase of such stock or shares:".

5. Bills of exchange accepted or endorsed by a bank - Section 4 of the principal Act is hereby amended by inserting, after subsection (1E) (as inserted by section 3 of the Trustee Amendment Act 1974), the following subsections:

"(1F) In addition to the powers conferred by subsections (1) and (1A) of this section, a trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in bills of exchange accepted generally or endorsed without restriction by any bank.

"(1G) in respect of any such bill of exchange, the amount of the excess (if any) of the face value of the bill or (if the trustee sells the bill before maturity) the sale price received by the trustee for the bill, over the price paid by the trustee shall, on maturity or sale, be accountable for as if it were income accruing from day to day over the period between the date of the purchase and the maturity date of the bill or the date of sale, as the case may be, and shall be apportionable accordingly."

6. Mortgages of certain leases under the Public Bodies Leases Act 1969 - Section 4(3A) of the principal Act (as inserted by section 4(2) of the Trustee Amendment Act 1974) is hereby amended by repealing subparagraph (iv).

7. First mortgages secured over cross-lease titles -
(1) Section 4 of the principal Act is hereby further amended by inserting after subsection (3AA) (as inserted by section 29(1) of the Unit Titles Amendment Act 1979), the following subsection:

"(3AB) In this section the term 'real security' also means a first mortgage of any estate or interest to which this subsection applies where all the terms and conditions set out in paragraph (b) of this section are satisfied:

"(a) This subsection applies to any estate or interest in a cross-lease residential unit that is one of two or more self contained residential units, the title to each unit comprising -

"(i) An undivided share as tenant in common in the fee simple estate in the land on which the residential units are erected where all shares in the fee simple estate are held by the persons who are the lessees of the units and the land is used solely for residential purposes; and

"(ii) A lease of a specified residential unit erected on the land shown on a plan deposited in the office of the District Land Registrar for lease or licence purposes, which lease provides for an unexpired term of not less than 60 years and for the payment of a nominal rent only:

"(b) Any advance under this section shall be subject to the following terms and conditions:

"(i) The trustee shall act upon a report as to the value of the borrower'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 the borrower and any other owner of the property, whether that valuer resides or carries on business in the locality where the property is situated or elsewhere:

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

"(iii) Subject to subparagraph (iv) of this paragraph, the trustee shall have obtained and considered advice in writing as to the terms and conditions of the owner's title, and the provisions of the lease, so far as they 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:

"(iv) The advice referred to in subparagraph (iii) of this paragraph need not be in writing where it is given to his co-trustees by a trustee who is qualified to give it, or where it is given to a trustee corporation by an officer or servant of the corporation who is so qualified:

"(v) The mortgage shall contain a provision irrevocably appointing the mortgagee, or declaring that the mortgagee shall be deemed to have been irrevocably appointed, as attorney of the owner with full authority so long as any money remains owing under the mortgage to exercise on behalf of the owner all the owner's rights, powers, and options."

(2) Section 4(1)(b) of the principal Act is hereby amended by inserting, after the words "or subsection (3AA)" (as inserted by section 2 of the Trustee Amendment Act (No. 2) 1982), the words "or subsection (3AB)".

(3) Section 4 of the principal Act is hereby further amended by inserting, after subsection (3C) (as inserted by section 3(2) of the Unit Titles Amendment Act 1981), the following subsection:

"(3D) Subsections (1) and (3) of section 10 of this Act shall not apply in any case where a trustee, pursuant to subsection (3AB) of this section, lends money on the security of any property described in paragraph (a) of that subsection."

P. D. HASSELBERG, GOVERNMENT PRINTER,
WELLINGTON, NEW ZEALAND—1985