



1996

**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND
INTERGOVERNMENTAL AGREEMENTS**

TRUSTEE LAWS

Sixteenth Report
In the Thirty-Fourth Parliament

Presented by
Hon. P. G. Pandal, MLA
Laid on the Table of the Legislative Assembly
on 31 October, 1996.

ORDERED TO BE PRINTED

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TERMS OF REFERENCE

On Wednesday, 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following Terms of Reference:

- (1) to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth;
- (2) when considering draft agreements and legislation, the Committee shall use its best endeavours to meet any time limits notified to the Committee by the responsible Minister;
- (3) the Committee shall consider and, if the Committee considers a report is required, report on any matter within three months, but if it is unable to report in three months, it shall report its reasons to the Assembly;
- (4) each member, while otherwise qualified, shall continue in office until discharged, notwithstanding any prorogation of the Parliament;
- (5) no member may be appointed or continue as a member of the Committee if that member is a Presiding Officer or a Minister of the Crown;
- (6) when a vacancy occurs on the Committee during a recess or a period in excess of two weeks the Speaker may appoint a member to fill the vacancy until an appointment can be made by the Assembly;
- (7) the Committee has the power to send for persons and papers, to sit on days over which the House stands adjourned, to move from place to place, to report from time to time, and to confer with any committee of the Legislative Council which is considering similar matters;
- (8) if the Assembly is not sitting, a report may be presented to the Clerk of the Legislative Assembly who shall thereupon take such steps as are necessary and appropriate to publish the report; and
- (9) in respect of any matter not provided for in this resolution, the Standing Orders and practices of the Legislative Assembly relating to Select Committees shall apply.

CHAIRMAN'S FOREWORD

This Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements reviews the Western Australian *Trustees Act 1962* in response to both South Australia and Victoria enacting 'prudent person' trustee legislation in 1995.

The Report recommends that the prescribed list of investments and/or current authorised trustee investments and/or the prudent person principle be applied by lay or professional trustees. It further recommends that the prescribed list of investments should include ordinary shares in companies with an AA- credit rating.

I am especially grateful for the input into this report to of our Clerk, Keith Kendrick, and our Legal/Research Officer, Melina Newnan who continue to serve the Committee in a most professional and highly enthusiastic manner.

I commend the Report to all Members.

PHILLIP PENDAL, MLA
CHAIRMAN

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CHAPTER ONE

1. INTRODUCTION

1.1 Current Western Australian Legislation

The Committee in this Report examines Trustee Laws in Australia in response to concerns about the lack of uniformity in this area.

Any appointed trustees may only invest in authorised trustee investments unless authority is given to do otherwise in the instrument creating the trust. The Committee was advised that the majority of trust instruments, prepared by professional trustees, give trustees the authority to invest in other than authorised trustee investments.

1.2 South Australian Legislation

Trustee (Investment Powers) Amendment Act 1995

South Australia has passed legislation that relies on a prudent person test at two levels. Section 7 of the South Australian Act states:

Subject to the instrument creating the trust, a trustee must, in exercising a power of involvement -

- (a) if the trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons - exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
- (b) if the trustee is not engaged in such a profession, business or employment - exercise of the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons.

The legislation also lists a range of matters that the trustee may have regard to when considering investments, relating to the needs and circumstances of beneficiaries, diversification, risk, income versus capital return and time frame to name but a few.

1.3 Victorian Legislation

Trustee and Trustee Companies (Amendment) Act 1995

The Victorian Trustee Act was amended by repealing the list of Authorised Trustee Investments and replacing it with a general prudent-person power of investment. This legislation empowers trustees to -

- (1) invest in any kind of investment, so long as it is prudent, having regard to circumstances of the Trust;
- (2) invest in any property, unless the instrument creating the Trust otherwise provides.

Trustees are given protection against the claims for loss on an individual investment if they can demonstrate that the investments were part of a diversified management strategy which was established and operated in a prudent manner.

The Victorian legislation extends beyond the South Australian legislation in two areas:

- **Section 9A** refers to Investments in securities under the Reserve Bank Information and Transfer System (RITS). RITS is a system which provides a means of transferring and settling transactions in securities. Authority to enable trustees to access the system was required because of the issue of a trustee actually obtaining title to the securities in the trustees own name when the securities are held in the RITS system.
- **Section 12E** refers to housing loans by Trustees and in particular where those housing loans are supported by mortgage insurance. Mortgage insurance is used to enable trustee's to lend more than 66.7% of the property value.

2. OPTIONS

The Committee has identified the following options:

- (1) Retain Authorised Trustee Investments.
- (2) Replace Authorised Trustee Investments with Prudent Person Principle.
- (3) Retain Authorised Trustee Investments for lay trustees and provide Prudent Person Principle for professional trustees.
- (4) Replace Authorised Trustee Investments with Prudent Person Principle for professional trustees and provide a list of prescribed investments for lay trustees.
- (5) Add the Prudent Person Principle and the List of Prescribed Investments to the current Authorised Trustee Investments, thus providing discretion and two guides, to be used by either a lay or professional trustee depending on competency.

3. PROPOSED CHANGES

3.1 From Authorised Trustee Investments to the Prudent Person Principle

A prudent person would look at the financial structure of an organisation and recognise and be mindful that the money being invested is not their own.

The prudent person principle provides that a professional trustee would have a higher duty of care than a lay trustee.

3.2 From Authorised Trustee Investments to a Prescribed List of Investments

A Committee appointed by the Attorney General recommended providing lay trustees with a prescribed list of investments (limiting their options).

The Trustees Act would provide for lay trustees to be allowed to invest in interest bearing deposits with regulated institutions, including banks but also building societies and credit unions, which are subject to supervision under the Financial Institutions Code.

A prescribed investment list relieves trustees of the responsibility of determining whether an investment is prudent or not.

3.3 From Shareholders Equity of \$5 Million and Seven Years Unbroken Dividend Payment (immediately prior to investment) to a Credit Rating

Investments which have a credit rating from a recognised agency at or above a prescribed level would qualify.

3.4 New South Wales Legislation

Current minimum ratings for debentures, promissory notes or other prescribed securities to qualify for Authorised Trustee Investment Status are -

- (a) AA /Aa3 - Long Term;
- (b) A-1 /P-1 - Short Term.

In the event that an organisation's credit rating falls below the prescribed minimum, the Trustee is obliged to liquidate that investment within three months.

4. CURRENT PROBLEMS

The Committee has examined a number of problems with the current system of Authorised Trustee Investments and proposals for a list of investments for Lay Trustees.

4.1 Authorised Trustee Investments -

- Trusts cannot participate in the Reserve Bank purchase, transfer and settlement system for Government Securities. The Victorian legislation specifically covers this.
- Trusts cannot finance more than two thirds (66.7%) of housing loans. The Victorian legislation recognises mortgage insurance to allow an increase in the percentage financed.
- Trusts cannot subscribe to some companies floating on the stock exchange for the first time, because of the seven year unbroken dividend payment requirement. Hence they cannot take advantage of prospective extraordinary returns. For example :
 - Commonwealth Bank ordinary shares;
 - Qantas ordinary shares;
 - Bankwest ordinary shares;
 - Challenge Bank ordinary shares.

4.2 Problems Associated with a List of Investments for Lay Trustees

Building Societies would not expect to be on such a list and Home Building Society in correspondence suggested it could lose up to 5% of its balance sheet after withdrawal of deposits (see Appendix 2).

Many trustees would opt for the lay trustee approach, as the requirements of the prudent person principle are more onerous.

The interests of residual beneficiaries would be neglected in favour of life tenants, that is, Interest Bearing Deposits pay interest, but have no capital appreciation.

5. RECOMMENDATIONS**RECOMMENDATIONS**

- (1) That the prescribed list of investments and/or current authorised trustee investments and/or the prudent person principle be applied by lay or professional trustees.**
- (2) That the prescribed list of investments should include ordinary shares in companies with an AA- credit rating.**

APPENDIX 1**EVIDENCE**

Date	Name	Subject
4/9/96	CLARK, David Robert, General Manager, Perpetual Trustees	Trustee Law

APPENDIX 2

Letter dated 20 December 1995 from Home Building Society (attached)