THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

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Trusts and the Administration of Estates
Part V - Trustees' Powers of Investment

WORKING PAPER

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The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

The Commissioners are -

Mr E G Freeman, Chairman
Mr H H Jackson
Mr C W Ogilvie
Mr L L Proksch
Mr D R Williams, QC.

The Executive Officer and Director of Research is Mr P H Clarke. The Commission's offices are on the 16th Floor, City Centre Tower, 44 St George's Terrace, Perth, Western Australia, 6000. Telephone: 325 6022.

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PREFACE

As part of its review of the law of trusts and administration of estates the Law Reform Commission of Western Australia has been asked to consider and report upon whether the range of authorised trustee investments should be expanded.

The Commission has completed its first consideration of this matter and now issues this working paper. This paper does not necessarily represent the final views of the Commission.

Comments, with reasons where appropriate, on individual issues raised in the working paper, on the paper as a whole or on any other matter coming within the Commission's terms of reference, are invited. The Commission requests that they be submitted to it by 15 April 1982.

Unless advised to the contrary, the Commission will assume that comments received on this working paper are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

A notice has been placed in *The West Australian*, offering to send, without charge, a copy of the working paper to anyone interested in it and inviting comments thereon.

The research material on which the working paper is based will, upon request, be made available at the offices of the Commission.

This working paper is based on material available to the Commission in Perth on 15 December 1981.

PART I: SCOPE OF THE PROJECT
CHAPTER 1 - INTRODUCTION

1. THE COMMISSION'S TERMS OF REFERENCE

1.1 The Commission has a general project to review aspects of the law of trusts and the administration of estates, which it has divided into a number of parts.[1] This working paper deals with certain of the powers of investment conferred on trustees by Part III of the *Trustees Act 1962-1978*[2] and certain other matters concerning trustees' powers of investment.

1.2 It has been suggested[3] that the types of investment presently authorised by Part III of the *Trustees Act* for the investment of trust funds are inadequate in the prevailing economic circumstances. It has also been suggested that trustees be given further powers of investment to enable them to take advantage of certain new forms of investment now available. This paper deals with these suggestions, and certain ancillary matters.

1.3 There are, however, other powers of investment set out in Part III of the *Trustees Act* to which no criticism has been directed in these submissions. Some of these powers are referred to in this paper. The Commission would welcome comment on any issues arising out of the provisions of Part III, whether or not they are dealt with in this paper, and also on the other ancillary matters referred to in this paper.

1.4 During the preparation of this working paper, the issues dealt with herein were discussed with the Trustee Companies Association of Australia and New Zealand,[4] which also corresponded with this Commission. Its views are referred to in appropriate places.

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1 Reports have already been submitted on Part I - *Distribution on Intestacy*, Part II - *Administration Bonds and Sureties* and Part III -*Administration of Deceased Insolvent Estates*. A working paper has been issued on Part IV - *Recognition of Interstate and Foreign Grants of Probate and of Letters of Administration*.

2 Hereinafter cited as the "Trustees Act". Part III and certain other provisions of the *Trustees Act* are reproduced in Appendix I.

3 By Perpetual Trustees W.A. Ltd and West Australian Trustees Limited in a joint submission (hereinafter called "the Trustee Companies"); The Stock Exchange of Perth Limited (hereinafter called "the Stock Exchange"); and The Real Estate Institute of Western Australia Inc. The Trustee Companies and the Stock Exchange supported each other in their respective submissions. A submission by the (then) Commissioner for Corporate Affairs on some of these matters has also been considered.

4 Hereinafter called "the Trustee Companies Association". The Association represents all except one of the private statutory trustee companies of Australia and New Zealand.

2. THE DEFINITION AND PURPOSE OF A TRUST

1.5 A trust may be broadly defined[5] as the relationship which arises wherever a person, called a "trustee", holds a legal or an equitable interest in property under a personal obligation, annexed to that property, which requires him to deal with it for the benefit of another person, called the "beneficiary",[6] or for some object permitted by law. Generally speaking, any person who is capable at law of holding property in his own right may be a trustee.[7] In fact, a wide range of persons, including specialised companies, are trustees. As a result, the skill and capacity of trustees tends to vary considerably, from those who are expert in the field to those who have no experience in such matters at all.

1.6 A trust may be created expressly[8] by a person[9] or by operation of law.[10] Trusts are created expressly for a variety of reasons. In the case of trusts created during the settlor's lifetime, the reason is often to protect and preserve the capital sum whilst allowing the beneficiaries to have only the income it generates. There are a number of motives for doing this. In some cases it will be because the beneficiaries are thought by the settlor to be incapable of handling the capital themselves because they are under age, or infirm, or unwise or inexperienced in the investment of money. Such trusts may be of comparatively short duration and may provide for the capital to vest[11] when the present beneficiaries come of age or die as the case may be.[12] In other cases the motive may be the long term preservation of family wealth.[13] Here, the intention is to create "a chain of life interests, enjoying current

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5 It is difficult to provide a comprehensive and unobjectionable definition of "trust" : see the discussion in G W Keeton, *The Law of Trusts*, (9th ed 1968) 2-6 (hereinafter cited as "Keeton"); R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia*, (4th ed 1977) 4-6 (hereinafter cited-as "Meagher and Gummow"); D J Hayton, *Underhill's Law of Trusts and Trustees*, (13th ed 1979) 1-2 (hereinafter cited as "Underhill").

6 There may be more than one beneficiary and the trustee in such a case may himself be a beneficiary: Meagher and Gummow, 5.

7 Meagher and Gummow, 258.

8 Trusts created expressly by a person may be called express or declared trusts: Meagher and Gummow, 46-47.

9 The person who creates a trust is called either a "settlor" or "testator" depending on whether the trust is created and commences to operate during the person's lifetime or whether it is created by will and therefore operates from the person's death.

10 Trusts created by operation of law may be either presumed or implied trusts on one hand or constructive trusts on the other depending on the circumstances: see Meagher and Gummow, 45, 47-48.

11 When a person becomes entitled to a right it is said to vest in him.

12 These trusts could be viewed as "caretaker trusts": R D Blair and A A Heggestad, *The Prudent Man Rule and Preservation of Trust Principal*, 1978 Uni of Illinois Law - Forum 79, 85 (hereinafter cited as "Blair and Heggestad").

13 These trusts could be viewed as "dynastic trusts": L M Friedman, *The Dynastic Trust*, 73 Yale L J 547 (hereinafter cited as "Friedman").

income rights, while enjoyment of principal is postponed until the rule against perpetuities forces distribution to relatively remote descendants".[14]

1.7 Trusts may also be created for other reasons including the furtherance of charitable or non-charitable purposes[15] and the obtaining of taxation advantages which may flow from trusts.

1.8 An important feature of trusts is the varying skill with which they are created. Some trusts are created with the benefit of legal and other advice. In such cases they will usually be created by a formal written document, either a deed or a will, which may confer on the trustee broader powers of investment than those provided by the *Trustees Act*.

1.9 In other cases the trust may not be created with such care or knowledge or may be created by law without a written instrument at all. In these circumstances a trustee may find that the only powers of investment he has are those presently contained in the *Trustees Act*. These may or may not be adequate depending on such circumstances as the duration and purpose of the trust.

3. THE POWER OF TRUSTEES GENERALLY TO INVEST TRUST FUNDS

1.10 The power of a trustee to invest trust funds in his hands may be derived from a number of sources. He may lawfully invest trust funds in the manner and upon the securities authorised -

(1) by the trust instrument (if any)[16]

(2) by the *Trustees Act*

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14 Id, 547-548. The rule against perpetuities can be defined in the following terms: where the vesting of any interest in property, whether legal or equitable, is postponed for a period exceeding a life or lives in being at the date of the instrument creating it, or where the disposition is in a will, at the death of the testator, and twenty-one years after the expiration of such life or lives, such interest is void: B Marks and R Baxt, *Law of Trusts* (1981) 77-78; Meagher and Gummow, 112 et seq. This rule has been modified by statute in Western Australia to permit a period of not more than eighty years to be stipulated in the instrument creating the trust as an alternative to the concept of life or lives in being and twenty-one years: *Property Law Act 1969- 1979*, ss 99-115.

15 Charitable purposes include such purposes as the relief of poverty and the advancement of education. Non-charitable purposes include certain purposes not involving a human beneficiary, for example, the maintenance of animals or the erection and repair of monuments.

16 Investment clauses in trust instruments, which confer broader powers than the *Trustees Act* have, in the past, been strictly construed although this seems now to be giving way to a more "natural" interpretation: P H Pet tit, *Equity and the Law of Trusts*, (4th ed 1979), 275 (hereinafter cited as "Pettit"), Keeton 259; the onus is still on the trustee to show that he has acted within the terms of the clause: Keeton, 256-257.

(3) by any other statute giving trustees authority to invest trust funds

(4) by the court under section 89 of the *Trustees Act.*

However, not all these options may be open to a trustee in a particular case. If the trust has been created by an instrument, a trustee's first duty is to obey the directions contained therein. The trust instrument may specifically direct, or merely authorise, investment in specified classes of security not otherwise permissible for trustees. Alternatively, it may forbid investment in securities otherwise allowed by law. A trustee may apply to the Court if there is any doubt as to the power to invest in a particular way[17] or if he considers it advisable to obtain broader powers to invest.[18] If there is no trust instrument, or if it does not grant any additional powers, the trustee must rely on the investment powers conferred by the *Trustees Act* or by other statutes or by the Supreme Court. The powers conferred by the *Trustees Act* are in addition to those given by any other Act and the instrument (if any) creating the trust, but unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument.[19]

1.11 It is important to note in the present context that the word "invest" and hence the word "investments" has, in the law of trusts, a narrower connotation than it may have in ordinary usage. One of its meanings has been held to be "to apply money in the purchase of some property from which profit or interest is expected and which property is purchased in order to be held for the sake of the income which it will yield".[20] Pettit's view is that it is safe to regard this as probably *the* meaning of the word in this context.[21] Thus a clause in a trust instrument giving power to invest in freehold property has been held not to authorise the purchase of a freehold house, not for the rent or other income it might generate, but in order to permit beneficiaries to live in it.[22] However, it has been held that the statutory power given to trustees to "invest" in a dwelling house for "the use of" beneficiaries does not require that the property be income-producing.[23] Another consequence of the technical meaning of "invest" in the law of trusts is that in the absence of statutory or other authority a loan upon an unsecured

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17 *Trustees Act*, s 92.
18 Id, s 89.
19 Id, s 5(2) and (3).
20 *Re Wragg* [1919] 2 Ch 58, 64-65 per Lawrence J.
21 Pettit, 275.
22 *Re Power* [1947] Ch 572; *In Will of Sherriff; In Will of Lawson* [1971] 2 NSWLR 438.
23 *Re Bentley*; *Equity Trustees Executors and Agency Co Ltd v Bentley* [1955] VLR 33. For the Western Australian provision see *Trustees Act* s 17

promise to repay is not an "investment" since the trust fund has not been applied in the purchase of property.[24] Further, a trustee cannot simply put the money in a bank account where it gains no interest.[25] The result is, therefore, that a trustee should not without authority purchase property which provides no income even if there is a high rate of capital growth.

1.12 Every investment must be authorised. Any profit arising from an unauthorised investment belongs to the beneficiaries, not the trustee, but the trustee is personally liable for any loss so arising, regardless of how successful the other trust investments, authorised or unauthorised, have been.[26]

4. THE DUTIES OF TRUSTEES WHEN MAKING INVESTMENTS

1.13 The first duty of a trustee, in considering whether to invest in a particular venture, is to determine whether the investment under consideration is authorised. This will determine whether he has power to invest in it at all.

1.14 In addition, the trustee must act prudently when making investments. If a trustee is instructed by the trust instrument to invest in a particular security but feels any doubt about the prudence of such an investment, he can apply to the Supreme Court for directions. However, he is not obliged to do so and if he does not, he must obey the trust instrument.[27] If the trust instrument merely authorises investments of a class not authorised by statute the trustee must exercise a high degree of prudence before making a particular investment. He is not safeguarded merely because the investment made is authorised by the instrument or by statute. Even with regard to authorised investments he must take such care as a reasonably cautious man would take, having regard to the interests not only of those who are entitled to the income of the trust, but also of those who will be entitled to its capital in the future.[28]

1.15 In *Re Whitely, Whitely v Learoyd*[29] Lindley J described the duty imposed upon trustees in the following terms:

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24 *Khoo Keong v Ch'ng Joo Tuan Neoh* [1934] AC 529.

25 *Hutching v Snowden* (1897) 23 VLR 118.

26 The trustee will only be able to set off losses against profits on unauthorised investments if the investments are all part of the one overall transaction and some are profitable and others are not: *Bartlett and others v Barclays Bank Trust Co Ltd* [1980] 1 Ch 515.

27 Meagher and Gummow, 349.

28 Underhill, 502.

29 (1886) 33 Ch D 347, 355.

> "The duty of the trustee is not to take such care only as a prudent man would take if he had only himself to consider, the duty is rather to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide."

1.16 Another important duty of a trustee is to act impartially. He must not exercise the powers of investment for the benefit of one or more of the beneficiaries at the expense of the others. Similarly, he must act impartially[30] between the income beneficiaries[31] and those interested in the remainder.[32] This can create substantial difficulties for a trustee, particularly if there is a high rate of inflation. For example, a trustee may be confronted with a choice between an investment which earns a high income but which has little or no capital growth and an investment which has a high capital growth but a poor income.[33] In periods of inflation this conflict is difficult to resolve satisfactorily if nearly all avenues of authorised investment are restricted to fixed interest securities. Many such investments, although providing an appropriate return for the income beneficiary, are deficient as long term capital investments.[34]

1.17 There is a wide range of other matters a trustee must consider in making an in vestment, including a need to diversify,[35] to take advice as to certain investments,[36] and to invest promptly.

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30 *Re Zimpel, deceased; Morrison v Perpetual Executors Trustees and Agency Company (WA) Limited and Sadler* [1963] WAR 171. See also J C Phillips, *Some Instances of the Trustee's Duty to Act Fairly Between Different Classes of Beneficiaries,* (1977-1978) 10 Uni of Qld LJ, 83 esp at 88-94 (hereinafter cited as "Phillips").

31 Income beneficiaries are those who are presently entitled to receive the income of the trust.

32 The remaindermen are those who are entitled to either the income or the capital of the trust once the interests of the present income beneficiaries are extinguished.

33 Phillips, 94.

34 For an extraordinary example, see G W Keeton and L A Sheridan, *The Comparative Law of Trusts in the Commonwealth and the Irish Republic,* (1976), 36. Some forms of mortgage investment have developed which link repayments of capital or interest to an external factor such as currency exchange rates or cost of living indexes with the object of preserving the real value of the amounts to be paid. See for example, *Multi-Service Bookbinding Ltd v Marden* [1979] Ch 84 and *Klonis v Charmelyn Enterprises Pty Ltd* (unreported) Supreme Court of New South Wales ED No 2165/78 noted in 1980 Australian Current Law Cases No 598. In this way possible increases in capital repayments in money terms can be joined to a traditional interest-bearing trustee investment. It may be that the duty of prudence imposed on trustees requires that if a trustee invests trust money in an index-linked mortgage a provision be included which sets fixed minimum repayment terms.

35 Underhill, 474

36 *Trustees Act,* s 16(5).

5. THE POWER OF THE COURT TO EXPAND POWERS OF INVESTMENT

(a) Statutory power

1.18 Where a trustee has inadequate power to invest he is entitled to apply to the Supreme Court under section 89 of the *Trustees Act* for broader powers to invest.

1.19 Section 89 provides inter alia that where in the opinion of the Supreme Court any investment is:

> "expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the Court, or it or they cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit."

An order under this section can be revoked or varied and may be made notwithstanding anything to the contrary contained or expressed in the trust instrument.[37] Applications to invoke the section may be made by any trustee or beneficiary. [38]

1.20 An application of this nature would be decided on the merits.[39] The result of a particular application may well depend on the nature of the trustee as well as the inherent merits of the application. In *National Trustees Executors and Agency Company of Australasia Limited v Attorney General for the State of Victoria*,[40] McInerney J said that the fact:

> "That an application is made by a trustee company is a circumstance which may incline a court to permit investments of a kind which it would not be disposed to permit if the application was made by individual trustees not shown to have the overall investment experience of a trustee company. Furthermore, that circumstance may justify the court in dispensing with safeguards which the court might require if the application were made by a private trustee without the experience and full-time commitment of a trustee company".

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37 Id, s 89(3).

38 Id, s 89(4).

39 In England and Wales a practice note has been issued indicating that there is no need for expert evidence to be called on economic or financial history, or arguments in general terms as to the wisdom of extending powers of investment: *Re Allen's Settlement, Allen v Allen and Others* [1959] 3 All ER 673.

40 [1973] VR 610, 613.

In this case the court authorised the trustee to invest up to one-half of the trust assets in land.[41]

1.21 In the same case McInerney J indicated that a trustee of a trust in which the real value of the capital is being reduced by inflation may be under a duty to bring such an application particularly if the trustee is a trustee company.[42]

1.22 In granting such an application the Court may either confine itself to a particular investment or confer a general power to invest amongst a class of investments.[43] The Court may also stipulate a number of conditions for the exercise of the expanded power of investment, for example, that not more than a certain percentage of funds may be invested in a particular way.[44]

(b) Inherent power

1.23 The Court also has inherent equitable jurisdiction to sanction deviations from the terms of a trust so as to permit a trustee to enter into some business transaction or to make some investment which was not authorised by the settlement where circumstances have arisen of an exceptional and urgent nature. However, the statutory jurisdiction is so much more extensive than the court's inherent jurisdiction as to render the latter virtually obsolete.[45]

6. THE LIST APPROACH OR THE PRUDENT MAN RULE

1.24 The traditional approach to authorised trust investments in Australia, as in England[46] and New Zealand, has been to restrict trustees to a statutory list of authorised investments

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41 The same judge had in an earlier case refused a similar application by private trustees: *Lambrick v Attorney General for the State of Victoria*, (unreported) Supreme Court of Victoria, 1972.

42 *National Trustee Executor and Agency Company of Australasia Limited v Attorney General for State of Victoria* [1973] VR 610, 611:

> "...having regard to the overall picture of the inflationary trend which has emerged from the materials laid before the courts in cases such as *Riddle v Riddle* (1952) 85 CLR 202 and *Re Baker* [1961] VR 641 it behoves trustee companies to consider whether in the interests of the beneficiaries they should not make applications of the kind presently before me".

43 Id, 614-615.

44 Ibid.

45 Meagher and Gummow, 306-307 and Underhill, 386-7.

46 In England the list set out in the *Trustee Investments Act 1961* is divided into two broad categories. Not more than one half of the trust fund may be invested in "wide range investments" which include the debentures, stocks and shares of certain companies. The balance must be invested at interest in more traditional trustee securities.

subject to the trust instrument, if any. That list may of course be expanded by court order or by other statutes. Trustees may invest only in investments authorised by the list and are then subject to the rules referred to earlier.[47]

1.25 The American position has developed somewhat differently. Whilst some States have a statutory list of authorised investments the majority now follow the Massachusetts "prudent man rule". This was laid down in 1830 by Judge Putnam in *Harvard College v Amory*[48] when he said:[49]

> " All that can be required of a trustee is that he shall conduct himself faithfully and exercise sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

1.26 This rule is described by Keeton as permitting trustees to invest in the same range of stocks and shares and in the same manner as a prudent man would do, when investing on behalf of others. [50]

1.27 However, it has been suggested[51] that the apparent breadth of discretion accorded trustees by the rule has been reduced by judicial interpretation so that "despite the seeming liberality of the prudent man rule, the courts have reached a result similar to that reached by the legal lists: the restriction of investment opportunities to only certain classes of securities".[52] Nevertheless, the prudent man rule does seem to provide somewhat broader powers of investment than the narrow list approach adopted in some American States. It also contains a potential for flexibility and development if new forms of investment arise or economic conditions change.

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47 Paras 1.13 to 1.17 above.

48 26 Mass (9 Pick) 446.

49 Id, 461.

50 Keeton, 251.

51 Blair and Heggestad, 88

52 Ibid. It is noteworthy that while a trustee can apparently under this rule purchase income-producing property, he cannot buy land for resale at a profit because this would amount to "speculation" and hence would not be a prudent investment: American Law Institute, *Restatement of the Law; Trusts,* 2(d) 532.

7. AIMS OF REFORM IN THIS FIELD

1.28 The Commission takes as basic the need to ensure that investments of trust property are as secure as can reasonably be expected. To this end the *Trustees Act* must recognise the existence of inexpert as well as expert trustees. Trust funds must be secured against speculation. By this the Commission means those forms of investment which would place the capital involved at unacceptable risk of loss in absolute terms.

1.29 The Commission accepts, however, that in periods of inflation the capital of a trust fund may be also at risk through the failure of the fund to grow in money terms at a rate sufficient to offset the fall in money values. This problem is particularly acute in respect to those trust funds in which entitlement to income is vested in one class of beneficiaries and entitlement to capital is vested in another, although the conflict between income and capital beneficiaries is not restricted to inflationary times. In these matters trustees' powers of investment should be sufficiently limited to prevent unwise speculation yet sufficiently flexible to permit investments capable of retaining the real value of the capital fund.

1.30 These aims may be achieved through the specific provision of a suitable list of authorised investments and the imposition of certain duties upon trustees to act prudently and to take proper advice in appropriate cases.

8. ECONOMIC CONSIDERATIONS

1.31 The Commission has not, in this paper, examined the economic implications of the changes discussed below. It has proceeded on the basis that the benefits or detriments, if any, which changes in the law relating to trustees' powers of investment might have on the economy of Western Australia should not be the only determinants of whether or not those changes should be made. The Commission believes that beneficiaries should not be disadvantaged by restrictions which would not apply to them if they held the trust property directly, rather than through trustees, and that adverse economic consequences, at least of a minor nature, should not be permitted to override what is in their best interests.

1.32 The Commission recognises that adoption of its tentative proposals may have economic implications.[53] The Commission would welcome comment or information on these matters.

9. CONSEQUENCES FOR OTHER LEGISLATION

1.33 There are a number of Acts under which various bodies are empowered or required to invest in authorised trustee investments. These include for example -

(a) *Perpetual Trustees WA Ltd Act 1922-1980*, section 21A,
(b) *West Australian Trustees Limited Act 1893-1979*, section 21A,
(c) *Public Trustee Act 1941-1981*, section 40(2),
(d) *Building Societies Act 1976-1978*, section 47,
(e) *Local Government Act 1960-1981*, sections 527(3) and 626(5a),
(f) *Friendly Societies Act 1894-1975*, section 15(1)(h),
(g) *Superannuation and Family Benefits Act 1938-1981*, section 25(1)(a),
(h) *Real Estate and Business Agents Act 1978-1980*, section 108(b),
(i) *Coal Mine Workers (Pensions) Act 1943-1980*, section 20(5),
(j) *Lotteries (Control) Act 1954-1972*, section 9(2), and
(k) *Legal Contribution Trust Act 1967-1976*, section 17.

The Commission draws attention to the fact that any changes made to the provisions of the *Trustees Act* would be thereby transmitted also to these and other statutes which contain such provisions. It would, of course, be a simple matter to make appropriate amendments to any such statutes if any particular alterations to the *Trustees Act* were considered inappropriate in the particular case.

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53 For example, in introducing the Trustee (Authorized Investments) Bill 1981, which proposes to authorise deposits in building societies as trustee investments, the Attorney General for Victoria spoke of the desirability of increasing the funds available in Victoria for housing construction: Victorian Parliamentary Debates (Legislative Council) 27 October 1981, 2024.

PART II: THE EXISTING LAW
CHAPTER 2 - THE LAW IN WESTERN AUSTRALIA

1. INTRODUCTION

2.1 As mentioned earlier[1] this working paper deals with certain of the powers of investment conferred on trustees by Part III of the *Trustees Act* and certain other matters relating to trustees' powers of investment. In this chapter the Commission briefly describes the position in Western Australia in relation to these matters and the power of the Supreme Court to expand a trustee's powers of investment.

2.2 In paragraph 1.10 above the Commission outlined in general terms the sources of a trustee's power to invest.[2] It pointed out that these powers can be derived from the trust instrument (if any), from the Trustees Act, from any other statutes giving trustees authority to invest or from the Supreme Court pursuant to an application under section 89 of the Trustees Act.

2. INVESTMENTS AUTHORISED BY PART III OF THE *TRUSTEES ACT*

2.3 Broadly speaking, Part III of the *Trustees Act* authorises trustees to invest in government and semi-government securities, first legal mortgages, certain deposits in banks, certain deposits and shares in certified building societies, or with an approved dealer in the short term money market and in various other investments at interest. Part III also permits investments in certain quoted stocks and shares of certain public companies thus enabling a trustee to invest in assets which have a potential for capital growth as well as an ability to earn income. In addition, a trustee may invest in certain specified debentures, deposits and notes of such companies. A trustee may also invest in the units, or other shares of the investments subject to the trust, of a unit trust scheme in respect of which there is an approved deed under the *Companies Act*. When investing in securities in these latter categories, however, the trustee is required to obtain and consider proper advice in writing on whether the proposed investments are satisfactory having regard to the need for diversification, prudence and the

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1 Paras 1.1 to 1.3 above.

2 For the technical meaning of the word "invest" see para 1.11 above. The word is used in this sense in the discussion which follows.

suitability of the investments to the trust.[3] Once having invested in such a way, the trustee is under an obligation to obtain advice from time to time on whether he should retain such investments.[4] A trustee is also given power to invest in the common trust fund of a trustee corporation and to purchase a dwelling house for the use of a beneficiary. Some of these powers are now discussed in more detail.

(a) First legal mortgages in Western Australia

2.4 Subject to any contrary directions in the trust instrument, if any, a trustee may pursuant to section 16(1)(b) of the *Trustees Act* invest trust money by lending it, at interest, for a period not exceeding seven years[5] on the security of a first legal mortgage of an estate in fee simple in land in Western Australia. As a general rule, a trustee should only make this kind of investment if the amount of money lent does not exceed two-thirds of the value of the land and if advised to do so by a person competent to value that land.[6] This is because section 22 of the *Trustees Act* provides that if these conditions have been fulfilled the trustee cannot be liable for breach of trust by reason only of the amount of the loan in relation to the value of the land.

2.5 Section 22, however, provides only limited protection which is subject to the overriding duty of a trustee to invest prudently so that if he does not, he cannot escape liability merely by showing that he only lent two-thirds of the value of the property and complied with the other conditions specified in the section. Therefore, if the land is liable to deteriorate, or is subject to fluctuation in value, or depends for its value on circumstances the continuation of which are precarious, a larger margin of protection would be advisable. Indeed, having regard to the nature of a particular piece of land, prudence may indicate that no loan should be made on it at all.

2.6 On the other hand, the mere fact that a trustee advanced slightly in excess of two-thirds does not mean he is in breach of trust. The section does not place a positive duty on a trustee to follow the procedure laid down. However, as Underhill points out[7] "Although the procedure is therefore in this sense voluntary, the protection which its adoption gives, both to

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3 *Trustees Act*, s 16(5).
4 Id, s 16(6).
5 Id, s 25(1)(a).
6 Id, s 22.
7 Underhill, 510.

trustees and to beneficiaries, is so valuable that it should be regarded as compulsory in any normal case". It seems highly unlikely that trustees will risk lending more than two-thirds of the value of a property without increased statutory protection to do so.

(b) Deposits in banks

2.7 Section 16(1)(d) provides that trustees can invest in certain deposits in certain banks. Investments may be made in "fixed deposits" in any incorporated or joint stock bank carrying on business in the State. Investment may also be made "on deposits" in the Savings Bank Division of the Rural and Industries Bank of Western Australia. Finally investment may be made "on deposit" in any savings bank authorised to carry on savings bank business under the *Commonwealth Banking Act 1959-1979*.

2.8 The receipt given by a bank for a fixed deposit may take the form of a "certificate of deposit" rather than being described as a simple receipt. In recent years other more sophisticated forms of certificates of deposit have developed. These include convertible certificates of deposit,[8] negotiable certificates of deposit[9] and transferable certificates of deposit.[10] The Commission's tentative view is that the purchase of any of these certificates of deposit direct from a bank comes within section 16(1)(d). A trustee who deposited money with a bank in exchange for a convertible, negotiable or transferable certificate of deposit seems to have made a deposit.

2.9 There is some doubt, however, whether the purchase of these more sophisticated certificates of deposit from a third party, including the original depositor, falls within the section. In these cases the purchaser may not be investing "on deposit" with a bank but purchasing an instrument, because the trust money used to pay for it goes to the vendor of the instrument not the bank.

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8 Convertible certificates of deposit are issued when banks accept deposits for large sums on the basis that the depositor may convert to negotiable certificates of deposit at a later date: G A Weaver and C R Craigie, *The Law Relating to Banker and Customer in Australia*, (1975) 64 (hereinafter cited as "Weaver and Craigie").

9 A negotiable certificate of deposit would simply appear to be a negotiable instrument though not within the *Bills of Exchange Act 1909-1973* (Cth): Weaver and Craigie, 64.

10 Transferable certificates of deposit are issued for deposits registered in the name of the depositor which are transferable by an instrument of transfer in much the same way as company debentures and unsecured notes. These certificates are not negotiable: Weaver and Craigie, 64.

(c) Deposits in building societies

2.10 Section 16(1)(e) provides that trustees may invest on "fixed deposits in or in the shares of any incorporated building society carrying on business in the State and certified by notice in the [Government] Gazette, signed by the Treasurer, as a society in which trustees may invest." It will be noted that the present provision probably does not permit call deposits in building societies.[11]

(d) Preference or ordinary stock or shares

2.11 Trustees may purchase certain preference or ordinary stock or shares in companies which satisfy the requirements of sections 16(1)(k) and 16(4). Section 16(4) of the *Trustees Act* provides that a trustee shall not invest in the stock or shares of a company unless it has a paid up share capital of not less than two million dollars and has paid a dividend in each of the fifteen years immediately preceding the year of investment on all its ordinary stock or shares. The stock or shares must be quoted on an Australian stock exchange and be either fully paid up or, by the terms of the issue, required to be fully paid up within nine months of the date of issue.

2.12 In each case the trustee is required to obtain and consider "proper advice" from time to time.[12]

(e) Company debentures

2.13 Section 16(1)(1) provides that a trustee may invest in certain debentures, including debenture stock and bonds, whether constituting a charge on assets or not, issued by any company in which at the time of investment it would have been proper to invest in the purchase of ordinary shares.[13] In addition, the debentures must be quoted on an Australian stock exchange and be either fully paid up or, by the terms of the issue, required to be fully

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11 The *Trustees Act,* s 16(1)(e), however, authorises trustees to invest in "the shares" of building societies. At least some building societies describe money invested in their passbook savings accounts as the acquisition of" shares". Normally, this money is available at call although under the Rules of the society a period of notice in writing can be required.

12 *Trustees Act,* s 16(5)-(8).

13 *Trustees Act,* s 16(4) sets out the criteria for such a company. It would seem (although it is open to argument) that the ordinary stock and shares must also be quoted and satisfy the requirements of s 16(3).

paid up within nine months of the date of issue. The trustee is required to obtain and consider "proper advice" from time to time. [14]

2.14 There are a number of companies whose debentures would otherwise qualify as authorised trustee investments for this purpose by having a paid up capital of two million dollars and by having paid a dividend in each of the previous fifteen years and which issue debentures to the public, but either whose shares or debentures (or both) are not quoted on an Australian stock exchange. These include certain finance companies which are wholly owned or substantially owned subsidiaries of banks or other substantial companies.

(f) Deposits or notes

2.15 Section 16(1)(m) provides that a trustee may invest on deposit or notes, whether secured or unsecured, at interest either for a fixed term not exceeding seven years or at call, in any company in which at the time of investment it would have been proper to invest in the purchase of ordinary shares.[15] There is, however, no requirement for such notes or deposits to be quoted on a stock exchange. The trustee is required to obtain and consider "proper advice" from time to time.[16]

(g) Dwelling house for the use of a beneficiary

2.16 Pursuant to section 17 of the *Trustees Act*, a trustee may purchase a dwelling house for the use of any beneficiary under the trust and may permit the beneficiary to reside on the land under such terms and conditions[17] consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit. The purchase must be of an estate in fee simple in land in Western Australia used for the purpose of a dwelling house[18] only. The trustee must follow certain procedures set out in section 17(2) which are designed to ensure that he makes a

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14 Id, s 16(5)-(8).

15 *Trustees Act,* s 16(4) sets out the criteria for such a company. It would seem (although it is open to argument) that the ordinary stock and shares must also be quoted and satisfy the requirements of s 16(3). The argument to the contrary is stronger than in the case of s 16(1)(1) because s 16(1)(m) does not specifically refer to s 16(3) and s 16(3) does not refer to s 16(1)(m).

16 Id, s 16(5)-(8).

17 Where only one of a number of beneficiaries resides in a house it would normally be appropriate to charge rent. The trustee has authority to do this: *Trustees Act,* s 17(1).

18 In case there is any doubt whether this term includes a strata title lot used for residential purposes, this should be clarified by legislation. At the same time it may be useful to consider possible extension of the provision to the acquisition of shares in a home unit company, and also possibly to the purchase of a tenancy in common, for this purpose.

prudent purchase. These are that he must act upon the report of a qualified valuer independent of the owner; the purchase price must not exceed the value of the land as stated in the report; the report must state the net annual rental which the property produced or is capable of producing at the time of valuation and the purchase must be made upon the advice of such valuer. Once a trustee has purchased a dwelling house pursuant to this section he is permitted to retain it notwithstanding: that no beneficiary under the trust is residing on the land. [19]

3. INVESTMENTS NOT PRESENTLY AUTHORISED BY PART III OF THE *TRUSTEES ACT*

(a) Land

2.17 At present there is no general statutory power in Western Australian law which allows a trustee to purchase land as an investment.[20]

(b) Rights to shares and convertible notes

2.18 Section 25(4) of the *Trustees Act* provides that if any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in that company, or any other company, the trustees may exercise the right to take up the securities or renounce or assign the right.

2.19 However, these powers do not seem to authorise a trustee to purchase rights to shares or convertible notes on a stock exchange. Companies often issue rights to take up further shares to existing shareholders at a concessional price. Sometimes the shareholders choose not to do so and instead sell the right to take up such further shares. Whilst a trustee may be able to purchase shares in the company concerned it seems that he has no power to purchase rights to such shares on the market. Similarly, companies sometimes offer the holders of shares the right to take up convertible notes in the company. These notes allow the holder to convert to

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19 *Trustees Act*, s 17(4).

20 A trustee may retain any land which forms part of an estate because at general law there is no duty on a trustee to convert land in the absence of an express direction to the contrary in the trust instrument: Keeton, 266-267, Underhill, 431; see also *Trustees Act*, ss 27(1)(c) and 27(5). It is presumed that such property is meant to be enjoyed in specie. However, a trustee can be compelled to sell the land if so required in writing by all the persons at that time beneficially entitled to an interest in possession of the land under the trust: s 27(4). The trustee also has a statutory power pursuant to s 27(1)(b) to exchange property including land for other of a like or better tenure or concur in its partition or give or take property by way of equality of exchange or partition.

shares at some later date. If the holder of the shares does not wish to take up these rights he may sell them on the stock exchange. It would seem that a trustee has no power to purchase such rights to convertible notes although if in a qualifying company he would be able to purchase the convertible notes themselves were they available.

(c) Bank accepted or endorsed bills

2.20 Since the mid 19601 s both an official[21] and unofficial market[22] has been created in Australia in commercial bills of exchange. Bills are created for a variety of reasons but principally to pay for goods, to finance transactions, or merely to raise capital. For example, Company A may wish to buy certain goods from Company B, but for financial reasons Company A may not wish to pay for them immediately. Company B, however, may not wish to extend credit from its own resources. Company A, with the agreement of Company B, would therefore draw a bill of exchange in favour of Company B payable in say 180 days time. Company A by this means defers its payment of the amount for 180 days. Company B instead of retaining the bill until maturity and waiting 180 days for payment could sell the bill on the market at a discount and thereby receive cash in hand.

2.21 Sometimes these bills are sold through the unofficial money market in which case the parties to the transaction will simply rely on the reputation of the parties to the bill and the signatories to the bill to make the bill marketable and acceptable to buyers. Such bills are known as "non-bank bills".

2.22 In other cases, commercial bills are by prior arrangement accepted or endorsed[23] by a bank and are then known as "bank bills" and may be traded through the official money market. The effect of acceptance or endorsement by a bank is to make the bill of exchange secure because a bank has agreed either to honour the bill in case of acceptance, or to pay should the acceptor default in case of endorsement. The rate at which commercial bills are

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21 In 1964 the Reserve Bank of Australia conducted an inquiry into the scope for developing an Australian market in commercial bills. It was announced that from March 1965 authorised dealers in the existing official short term money market would be permitted to trade in commercial bills which had been accepted or endorsed by an authorised bank: D E Allan, M E Hiscock, L Masel and D Roebuck, *Credit and Security in Australia* (1977), 196 (hereinafter cited as" Allan and Others").

22 The unofficial money market consists of dealers who are not authorised by the Reserve Bank in the manner outlined in footnote 1 above.

23 Acceptance or endorsement are quite different procedures but the technicalities need not be elaborated here. For a full discussion see Allan and Others, 215; see also Weaver and Craigie, 383 et seq.

discounted varies with the prevailing rate of interest, with bank bills attracting a lesser rate than non-bank bills because of their greater security.

2.23 The *Trustees Act* does not at present authorise a trustee to invest in bills of exchange.[24]

4. MISCELLANEOUS MATTERS

(a) Grant of options to purchase trust property

2.24 The only statutory power given to trustees to grant an option to purchase trust property[25] is where the trustee has leased the property. In such a case the lease may contain an optional or compulsory purchasing clause.[26]

2.25 However, in equity there is a limited power to grant an option to purchase trust property but it arises only where trustees have a power of sale. Even if they do have a power of sale, the general principle is that this does not authorise them to enter into a contract to sell at a future time[27] at a price fixed at the present time without regard to the value of the property at the future time.[28] "The ground on which the grant of an option to purchase at some time in the future is treated as improper on the part of the trustees is because it precludes them in advance from exercising their judgment according to the circumstances as they exist at the time of the sale".[29]

2.26 Nevertheless, the giving of an option by a trustee to purchase trust property may be proper where, for example, an option is given only for such time as would enable a purchaser to satisfy himself that it would be profitable to acquire the property and to arrange his finances.[30] The true position would appear to be that " ...on principle an option granted by a

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24 Investment of money with dealers in the official short-term money market is permitted: *Trustees Act*, s 16(1)(f). Official dealers are permitted to hold a small (but undefined) proportion of their portfolios in bank bills: Allan and Others, 196.

25 "Property" includes both real and personal property: *Trustees Act*, s 6(1).

26 *Trustees Act*, s 27(3)(b).

27 There is a controversy as to the true nature of an option to purchase. One view is that it is a present sale upon condition that the other party shall within the stipulated time bind himself to perform the terms of the offer embodied in the contract. The other view is that an option given for value is an offer, together with a contract that the offer will not be revoked during the time, if any, specified in the option. For a discussion of the conflicting views see the judgment of Gibbs J in *Laybutt v Amoco Australia Pty Limited* (1974) 132 CLR 57, 71-76.

28 *Clay v Rufford* (1852) 5 De G & Sm 768; 64 ER 1337.

29 *Rawcliff v Johnstone* [1921] NZLR 470, 473 per Hosking J.

30 *Meek v Bennie* [1940] NZLR 1.

trustee for sale can be supported if on the facts of the particular case it appears to be a proper and reasonable method of effecting a prompt sale at the best price".[31] Such an option would have to be of short duration and be a prudent transaction in all other respects. On this basis trustees who were careful not to tie up the trust property for long periods, though from time to time they extended the options and received consideration for giving them, have been held not to have departed from their duty as trustees.[32] The practical difficulty for a trustee who wishes to rely on the equitable power is to know where to draw the line.

2.27 The position may also be thought to be anomalous when regard is had to the fact that a trustee can sell land on terms of deferred payment under the *Trustees Act*.[33] To do so in inflationary times may incur the same disadvantages as a lengthy option even though interest would be payable on the balance outstanding from time to time.[34] The instalments of capital would depreciate in real terms as time went on.

(b) Application to trustees of the apportionment provisions[35] of the Property Law Act 1969-1979 Part XV (sections 130-134)

2.28 A testator may die having bequeathed property to various persons in succession. At the date of his death rents, dividends or other periodical payments may be accruing on the property but may not become payable until after his death. The problem arises as to whether the rent, dividends or other payments, when ultimately received after his death form part of the income of the estate to which the life tenant is entitled, or part of the capital of the estate which is preserved for the remaindermen, or are partly capital and partly income. A similar situation will arise when the life tenant dies; and if there is a succession of interests, each time the beneficial interest in the property from which the payments are derived changes. Thus when dividends, rent or other periodical payments are received, it must be determined whether the sum is apportionable and if so how.

2.29 This matter is now regulated by the provisions of sections 130-134 of the *Property Law Act 1969-1979*. The effect of these provisions is that every periodical payment in the nature of income is deemed to have accrued by equal daily increments[36] and must be

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31 *Rousset v Antunovich* [1963] WAR 52, 60.
32 *Meek v Bennie* [1940] NZLR 1.
33 *Trustees Act*, s 34.
34 Id, s 34(3)(b).
35 These provisions are reproduced in Appendix II.
36 *Property Law Act 1969-1979*, s 130(2).

apportioned where there is any change in the ownership of the property from which the income is derived in the interval between one payment and the next succeeding payment.[37] Thus if a testator leaves a life estate to a beneficiary with a remainder over, the provisions have to be applied both at the death of the testator and also at the death of the life tenant.

2.30 The position can most easily be demonstrated in the context of wills by a simple example. Assume a testator whose estate consists solely of shares on which the annual dividend is payable in one month's time, dies today leaving a life estate to his wife with remainder to his children absolutely. When the annual dividend becomes payable in a month's time, the question arises as to how it is to be apportioned as between capital and income.

2.31 In the absence of a contrary direction in the will, the effect of sections 130 to 134 of the *Property Law Act* is that that part of the annual dividend which accrued during the testator's lifetime (that is, eleven-twelfths) will form part of the capital of the testator's estate and only the remaining one-twelfth will be payable to the widow as income. The widow will then have to wait another twelve months before she actually receives a full annual dividend from the shares in respect of which she has a life interest.[38] The same process of apportionment is repeated when the widow dies. Assuming she died in a subsequent year to her husband but on the same date eleven-twelfths of the annual dividend would form part of her estate and be distributed according to the terms of her will. The remaindermen (that is, the children) would only receive one-twelfth of the dividend in that year and would have to wait to the following year for a full annual dividend. If the dividend had been declared just before the testator's death but was not payable until after his death it would all form part of the capital of the estate.[39]

2.32 The results of apportionment pursuant to the *Property Law Act* may in many cases come as a surprise to the lay person.[40] In the example given above, the testator would probably have expected his widow to continue to receive the full income from the shares, so that his intention in this respect is defeated. The widow may suffer hardship by reason of an unexpected reduction of family income. Although the apportionment provisions can be

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37 Id, s 131 and see also Meagher and Gummow, 392.

38 The eleven-twelfths share of the dividend would fall into the capital of the estate and be invested by the trustees and the earnings on that would be payable to her from time to time.

39 *Wright v Tuckett* (1860) 1 John and H 266; 70 ER 747.

40 The notion of apportionment is well known to conveyancers and is very often used between vendors and purchasers in regard to such matters as rates, taxes and rents.

prevented from operating by express stipulation,[41] a will drawn without expert advice may omit such a provision through inadvertence.

41 *Property Law Act 1969-1979*, s 134(2). In cases of doubt as to whether money is capital or income or whether a loss is of capital or income a trustee is empowered to determine the matter, binding the beneficiaries by his decision: *Trustees' Powers Act 1931-1935*, s 5.

CHAPTER 3 - THE POSITION IN OTHER JURISDICTIONS

1. INTRODUCTION

3.1 In this chapter the Commission will review the statutory provisions in each of the Australian States and Territories as well as in New Zealand and England. A comparative table of the statutory provisions in these jurisdictions is set out in Appendix III.

2. THE POSITION ELSEWHERE

(a) First legal mortgages

3.2 There are similar provisions to section 16(1)(b)[1] and section 22[2] of the *Trustees Act* in each of the Australian States and Territories as well as in England[3] and New Zealand.[4] In each of these jurisdictions the traditional proportion which a trustee is protected in lending, two-thirds of the value of the secured property, is repeated.

3.3 Five Australian jurisdictions now protect a trustee who lends a greater proportion provided mortgage insurance is effected.[5] The position in each of these jurisdictions is that a trustee who is an approved lender[6] is protected, in respect of an insurable loan, in lending such amount as he thinks fit but not exceeding in any case such amount as is the subject of a contract of insurance in respect of the loan entered into by the Housing Loans Insurance Corporation. While this is a valuable provision, it is limited to certain types of loan[7] and to insurance with one particular insurer. Tasmania also allows other approved insurers to participate in addition to the Housing Loans Insurance Corporation, although the loans are

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1 *Trustee Act 1925-1981* (NSW), s 14(2)(e), *Trustee Act 1958-1981* (Vic), s 4(1)(1), *Trusts Act 1973-1981* (Qld), s 21(b), *Trustee Act 1936-1980* (SA), s 5(1)(b), *Trustee Act 1898-1981* (Tas), s 5(1)(f), *Trustee Act 1925-1978* (ACT), s 14(1)(g) and *Trustee Act 1893-1981* (NT), s 4(1)(f).

2 *Trustee Act 1925-1981* (NSW), s 18, *Trustee Act 1958-1981* (Vic), s 8, *Trusts Act 1973-1981* (Qld), s 27, *Trustee Act 1936-1980* (SA), s 10, *Trustee Act 1898-1981* (Tas), s 10, *Trustee Act 1925-1978* (ACT), s 18 and *Trustee Act 1893-1981* (NT), s 9.

3 *Trustee Act 1925-1961* (Eng), s 8 and *Trustee Investments Act 1961* (Eng), First Schedule, Part II, para 13.

4 *Trustee Act 1956-1978* (NZ), ss 4(1)(b) and 10. If a loan is made on the interest of a lessee then not more than one-half may be advanced: s 4(3A)(b)(ii).

5 *Trustee Act 1958-1981* (Vic), s 8A, *Trusts Act 1973-1981* (Qld), s 23, *Trustee Act 1936-1980* (SA), s l0a, *Trustee (Insured Housing Loans) Act 1970-1977* (Tas), s 3, and *Trustee Act 1893-1981* (NT), s 4(1)(m).

6 An "approved lender" is a lender approved by the Housing Loans Insurance Corporation under s 5 of the *Housing Loans Insurance Act 1965-1978* (Cth).

7 *Housing Loans Insurance Act 1965-1978* (Cth), s 4.

restricted to housing loans as defined in the legislation.[8] There do not seem to be any provisions of a more general nature which would protect a trustee who lends on insured loans on commercial properties, or with other insurers.

3.4 In Western Australia the *Trustees Act*[9] at present requires a trustee to include a covenant requiring the mortgagor to keep all buildings insured against "loss or damage by fire to the full insurable value thereof". Victoria, New South Wales and the Australian Capital Territory all have a substantially identical provision.[10] In Queensland[11] the provision is broader and requires the mortgagor to insure against "loss or damage by fire and by storm and tempest to the full insurable value thereof". There are no similar provisions in the other States[12] and Territories nor is there any similar provision in England[13] or New Zealand. However, the general duty of prudence imposed in equity upon all trustees[14] would seem to require them to obtain appropriate mortgage covenants from borrowers in any event.

(b) Deposits in banks

3.5 All Australian jurisdictions allow trustees to invest on deposit with banks though the provisions do vary.[15] As mentioned earlier[16] a provision allowing investment on deposit is probably sufficient to allow investment in certificates of deposit of differing types. Two jurisdictions, however, specifically authorise investments in certain certificates of deposit. However, they do not expressly authorise purchase of these certificates from a third party. Queensland[17] authorises investment "on the security of a certificate of deposit issued by any

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8 *Trustee (Insured Housing Loans) Act 1970-1977* (Tas), s 2.

9 *Trustees Act*, s 25.

10 *Trustee Act 1925-1981* (NSW), s 16(2)(b), *Trustee Act 1958-1981* (Vic), s 11(2)(b), and *Trustee Act 1925-1978* (ACT), s 16(2)(b).

11 *Trusts Act 1973-1981* (Qld), s 30(2)(b).

12 In South Australia, if a trustee sells land on terms of deferred payment he is required to insert a covenant in the contract of sale that the purchaser will insure "against loss or damage by fire to the full insurable value thereof": *Trustee Act 1936-1980* (SA), s 23a(3)(e). Similarly if a trustee permits a transfer of the land with a mortgage back to secure the balance of purchase money, the same term is required to be inserted in the mortgage: s 23a(4)(c).

13 In England a provision in similar terms to Western Australia is required where a trustee sells land and takes a mortgage back: *Trustee Act 1925-1961*, s 10(2).

14 See para 1.14 to 1.15 above.

15 *Trustees Act* (WA), s 16(1)(d), *Trustee Act 1925-1981* (NSW), s 14(2)(f), *Trustee Act 1958-1981* (Vic), ss 4(1)(h)(i) and 4(i), *Trusts Act 1973-1981* (Qld), s 21(1)(e), *Trustee Act 1936-1980* (SA), s 5(1)(c)(i), *Trustee Act 1898-1981* (Tas), s 5(1)(d), *Trustee Act 1925-1978* (ACT), s 14(1)(e) and (f), and *Trustee Act 1893-1981* (NT), s 4(1)(d) and (e).

16 Para 2.8 above.

17 *Trusts Act 1973-1981* (Qld), s 21(1)(e)(ii).

bank", while Victoria[18] authorises investment "in certificates of deposit issued by a bank whether negotiable, convertible or otherwise".

3.6 New Zealand[19] merely permits investment "on deposit in any bank". England[20] authorises investments "in deposits" in certain specified savings bank accounts.

(c) Deposits in building societies

3.7 There is no statutory power for a trustee to invest in building societies in New South Wales, Queensland or the Australian Capital Territory. Legislation has been passed by the Victorian Parliament[21] to authorise trustees to invest "on deposit or term deposit" with prescribed building societies.

3.8 In the Northern Territory[22] a trustee may invest "on deposit in or in the shares of an approved building society". Thus a trustee may deposit money whether for a term or at call. However, the Minister may by notice limit the amount which may be invested by the trustees of a trust fund in a society.[23] In South Australia[24] a trustee can also invest "on deposit" with a prescribed building society and hence at call as well as for a term. By contrast Tasmania[25] only allows investment "on fixed deposit" with a building society.

3.9 New Zealand[26] and England[27] both permit trustees to invest on deposit whether for a term or at call with designated building societies. England, in addition, permits investment in the shares[28] of any designated building society.

(d) Preference or ordinary stock or shares

3.10 Of the other Australian jurisdictions only South Australia[29] and the Northern Territory[30] give trustees a power to invest in the purchase of preference or ordinary stock or

18 *Trustee Act 1958-1981* (Vic), s 4(1)(k).
19 *Trustee Act 1956-1978* (NZ), s 4(1)(h).
20 *Trustee Investments Act 1961* (Eng), First Schedule, Part I, para 2; First Schedule, Part II, para 11.
21 Trustee (Authorized Investments) Bill 1981 (Vic), cl 2. The Bill is awaiting assent.
22 *Trustee Act 1893-1981* (NT), s 4(1)(k).
23 Id, s 4B.
24 *Trustee Act 1936-1980* (SA), s 5(1)(c)(ii).
25 *Trustee Act 1893-1981* (Tas), s 5(1)(e).
26 *Trustee Act 1956-1978* (NZ), s 4(1)(hh).
27 *Trustee Investments Act 1961* (Eng), First Schedule, Part II, para 12.
28 Id, First Schedule, Part III, para 2.

shares similar to that given in section 16(1)(k) of the *Trustees Act.* In South Australia[31] the shares must be shares of a company with a paid up capital of not less than four million dollars and which has paid a dividend in each of the ten years immediately preceding the year in which the investment is made. In the Northern Territory[32] the paid up capital must be not less than two million dollars and the company must have paid a dividend in each of the preceding seven years. None of the other States has authorised investments in company shares. In Victoria a sub-committee of the Chief Justice's Law Reform Committee recommended that company shares be an authorised trustee investment but suggested that such authorised investments be limited to companies having a paid up capital of not less than two million dollars and which have paid a dividend for each of the preceding five years[33] while a similar report in Queensland[34] suggested corresponding figures of two million dollars and seven years. Neither of these suggestions have yet been implemented.

3.11 Both New Zealand[35] and England[36] authorise investment in the purchase of preference or ordinary stock or shares of certain companies. In New Zealand the company must have a paid up capital of two million five hundred thousand dollars while in England the company must have a paid up capital of one million pounds. In each jurisdiction the company must have paid dividends for each of the immediately preceding five years.

(e) Company debentures

3.12 The criteria which must be satisfied before company debentures qualify to be authorised investments in Western Australia are set out in paragraph 2.13 above. The provisions in New Zealand[37] and the Northern Territory[38] are the same as those in Western Australia. The other Australian jurisdictions, except South Australia, do not authorise the purchase of any company debentures as trustee investments. In South Australia[39] the ordinary

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29 *Trustee Act 1936-1980* (SA), s 5(1)(e).
30 *Trustee Act 1893-1981* (NT), s 4(1)(h).
31 *Trustee Act 1936-1980* (SA), s 5(3).
32 *Trustee Act 1893-1981* (NT), S 4(1B).
33 Victorian Chief Justice's Law Reform Committee, Report of Sub-Committee on *Trustees' Statutory Powers of Investment* (1971) Appendix, 2.
34 Queensland Law Reform Commission, *Report on the Relating to Trusts, Trustees, Settled Land and Charities* (1971), 23-24.
35 *Trustee Act 1956-1978* (NZ), ss 4(lA)(a) and 4(lC).
36 *Trustee Investments Act 1961* (Eng), First Schedule, Part III, para 1, and First Schedule, Part IV, para 3.
37 *Trustee Act 1956-1978* (NZ), s 4(lA)(b) and (lB).
38 *Trustee Act 1893-1981* (NT), s 4(1)(i) and 4(lA).
39 *Trustee Act 1936-1980* (SA), ss 5(1)(e), 5(2)(b) and (c), 5(3).

shares of the company must be quoted on a stock exchange although the debentures need not. The company must have a paid up capital of more than four million dollars and have paid a dividend in each of the preceding ten years unless -

(i) repayment of the debentures is unconditionally guaranteed by a company that does have such capital and has paid such dividends, or

(ii) the company is a subsidiary of a bank and repayment is unconditionally guaranteed by the bank.

There are no time limits on the debentures and they need not be secured by a charge on assets.

3.13 In England[40] a trustee may invest in debentures issued and registered in the United Kingdom by a company incorporated in the United Kingdom provided the debentures are quoted. There is no requirement that the shares of the company be listed on a stock exchange.

(f) Deposits or notes

3.14 In Australia, apart from Western Australia only South Australia and the Northern Territory authorise investment in deposits or notes in specified companies by trustees. In the Northern Territory[41] the position is the same as in Western Australia. In South Australia[42] "deposits" may be secured or unsecured and whether at call or for a fixed term not exceeding seven years but "notes" are not limited as to time. In the case of "deposits" the shares of the company need not be quoted on a stock exchange, but the company must satisfy the same requirements as to capital and payment of dividends, or guarantee by another company or a bank, as do debentures. In the case of "notes" the position in South Australia is the same as that for debentures and therefore the company must satisfy the same requirements as to capital and payment of dividends and further its shares must be quoted on a stock exchange.

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40 *Trustee Investments Act 1961* (Eng), First Schedule, Part II, para 6; Part III, para 1; and Part IV, paras 2, 3(a) and (b).

41 *Trustee Act 1893-1981* (NT), s 4(1)(j).

42 *Trustee Act 1936-1980* (SA), ss 5(1)(e) and (f) and 5(2)(b).

(g) Dwelling house for the use of a beneficiary

3.15 In Victoria, Queensland, South Australia, Tasmania, the Northern Territory and New Zealand trustees are permitted to purchase a dwelling house for the use of a beneficiary.[43] In New South Wales only the Public Trustee or a statutory trustee company may do so,[44] though other trustees may apply to the court for such authority.[45] In England and the Australian Capital Territory a trustee has no such express statutory power.

(h) Land

3.16 Queensland, Victoria and Tasmania are the only Australian jurisdictions in which trustees are granted power to invest in the purchase of land. In the other Australian jurisdictions as in England and New Zealand there is no general power to invest in land. In New Zealand a trustee is permitted to purchase land which adjoins land which he is permitted to retain as part of the trust estate.[46]

3.17 Queensland provides[47] that a trustee may invest in the purchase of land in fee simple in any State or Territory of the Commonwealth, or leasehold land in the State held for a term of forty years or more unexpired at the time of the purchase or, subject to the provisions of the *Land Act 1962*, any "agricultural farm or grazing homestead freeholding lease" of land held from the Crown under that Act. In exercising the power, a trustee must act upon the advice of an independent registered valuer.[48]

3.18 In Victoria, a trustee may invest not more than one-third of the trust funds in his hands in the purchase of land in fee simple in the State of Victoria.[49] Guidelines laid down in the legislation include that a trustee must act on the advice of a registered valuer, that the valuer must state the annual rental value and that the land must have been substantially improved by the erection of buildings thereon. A sub-committee of the Victorian Chief Justice's Law

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43 *Trustee Act 1958-1981* (Vic), s 4(3), *Trusts Act 1973-1981* (Qld), s 22, *Trustee Act 1936-1980* (SA), s 5a, *Trustee Act 1898-1981* (Tas), s 5(g), *Trustee Act 1893-1981* (NT), s 4C, and *Trustee Act 1956-1978* (NZ), s 14(2).

44 *Trustee Act 1925-1981* (NSW), s 83(5A)-(5C).

45 Id, s 83(1).

46 *Trustee Act 1956-1978* (NZ), s 14(2).

47 *Trusts Act 1973-1981* (Qld), s 21.

48 Id, s 22(2).

49 Trustee Act 1958-1981 (Vic), s 4A.

Reform Committee, however, had earlier recommended against a power to invest in land.[50] The sub-committee did not give any reasons for its views apart from saying that a power to invest in land had not been adopted in the United Kingdom, Western Australia or in the New Zealand Draft Bill which was then under consideration.

3.19 In Tasmania, a trustee may invest trust funds in the purchase of an estate in fee simple in land in the State.[51] The restrictions on this form of investment are that it must be for the purpose of obtaining income for the trust by letting a building on the land. A trustee cannot make such an investment where the value of the trust estate does not exceed $20,000 nor can he invest more than 50% of the value of the trust estate in this way. There are requirements to obtain appropriate advice and to act on the recommendation of a valuer.

(i) Rights to shares and convertible notes

3.20 No Australian jurisdiction permits trustees to purchase the rights to shares or convertible notes on a stock exchange, notwithstanding that the trustees may have authority under the various Acts to purchase the shares or notes in such a company. The position is the same in New Zealand and England.

(j) Bank accepted or endorsed bills

3.21 Victoria permits the purchase of bills, provided they are bank accepted bills which at the time of acquisition have a maturity date of not more than 200 days.[52] In Queensland,[53] trustees are authorised to invest "on the security of a commercial bill of exchange accepted by a bank". No other jurisdiction in Australia or New Zealand permits trustee investment in bills of exchange.[54] In England trustees cannot invest in bank bills or in the money market generally.

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50 Victorian Chief Justice's Law Reform Committee, Report of Sub-Committee *on Trustees' Statutory Powers of Investment* (1971) 2.

51 *Trustee Act 1898-1981* (Tas), ss 5(g) and 5(4).

52 *Trustee Act 1958-1981* (Vic), s 4(1)(j).

53 *Trusts Act 1973-1981* (Qld), s 21(1)(e)(iv).

54 Tasmania allows an investment with authorised dealers approved by the Reserve Bank if the dealer either surrenders to the trustee a safe custody receipt for government securities issued by the Reserve Bank or endorses and delivers to the trustee a bank accepted bill of exchange: *Trustee Act 1893-1981* (Tas), s 5(1)(h)(ii).

(k) Grant of options to purchase trust property

3.22 No Australian jurisdiction has given trustees a general statutory power to grant options to purchase trust property though, of course, the equitable position applies.[55] Moreover, only Queensland[56] has a provision similar to that of Western Australia[57] in the case of a trustee granting a lease.

3.23 In New Zealand there is also no general statutory power to grant an option but there is a similar power to that of Western Australia where the trustee leases the property.[58]

3.24 In England, by virtue of section 51 of the *Settled Land Act 1925*, which is applied to trustees for sale by section 28 of the *Law of Property Act 1925*, trustees for sale can grant to tenants and others, options to purchase, provided such options are made exercisable within ten years. Nevertheless, it has been suggested[59] that such an option should contain some built-in protection against inflation.

(l) Application to trustees of the apportionment provisions of the Property Law Act 1969-1979 Part XV (sections 130-134)

3.25 The provisions in Western Australia[60] follow closely the English *Apportionment Act* of 1870. Similar provisions exist in all Australian States[61] and Territories[62] and New Zealand.[63]

3. THE POWER OF THE COURT TO EXPAND POWERS OF INVESTMENT

3.26 The statutory power of the court to expand the powers of investment of a trustee in Western Australia was discussed earlier.[64] A similar power is to be found in all other

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55 Para 2.25 above.
56 *Trusts Act 1973-1981* (Qld), s 32(3)(b).
57 *Trustees Act*, s 27(3)(b).
58 *Trustee Act 1956-1978* (NZ), s 14(5)(b).
59 Underhill, 465.
60 Para 2.29 above.
61 *Conveyancing Act 1919-1979* (NSW), ss 142 and 144; *Supreme Court Act 1958-1980* (Vic), ss 73-76; *Property Law Act 1974-1978* (Qld), ss 231-233; *Law of Property Act 1936-1980* (SA), ss 63-68; *Apportionment Act 1871-1954* (Tas) and see generally Meagher and Gummow, 391.
62 *Apportionment Act 1905* (ACT) of New South Wales is still in force in the Australian Capital Territory. *Apportionment Act 1905* (NT) of South Australia applies to the Northern Territory by virtue of *Northern Territory Acceptance Act 1910-1974* (Cth), s 7.
63 *Property Law Act 1952-1980* (NZ), ss 144-148.
64 See paras 1.18 to 1.22 above.

Australian jurisdictions[65] except the Northern Territory. The position in New Zealand[66] and England[67] is also similar to Western Australia.

65 *Trustee Act 1925-1981* (NSW), s 81; *Trustee Act 1958-1981* (Vic), s 63; *Trusts Act 1973-1981* (Qld), s 94; *Trustee Act 1936-1980* (SA), s 59b; *Trustee Act 1898-1981* (Tas), s 47; *Trustee Act 1925-1978* (ACT), s 81.

66 *Trustee Act 1956-1978* (NZ), s 64.

67 *Trustee Act 1925-1961* (Eng), s 57.

PART III: ISSUES FOR CONSIDERATION
CHAPTER 4 - THE LIST APPROACH OR THE PRUDENT MAN RULE

4.1 In Chapter 1 the Commission pointed out that in Australia, as well as in countries such as England and New Zealand, the categories of authorised trustee investments are listed in legislation . Trustees are also subject to additional rules as to prudence and impartiality. As the Commission also pointed out, in many States of the United States of America the approach has been to insist only upon the general rules of prudence and impartiality expressed by the "prudent man" rule.

4.2 While the American approach seems to be more attractive than a narrow list approach in many economic conditions, this may not always be so. The cautious Anglo-Australian approach was vindicated during the 1930's when trust funds in the United States suffered serious losses[1] while trusts in Australia and England tended to preserve their capital because it was generally invested in fixed interest securities rather than in stocks and shares.

4.3 Whether or not the prudent man rule is adopted or the list approach retained, certain difficulties remain for trustees. Academic writers in the United States have made suggestions to overcome these difficulties. For example, it has been suggested that the law which stipulates that trustees cannot offset gains on unauthorised investments[2] against losses should be modified so that provided the trust fund has shown reasonable growth and income, trustees should be able to offset such losses.[3] It has also been suggested that there should be a portfolio approach to investment and that trustees should be authorised to make at least some speculative investments to try to make up for losses of value in real terms on more conservative investments due to inflation.[4] Yet another approach has been to question whether different rules should not be developed and applied to different types of trust.[5] This working paper will not pursue these suggestions but the problems which underlie the proposals also affect the approach to be taken to trustees' powers of investment in particular forms or types of investment.

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1 Keeton, 250.
2 Para 1.12 above.
3 R S Minetz, *An Examination of the Rule which forbids a Trustee to offset his investment losses against his gains*, [1972] Uni of Illinois Law Forum 784, 804.
4 Blair and Heggestad, 100-101.
5 Friedman, 572.

4.4 Having regard to the general power of investment given to trustees in many States in America it might be considered whether Western Australia should adopt such a general power rather than a list of authorised investments which may need to be expanded from time to time because it is deficient or out of date. This could be achieved by conferring on trustees a general authorisation to invest as a reasonable man would, having regard to the fact that he is investing on behalf of others and that therefore his investments should be both safe and profitable.

4.5 There are a number of arguments both for and against a provision of this nature. One argument in favour is that it would allow trustees far greater flexibility to respond to changing economic circumstances which would assist in protecting the trust estate. While trustees can at present apply to the court under section 89 of the *Trustees Act* for an extension of their powers to invest,[6] this involves both delay and expense which would have to be borne by the trust estate. Moreover, some unskilled or inexperienced trustees may be unaware of their right to make such an application.

4.6 A general power of investment would also mean that an honest and diligent trustee who made prudent investments in good faith would be less likely to commit technical breaches of the trust by accident.[7] It would also mean that when new forms of investment arose, or old forms became attractive again, there would be no need to amend the law in order to allow trustees to invest in them. Many of the specific proposals discussed later in this paper illustrate this point.

4.7 On the other hand while wide powers may be suitable for trustees who are experienced investors they may not provide sufficient guidance to inexperienced trustees. Under the list approach trustees are provided with statutory categories of suitable investments and are required to take advice on such matters as are directed by the Act. While this may or may not produce a successful investment it at least enables a trustee to demonstrate to the beneficiaries that a particular investment is authorised in the event of a dispute. In any case, however, a widening of the powers of investment contained in Part III of the *Trustees Act* could provide a

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6 For a discussion of this power see paras 1.18 to 1.22 above.

7 A trustee is still liable for innocent or technical breaches notwithstanding that if he had followed the strict wording of the trust instrument a greater loss would have been incurred: *Shepherd v Mouls* (1845) 4 Hare 500, 504; 67 ER 746, 747.

trustee with a range of investment sufficient to enable him to meet changing economic circumstances whilst at the same time protecting the beneficiaries.

4.8 Further, it must be borne in mind that it is always open to a settlor to confer broad powers on a trustee if he chooses to do so.

4.9 While the Commission has reached no final conclusion on the matter it is tentatively of the view that the present list approach to authorised investments should be preserved although perhaps in an expanded form. The remaining chapters of this working paper will proceed on this assumption. No other jurisdiction in Australia has conferred a general power of investment of this nature on trustees. In Australia, as in England, many trustees are not professional and expert but are appointed because of special family or personal relationships based on honesty and trust rather than investment knowledge. The Commission further does not think it desirable to attempt to develop separate lists of authorised trustee investments depending on whether the trustee may be classified as professional and expert or not.

4.10 Moreover, if a trustee's powers prove deficient in any particular case an application can be made under section 89 of the *Trustees Act* to expand them. Hence, a conscientious trustee need never be placed in a situation where the trust estate is jeopardised through inadequate investment powers.[8]

4.11 If the present approach of having a list of authorised investments is continued it might nevertheless be considered that there should be some more expeditious way of adding to the list than by a formal statutory amendment. This could be done by providing that forms of investment could be authorised by regulation in suitable cases. In England, for example, the powers of investment may be extended by Orders in Council.[9] The Trustee Companies Association supports this approach.[10]

4.12 The Commission would welcome comment on these issues.

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8 Such applications, however, involve delay, expense and inconvenience. They are often made unnecessary in the case of professionally drawn wills and trusts by the use of wide investment clauses.

9 *Trustee Investments Act 1961* (Eng), s 12.

10 The Trustee Companies Association has also suggested that, as far as possible, the lists of authorised trustee investments should be uniform throughout Australia and New Zealand. Trustee investors in New Zealand often seek investments in Australia.

CHAPTER 5 - FIRST LEGAL MORTGAGES

1. INTRODUCTION

5.1 The present power to invest in mortgages in Western Australia[1] and in certain other jurisdictions[2] was outlined above. In this chapter the issues relating to the power to invest in mortgages are discussed. Two separate issues are involved. The first is whether the protection afforded to trustees by section 22 should be increased in any event, and if so, to what level. The second is whether the protection should be further increased if the loan is protected by mortgage insurance.

2. LIMIT ON PROPORTION TO BE LENT

5.2 The Trustee Companies have suggested that the limitation of the protection given by section 22 to loans that do not exceed two-thirds of the value of the property, substantially limits the scope of persons to whom money can be lent and the type of property which can be financed. Often the size of the sum a trustee has available will be most suitable for the housing market which generally requires smaller sums than commercial transactions. However, the provisions inhibit trustees from investment in the housing market because they do in effect require a house purchaser to have a one-third deposit or find the money elsewhere at what may be a higher rate of interest.[3] If money is difficult to place on mortgage, this may result in trustees investing in other, less attractive, fixed interest securities.

5.3 During the term of the loan, inflation and the effect it has on the value of real estate often increases the margin of security. The result is that as time passes the safety of the loan is enhanced. On the other hand, the provisions are of long standing and in the case of trusts a conservative view should be taken of the security required for money lent. If a different proportion were adopted it may have to operate in a quite different economic environment in the future and a cautious approach may be preferable.

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1 Paras 2.4 to 2.6 above.

2 Paras 3.2 to 3.4 above.

3 The effect of this on the housing market may not be in the interests of beneficiaries, home buyers, or the building industry

5.4 The Commission invites comment on whether the two-thirds proportion should be increased and if so to what level, bearing in mind always that the trustee's duty to make a prudent investment is an overriding one. He would not be justified in lending even two-thirds of the value of land unless he thought on reasonable grounds that the security was adequate and complied with the other safeguards imposed by the legislation.

3. THE EFFECT OF MORTGAGE INSURANCE

5.5 The next issue is whether the amount which a trustee can lend whilst retaining protection under section 22 of the *Trustees Act* should be increased if mortgage insurance is taken out on the loan. Where mortgage insurance is available to protect the money lent, the risk of lending money on the security of mortgages is reduced. In recent years specialty insurance companies, including the Housing Loans Insurance Corporation have offered policies guaranteeing the performance of the terms of mortgages as to the payment of principal, interest and costs of default. The premium for such insurance is usually assessed as a once only fee and is payable by the borrower at the commencement of the loan. This type of insurance is available even where the loan is up to 100% of the value of the property offered as security. The effect is to eliminate the risk undertaken by the lender in making such a loan without cost to the lender. It would permit a trustee to make loans of much greater proportion than presently sanctioned by the Act and yet be totally secure.

5.6 There is, of course, nothing at present to prevent a trustee-mortgagee from requiring that a loan be insured in this way. However, he would still not be protected by section 22 of the *Trustees Act* if he lent more than two-thirds of the value of the property. As a result, the valuable benefits which could flow from insurance of this type may not be achieved unless trustees are authorised to lend a greater amount than at present on the proviso that the loan is insured with an authorised insurer.

5.7 Four other States and the Northern Territory have acted to protect trustees who lend a greater proportion provided the loan is insured.[4] If it were thought desirable to introduce a similar scheme in Western Australia, a number of subsidiary issues would have to be considered.

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4 Para 3.3 above.

5.8 The first is whether the maximum percentage which a trustee is protected in advancing if the loan is insured should be fixed by legislation or left to the discretion of the trustee. Other Australian jurisdictions[5] provide no restrictions on the proportion provided the loan is insured. Another issue is whether a trustee should be protected by the legislation only where the loan is insured by the Housing Loans Insurance Corporation, or whether such a trustee should also be protected where the loan is insured by an approved commercial insurer.

5.9 While it is true that a fixed maximum provides clear guidance to a trustee it does not seem to matter what maximum is fixed, provided the loan is adequately insured. The Trustee Companies did, however, suggest a figure of 80% if the loan were insured. The provisions in some other States would permit a higher figure. Hence, in the case of suitably insured loans, the Commission is tentatively of the view that the trustee should be left at liberty to negotiate a suitable maximum in conjunction with the insurer.[6] Any amendment should operate as a protection in the same manner as the present provision. A trustee should not be chargeable with breach of trust by reason only of the proportion which the loan bears to the value of the property provided that performance of the mortgage is guaranteed by an authorised insurer. This would still leave the trustee's duty to be prudent intact. The Commission also seeks comment as to whether an extension of section 22 to protect trustees who make investments in insured mortgage loans should apply only to housing loans or also to loans secured on non-residential property. Trustees are already able to lend on the security of a first legal mortgage over non-residential property, and section 22 applies equally to both residential and non-residential property. Both as a matter of consistency and of security there seems no reason to limit insurers to housing loans.

5.10 In logic these arguments, of course, also apply to second and subsequent mortgages. However, the Commission seeks comment as to whether there is any need for trustees to seek such a form of trustee investment. An argument can also be raised that trustees should be permitted to lend on the security of mortgages of leasehold property if the loan were insured. The Commission seeks comment on this possibility also. The Commission notes that certain of these forms of investment are authorised in some of the other jurisdictions studied. General extension of authority to these forms of investment is opposed, however, by the Trustee

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5 Ibid.

6 This is the view of the Trustee Companies Association. If a restriction were to be imposed, however, it would support a figure of 75-80%.

Companies Association and was opposed by the New Zealand Property Law and Equity Reform Committee in 1970. [7]

4. THE MORTGAGE INSURER

5.11 The value of mortgage insurance obviously depends on the soundness of the insurer. In other jurisdictions, except Tasmania, only the Housing Loans Insurance Corporation is authorised to be the insurer. The Corporation is limited to housing loan insurance and the development of residential land and thus its insurance is not available in respect of commercial properties. Moreover, although at present the Corporation is backed by the Commonwealth Government,[8] the Commonwealth Government has announced that it wishes to sell the Corporation to private enterprise. It may be argued that if the concept of allowing trustees to lend a larger proportion if the loans are insured is nevertheless adopted, there would seem no reason why a wider range of insurers should not be eligible to insure such loans, as has been done in Tasmania.[9] The Real Estate Institute of Western Australia Inc has suggested that the position in Western Australia be amended to facilitate investment in mortgage loans which are insured by recognised insurers. The Trustee Companies Association supports this suggestion.

5.12 It would be vital that the insurer remain financially sound and in business for the period for which the loans were insured, preferably having a place of business in Western Australia. At present the Commonwealth *Insurance Act 1973* provides[10] for the licensing of approved insurers, one of the criteria being related to financial stability.[11] However, this legislation may not be adequate for the purposes of trustee legislation. Thus, it may be preferable to provide for insurers to be approved by the State Treasurer before they can insure loans made by trustees.[12] This would allow for complete flexibility in the approval or withdrawal of approval from any company. This is the present mechanism adopted for determining which building societies are appropriate as trustee investments.[13] In Tasmania it

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7 New Zealand Property Law and Equity Reform Committee, Report on *Trustees' Statutory Powers of Investment* (1970), 12.

8 *Housing Loans Insurance Act 1965-1978* (Cth), s 30.

9 Para 3.3 above. However, the Tasmanian legislation also is limited to insurers of housing loans.

10 *Insurance Acts 1973-1977* (Cth), s 22.

11 Id, s 23.

12 The Trustee Companies Association supported this approach.

13 *Trustees Act*, s 16(e).

is the Governor who approves insurers of trustee loans[14] presumably on the recommendation of the Treasurer to whom companies can be obliged to provide certain information.[15] The Tasmanian legislation does not set out any specific guidelines for the exercise of this power other than requiring that the company "has a place of business in [Tasmania] and is capable of properly carrying on the business in [the] State of insuring against losses arising in respect of housing loans".

5. SHOULD THE POWER TO INVEST IN MORTGAGES BE LIMITED TO WESTERN AUSTRALIA?

5.13 Another issue is whether trustees should have power to lend trust money on the security of mortgages over land situated in parts of Australia outside Western Australia, or even in specified overseas countries such as New Zealand. At present, unless otherwise authorised by the trust instrument, a trustee who wishes to invest in first mortgages can only do so in respect of land in the State.[16] The only Australian jurisdictions which permit trustees to lend on mortgage outside the jurisdiction are Queensland, the Northern Territory and the Australian Capital Territory.[17] In each case trustees may invest on mortgage of an estate in fee simple in any State or Territory of the Commonwealth but only within the jurisdiction in respect of mortgages of other interests.

5.14 At first sight the present restriction may be thought to be unusual as the Act permits trustees to invest money in the parliamentary stocks of any Australian State, the United Kingdom, New Zealand or Fiji[18] as well as in companies which carry on business elsewhere.[19] Thus trustees can quite freely invest trust money outside the State merely by choosing a different form of investment.

5.15 However, it could be argued that the present restriction is desirable because a trustee should be physically close to the property over which money has been advanced so that he can ensure that any buildings are being maintained and that the security is not being

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14 *Trustee (Insured Housing Loans) Act 1970-1977* (Tas), s 5. The Housing Loans Insurance Corporation is approved as an insurer by the Act itself: s 2(1).

15 Id, s 6.

16 *Trustees Act*, s 16(b).

17 *Trusts Act 1973-1981* (Qld), s 21(1)(b), *Trustee Act 1893-1981* (NT), s 4(1)(f), *Trustee Act 1925-1978* (ACT), s 14(1)(g).

18 *Trustees Act*, s 16(1)(a).

19 Id, s 16(1)(k).

diminished. Nevertheless, in view of the other investments which a trustee can make,[20] it is difficult as a matter of principle to argue in favour of a restriction to Western Australia alone for this sort of investment. The Trustee Companies Association considered trustees should not be restricted to mortgages over Western Australian land.

6. INSURANCE COVENANT

5.16 As mentioned above,[21] the *Trustees Act* at present requires a trustee to include a term in the mortgage agreement obliging the borrower to keep all buildings insured against "loss or damage by fire to the full insurable value thereof".[22] The Trustee Companies have suggested that this section be broadened to require in addition coverage against normal property risks such as storm, tempest, flood, earthquake, and damage by vehicles and aircraft.[23] In practice a prudent trustee should compel anyone who borrows trust money to insure the mortgaged property against all the usual risks for which property of that nature was normally insured. The section could be amended to provide that a trustee should require the borrower to insure against all usual risks having regard to the nature of the property. This would impose a broader requirement on trustees yet still leave adequate flexibility.

5.17 The Commission seeks comment on the various matters raised in this chapter.

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20 For example, shares in companies registered outside Western Australia.

21 Para 3.4 above.

22 *Trustees Act*, s 25(2)(b).

23 The view of the Trustee Companies was supported by the Trustee Companies Association.

CHAPTER 6 - OTHER INVESTMENTS PRESENTLY AUTHORISED BY PART III OF THE *TRUSTEES ACT*

1. INTRODUCTION

6.1 In this chapter the Commission discusses suggested changes to other forms of investment presently authorised by Part III of the *Trustees Act.*

2. DEPOSITS IN BANKS

6.2 The present position in Western Australia[1] and elsewhere[2] was discussed earlier. As pointed out there may be doubt as to whether the present provisions of the *Trustees Act* are sufficiently wide to allow investment by way of purchase from a third party of convertible, negotiable and transferable certificates of deposit.

6.3 The Commission is of the tentative view that trustee investment in all such certificates should be authorised.[3] A suitable provision might be had by adapting the Victorian provision[4] which authorises a trustee to invest "in certificates of deposit issued by a bank whether negotiable, convertible or otherwise" to expressly include purchases from a third party.

3. DEPOSITS IN BUILDING SOCIETIES

6.4 Probably "call deposits" or "deposits of no fixed term" in building societies do not come within the terms of section 16(1)(e) of the *Trustees Act* and hence are not authorised trustee investments.[5] This is because section 16(1)(e) provides for investment "on *fixed deposits* in or the *shares* of any incorporated building society carrying on business in the State and certified by notice in the Gazette, signed by the Treasurer, as a society in which trustees may invest". This would seem to be anomalous as upon a winding up money lent to a building society whether at call or not would be repayable before share capital and hence would be a safer investment than shares.[6]

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1 Paras 2.7 to 2.9 above.
2 Paras 3.5 to 3.6 above.
3 This is also the view of the Trustee Companies Association.
4 *Trustees Act 1958-1981* (Vic), s 4(1)(k).
5 See para 2.10 above.
6 *Building Societies Act 1976-1978* (WA), s 70. The rules of a society may not provide for share capital to be repaid in priority to funds of the society consisting of deposits: Id, s 53(4).

6.5 Section 16(1)(e) merely repeated the existing legislation.[7] The Stock Exchange suggested that at the time the *Trustees Act* was introduced in 1962 building societies were not using call deposits and that this may explain the way in which the section is presently worded.

6.6 The principle of investment in certified building societies being an authorised trustee investment has already been accepted. Building societies must convince the Treasurer of their suitability for the purpose. Investment of money at call permits a trustee to retain liquid funds. There would appear to be no reason why trustees should not be permitted to invest at call in certified building societies. Indeed, it may be a valuable addition to a trustee's powers particularly if he has to invest part or all of the trust money for a short but uncertain period.

4. PREFERENCE OR ORDINARY STOCK OR SHARES

6.7 As mentioned earlier in the paper,[8] section 16(4)(b) of the *Trustees Act* provides that a trustee shall not invest in the preference or ordinary stock or shares of a company if it has not inter alia "paid a dividend in each of the fifteen years immediately preceding the calendar year in which the investment is made on all the ordinary stock or shares issued by the company excluding any shares issued after the dividend was declared".

6.8 The Stock Exchange has suggested that this period is too long and ought to be reduced to ten years, and that at a later date the period might be reduced still further. The Trustee Companies Association thought that five years was an appropriate period. As mentioned earlier[9] there are a variety of periods specified in other jurisdictions, with England and New Zealand being the shortest with five years.

6.9 The purpose of the provision is to ensure that companies in which trustees invest pursuant to the powers contained in the Act are well-established and have a stable record of producing dividends. The Stock Exchange was of the view that many companies which are worthy investments are disqualified by this provision. The Commission notes that where courts have been asked to grant additional powers to trustees to invest in shares they have

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7 Report of the Law Reform Sub-Committee of the Law Society of Westem Australia on *The Law of Trusts*, 13.

8 Para 2. 11 above.

9 Paras 3.10 to 3.11 above.

sometimes specified only a five year period during which dividends must have been paid.[10] In addition many trust deeds grant broader powers of investment in company shares.

6.10 The Commission tentatively agrees that fifteen years appears to be too long. At the time the Act was introduced the Committee which drafted the new legislation acknowledged that the power of trustees to invest in stock or shares had been granted on a limited basis and anticipated that the range might be extended in subsequent years.[11] The Commission is tentatively of the view that the period should be shorter and possibly five years would be an appropriate figure, particularly as a trustee is under a duty to take advice on the matter.[12] He is also under an overriding duty to act prudently which should restrain any speculative or unsound investments.

6.11 Another precondition to the purchase by a trustee of stock or shares under section 16(1)(k) is that the company has a paid up capital of not less than two million dollars. This provision has been weakened by the impact of inflation upon the real value of money since 1962 but the Commission has not received any suggestion that the figure is now inadequate or needs revision.

5. COMPANY DEBENTURES

6.12 It has been suggested by the Stock Exchange that section 16(1)(1) is unreasonable in requiring that, in order to be authorised trustee securities, debentures[13] must be quoted on a stock exchange in Australia whereas deposits or notes whether secured or unsecured need not be quoted in order to be authorised trustee investments under section 16(1)(m). It has been pointed out to the Commission that although an unquoted debenture which was a charge on a company's assets would rank in priority to its notes on a winding up, it would not be an authorised investment even though the notes would be.

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10 *Re Baker* [1961] VR 641, 653; *National Trustees Executors and Agency Company of Australasia Limited v Attorney General for the State of Victoria* [1973] VR 610, 615.

11 D E Allan, *A New Look for Trustees*, (1963) 1 Tas Uni L Rev 797, 805. Professor Allan (as he now is) was a member of the Law Reform Sub-Committee of the Law Society of Western Australia which drafted the *Trustees Act*.

12 *Trustees Act*, s 16(5).

13 "Debentures" includes debenture stock and bonds. The debentures must be either fully paid up or be required to be fully paid up within nine months of the date of issue and be issued by a company in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares: ss 16(1)(1) and 16(4).

6.13 The aim of the *Trustees Act* requirement that a debenture be quoted on a stock exchange is to ensure that the debenture is more readily saleable. The view of the Stock Exchange, however, is that debentures issued by companies whose shares are quoted by a stock exchange are normally saleable regardless of whether the debentures themselves are quoted or not, and that the requirement should be removed. The Stock Exchange pointed out that the market value of debentures was determined by current interest rates and the financial strength or weakness of the company which issued them. The safety of the debentures is really promoted by the requirements in section 16(4) as to the paid up capital of the company and the payment of dividends over a period of years. Quotation of debentures may be sought by some companies and not others.

6.14 On the other hand the Trustee Companies Association disagrees with the suggestion that quotation of company debentures is unnecessary. Its view is that quotation fixes an appropriate price and also that unquoted debentures may not be always readily saleable. The Association is of the view that there are ample avenues of investment in quoted company debentures. The Commission seeks comment as to whether quotation at the time of investment is a necessary criterion.

6.15 The Stock Exchange has also suggested that trustees should be permitted to invest in debentures issued by wholly owned subsidiaries of banks.

6.16 The main arguments in favour of debentures issued by wholly owned subsidiaries of banks as authorised investments is that they are safe investments because of the close supervision and financial support of the bank concerned. It could be argued that in general debentures issued by wholly owned subsidiaries of banks represent at least as safe an investment as debentures issued by many other commercial companies in which a trustee may already invest pursuant to the terms of the *Trustees Act*. The Stock Exchange view is that such debentures are normally readily saleable whether quoted or not.

6.17 It might be queried whether in order to be a trustee investment debentures of wholly owned subsidiaries of banks should be guaranteed by the parent bank as is required in South Australia.[14] The parent bank is not otherwise obliged to ensure the repayment of the

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[14] South Australia also authorises as trustee investments, debentures in unqualified companies provided such debentures are guaranteed by a qualified company: *Trustees Act 1936-1980* (SA), s 5(3)(d)(i). See para 3.12 above.

debentures or other liabilities of the subsidiary concerned. However, to impose such a condition may be unduly restrictive having regard to the overall safety of this form of investment compared to other forms of debenture investment.[15] On the other hand while the Stock Exchange suggestion was limited to wholly owned subsidiaries of banks there seems to be no reason, if other satisfactory criteria are complied with, why the subsidiary should need to be wholly owned by a single bank, nor why only the subsidiaries of banks[16] should be included. The Commission seeks comment as to appropriate criteria for trustee investment in company debentures either generally or in particular cases.

6.18 The Stock Exchange thought that if its suggestion were adopted some consideration might have to be given to placing a time limit on unquoted debentures. At present, unsecured deposits or notes can only be authorised investments if their term does not exceed seven years[17] but there is no similar time restriction on company debentures. The Stock Exchange thought that quoted company debentures should continue to be unrestricted as to time but that unquoted ones should be limited. It could be argued that a term of seven years would be appropriate. The Trustee Companies Association, however, preferred that the term of authorised trustee investment in debentures not be limited but remain a matter for the trustee's discretion.

6.19 On the other hand the (then) Commissioner for Corporate Affairs raised the possibility of restricting section 16(1)(l) to debentures constituting a charge.[18] However, he left open the question whether debentures should be required to be quoted on a stock exchange to qualify as an authorised trustee investment.

6. DEPOSITS OR NOTES

6.20 The Commissioner for Corporate Affairs also suggested that perhaps deposits or notes, whether secured or unsecured, should be required to be either repayable at call or be issued

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15 Para 2.14 above. Such guarantees might have significant financial consequences in respect of liquidity of funds available for lending.

16 By "banks" the Commission here refers to banks licensed under the *Banking Act 1959-1979* (Cth). Some financial corporations under the *Financial Corporations Act 1974* (Cth) are wholly or partly owned by overseas banks.

17 *Trustee Act*, s 16(1)(m).

18 The *Trustees Act*, s 16(1)(l) authorises as trustee investments debentures, including debenture stock and bonds, whether constituting a charge on assets or not: see par 2.13 above. The *Companies Act 1961-1981* ss 38(4) and (5) requires that any securities described as "debentures" or "debenture stock" offered to the public should be secured as therein provided, except in the case of certain prescribed companies.

for a term not exceeding three months and that this term not be capable of extension except upon the making of a fresh application by the holder. This would restrict the position presently existing. The Trustee Companies Association thought a time limit unnecessary bearing in mind the normal duty of prudence.

7. DWELLING HOUSE FOR THE USE OF A BENEFICIARY

6.21 At present the power for a trustee to purchase a dwelling house for the use of a beneficiary is confined to one in this State. This restriction is unfortunate particularly where there are beneficiaries living in different States, which is likely to be an increasingly common occurrence. The Trustee Companies Association has informed the Commission that there is a need for trustees within to be able to purchase dwelling houses for the use of beneficiaries living outside Western Australia. The appropriate advice which a trustee should be required to obtain and consider before purchase is discussed further in paragraphs 7.9 and 7.10 below.

6.22 The Commission welcomes comment on the various issues raised in this chapter.

CHAPTER 7 - LAND

1. INTRODUCTION

7.1 The Trustee Companies have suggested to the Commission that a power to invest in land should be added to Part III of the *Trustees Act*.[1] The rationale is that in inflationary times the value of land tends to keep pace with, or even exceed, the rate of inflation and that accordingly a general power to invest in real estate would enable trustees to make secure investments which would retain the real and not only the nominal value of the capital.[2] The grant of such a power would raise a number of subsidiary issues. These include -

(a) Whether trustees should be authorised to purchase interests in land other than an estate in fee simple, such as leaseholds;

(b) Whether the property purchased should necessarily be an income-producing one;

(c) Whether there should be any distinction drawn between different types of land such as farming, residential, commercial, industrial or vacant land;

(d) Whether there should be any safeguards in terms of valuation or advice, which the trustee should be required to take;

(e) Whether there should be any restrictions on the proportion of the trust estate; invested in land;

(f) Whether the powers should be restricted to a particular class of trustees such as, for example, statutory trustee companies;

(g) Whether the power should be restricted to land in Western Australia only.

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1 It is important to emphasise that while there is at present no general power under the *Trustees Act* enabling a trustee to invest in land, many trustees in Western Australia have such a power conferred on them by their trust instruments.

2 *Estate Administration in the 1980's*, (1981) 67 American Bar Association Journal, 54,58.

7.2 The Trustee Companies Association has informed the Commission that in Victoria and Queensland the provisions permitting trustees to invest in land have been of substantial benefit to trusts. Generally real estate does have a capacity to increase in value in inflationary times, and a trustee who invests in land wisely can preserve or increase the real value of the trust estate during periods of prolonged inflation, but this may not be true of all land at all times. Some land in, or on the outskirts of, the Perth metropolitan area has during certain periods in the past declined in real or even nominal value. Rural land and land in country towns also from time to time has been subject to changes in value as a result of unfavourable climatic or economic conditions. However, these arguments are often true of ordinary stock and shares the purchase of which in restricted circumstances has been authorised since 1962.

7.3 As was pointed out in Chapter 1, the primary duties of a trustee are to invest only in authorised investments, to invest prudently so as not to put the trust fund at risk and to balance the interests of the income beneficiaries against those of the remaindermen in appropriate cases. The fundamental requirement that a trustee should not put the trust fund at risk traditionally meant that he was restricted to such investments as government and municipal securities, first legal mortgages and fixed deposits in secure institutions.

7.4 The 1962 amendments in Western Australia recognised that these investments might be inadequate in certain circumstances to protect the real, as distinct from the nominal, value of the capital. The amendments therefore recognised the need in some circumstances to permit trustees to invest in a wider range of investments including certain preference and ordinary stocks and shares, debentures, debenture stock and bonds and in units or other investment shares in certain unit trust schemes. In these cases the enabling provisions limited the powers granted to trustees by restricting the classes of investments to certain secure categories and by imposing on trustees certain duties to take advice. These restrictions recognised that whilst these additional forms of investment had the capacity for capital growth in real terms which the more traditional forms of authorised investments lacked, they were forms of investment in which, unlike the traditional forms, the nominal value of the capital was at risk. The question therefore is whether forms of investment in land should now be added to these newer categories of authorised trustee investments, and if so, upon what terms.

2. NATURE OF INTEREST IN LAND

7.5 If a power to invest in land were granted should a trustee be able to purchase a lesser interest than an estate in fee simple?[3] While an estate in fee simple offers the most secure title there are large areas of the State in which it is possible to purchase only a leasehold interest, the most significant of these being pastoral leases. Traditionally the law has viewed leaseholds as wasting assets because once a lease expires it is worth nothing.[4] However, many leaseholds are of very long duration. A trustee if granted power to purchase lesser interests in land than an estate in fee simple, would, however, still be under an obligation to act prudently in the exercise of the power, in addition to obeying any restrictions imposed by legislation. The Trustee Companies Association is of the view that trustees should be able to purchase interests in land, whether in an estate in fee simple or otherwise, subject to the safeguard that any leasehold interest is for a sufficiently long period. It should be noted that Queensland permits the purchase of certain leaseholds.[5]

3. VACANT OR IMPROVED LAND

7.6 As has already been noted[6] two jurisdictions, Victoria and Tasmania, require trustees to purchase improved land while Queensland imposes no such requirement. Traditionally the purchase of unimproved land which was not producing an income was thought to be speculative and hence unsuitable as a trustee investment, if indeed it was "an investment" at all.[7] It provided no income for the beneficiaries presently entitled. However, depending on the circumstances, the trustee may not be faced with the need for the trust fund to be income-producing. Real estate which is income-producing may not necessarily show as good a return by way of rent as a similar sum invested at interest. This also could cause problems for a trustee in balancing the interests of beneficiaries presently entitled with those of the remaindermen. This problem presently faces trustees under trust instruments containing powers of investment which include land. A similar problem arises when a trustee uses the

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3 It may be noted in passing that there is already a very wide definition of land in the *Trustees Act*, s 6(1).

4 Underhill, 430.

5 *Trusts Act 1973-1981* (Qld), s 21(1)(c)(ii) and (iii).

6 Paras 3.16 to 3.19 above.

7 Para 1.11 above. If a general power to purchase land as an authorised trustee investment were created there might therefore be a need to clarify or widen the meaning of "investment" and also to consider special provisions for apportionment of any capital gains or losses as between capital and income beneficiaries.

statutory power of investment in shares.[8] Some shares have a substantial capital growth but earn a small dividend while with others the situation is the reverse. The question therefore is whether, if a power to invest in land were granted, it should be restricted to improved, income-producing property or should be unrestricted. The solution may lie in a trustee receiving appropriate advice on the suitability of any particular investment having regard to the financial circumstances of the trust and the beneficiaries, and any other relevant matters. In the view of the Trustee Companies Association, trustees should be authorised to purchase property which is not income-producing subject to a restriction on the amount of capital money that may be expended on improvement or development. Such a limitation is seen as discouraging trustees from becoming property developers.

7.7 The Commission agrees that some limitation should be placed on the amount of capital money that may be expended by a trustee on improvements without court authority but the question is what that limit should be. Under the *Trustees Act* at present, a trustee can expend money subject to the same trusts in the improvement or development of any property for the time being vested in him,[9] up to a limit of $10,000, or a greater sum with the consent of the Supreme Court.[10] The figure of $10,000 has not been increased since 1962, and it would therefore seem necessary to consider whether it should now be increased. [11]

4. DIFFERENT TYPES OF LAND

7.8 There are some further aspects that bear on the advisability of land as a trustee investment, one being the management skill which will often be necessary. The expertise required to manage say a block of flats is of a different order to that required for the management of the passive investments trustees have traditionally made such as investment in interest bearing securities, or shares. While a trustee can delegate the management of income-earning real estate[12] to experts he must be careful because he may still remain liable.[13] This

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8 *Trustees Act*, s 16(1)(k).

9 Id, s 30(1)(C).

10 Ibid.

11 In Queensland the figure is also $10,000: *Trusts Act 1973-1981* (Qld), s 33(1)(a). In New South Wales the Public Trustee or a statutory trustee company can expend up to $10,000, or if all the beneficiaries concur, a greater sum. Private trustees can expend up to $1,000 or one-third of the value of the land whichever is the lesser: *Trustee Act 1925-1981* (NSW), s 82A(lA). In the ACT a trustee can spend $2,000 or one-third of the value of the land whichever is the lesser: *Trustee Act 1925-1978* (ACT), s 82A(1). In other Australian jurisdictions there seems to be no specific statutory limit fixed in the absence of court authority.

12 *Trustees Act*, s 53.

13 Meagher and Gummow, 318-325.

passive role of trustees may change in a significant way if a wide-ranging power to purchase land were granted. A trustee should not be given power to purchase a business under the guise of purchasing land. The purchase of a farming or pastoral property could amount to the purchase of a business rather than the purchase of an interest in land as such.[14] The same applies to the purchase of many commercial or industrial properties. Limitations on the types of land in which a trustee was authorised to invest would assist to prevent this from happening, as well as to prevent speculative or unwise investment. It may be noted, however, that neither Victoria nor Queensland make any distinction as to the type of land involved. In Tasmania land must be purchased for the purpose of obtaining income by letting a building on the land, but otherwise there is no requirement as to the type of land to be acquired.

5. ADVICE

7.9 The *Trustees Act* currently provides that where a trustee wishes to make certain investments which are of some risk he must take proper advice. This is true, for example, of the purchase of a dwelling house for a beneficiary in which case a trustee is obliged to obtain the advice of an expert valuer.[15] It is also the case where a trustee wishes to purchase shares or securities in a company.[16] If a power to purchase land is to be given then it seems appropriate to incorporate a similar requirement.

7.10 The requirement should perhaps be to act on proper advice, which should include not only advice as to the value of the property and its desirability as an asset for the trust bearing in mind the need for diversification, but its potential for maintaining that value over time, as well as the costs of holding and maintaining the land and the expected income from it. The Trustee Companies Association thought the advice should not need to be in the form of a sworn valuation because of the expense and of the need for expedition in the case of auction sales. They also thought a trustee buying at auction should not be chargeable with breach of trust by reason only of paying up to 10% more than the advice as to valuation. This is

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14 For example, purchase of rural land on which an orchard was growing and fruit-handling facilities were built, might be characterised more as investment in a fruit-growing business than as an investment in land.

15 *Trustees Act*, s 17.

16 Id, s 16(5). Proper advice in relation to the purchase of company securities and units or shares in a unit trust scheme is advice given by a person who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial matters: Id, s 16(7).

designed to enable realistic bids at auction sales. This suggestion was also intended to apply to the purchase of dwelling houses for the use of beneficiaries.[17]

6. RESTRICTION ON THE PROPORTION OF THE TRUST FUND TO BE INVESTED IN LAND

7.11 Trustees are generally under a duty to diversify investments as much as possible,[18] so that if a particular investment fails it will cause less overall loss to the trust since the assets are spread over a number of different investments. If the trust fund is small, however, it may be difficult to both diversify the investments and purchase land. To make even a modest purchase could mean that all of the estate or at least a large part of it would be invested in the one asset.

7.12 In Tasmania, an investment in land must comprise no more than 50 percent of the value of the trust estate and even then is only permissible where the trust estate exceeds $20,000.[19] In Victoria, a trustee may not invest more than one-third of the trust funds in his hands in the purchase of land.[20] By contrast in Queensland there are no restrictions and the question of the proportion which should be invested is left to the discretion of the trustee.[21]

7.13 On one view it would appear preferable to permit flexibility rather than to impose an arbitrary limit on the proportion which can be invested. To impose a limit might prevent the power to invest in land being available to small estates which may, nevertheless, be of long duration and hence in need of assets with the potential for capital growth. Rather than impose arbitrary restrictions in monetary or percentage terms it may be preferable to allow the matter to be determined by the trustee with the benefit of proper advice. However, the Trustee Companies Association thought it best to restrict the proportion to be lent to one-half of the trust fund at the time of investment.[22]

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17 Para 6.21 above.

18 Underhill, 474.

19 *Trustee Act 1898-1981* (Tas), s 5(4).

20 *Trustee Act 1958-1981* (Vic), s 4A(1). This is more restrictive than the courts in Victoria have been prepared to insist upon: see *National Trustees Executors Agency Company of Australasia Limited v Attorney-General for the State of Victoria* [1973] VR 610.

21 *Trusts Act 1973-1981* (Qld), s 21(1)(c).

22 In Victoria a number of court decisions have authorised this percentage: see, for example, para 1.20 above. If legislation imposed a fixed percentage limit it should perhaps take into account that money may also be expended on the land purchased by way of improvement or development under s 30 of the *Trustees Act*: see para 7.7 above.

7. SHOULD THE POWER BE RESTRICTED TO CERTAIN TRUSTEES?

7.14 As mentioned earlier[23] the courts appear to have been more amenable to giving extended powers of investment to skilled trustees particularly statutory trustee companies. There may also be a tendency for the courts to find a professional trustee to have a higher duty of care than a lay trustee because he has held himself out as having professional expertise in that field and has charged a fee for his services.[24] It could be argued that any amending legislation should draw a similar distinction. In Queensland, for example, statutory trustee companies had power to invest in land before trustees did generally.[25] On the other hand while it is obvious that some trustees will be more experienced investors than others it does not follow that power should be restricted on that account alone. The solution to the problem of an inexperienced trustee would appear to lie in provisions for taking expert advice[26] before investing. Accordingly, the Commission is of the tentative view that if a power to invest in land were to be given to trustees it should be given to all of them save where specifically excluded by the trust instrument. This is in accord with the views expressed by the Trustee Companies Association.

8. LAND IN WESTERN AUSTRALIA ONLY

7.15 Finally, if power to purchase land is granted to trustees should it be restricted to land in Western Australia? Tasmania[27] and Victoria[28] restrict investment to their respective States while Queensland[29] permits investment anywhere in Australia as far as a fee simple is concerned but only within the State for leaseholds and other interests. One argument in favour of restricting investment to land within the State is that a trustee is under a duty to exercise control and supervision over the trust investments and this would be difficult if the land was physically remote from the trustee. However, if an attractive investment opportunity were available in another State the trustee perhaps should be able to avail himself of it. The Trustee Companies Association adopts this view.

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23 Para 1.20 above.

24 *National Trustees Co of Australasia v General Finance Co of Australasia* [1905] AC 373; Meagher and Gummow, 509; *Bartlett and Others v Barclays Bank Trust Co Ltd* [1980] 1 Ch 515, 534.

25 *Trustee Companies Act 1968-1980* (Qld), s 28(b).

26 Paras 7.9 to 7.10 above.

27 *Trustees Act 1898-1981* (Tas), s 5(1)(g).

28 *Trustees Act 1958-1981* (Vic), s 4A(1).

29 *Trustees Act 1973-1981* (Qld), s 21(1)(c).

7.16 The Commission seeks comment on the issues raised in this chapter.

CHAPTER 8 - OTHER FORMS OF INVESTMENT NOT PRESENTLY AUTHORISED BY PART III OF THE *TRUSTEES ACT*

1. RIGHTS TO SHARES AND CONVERTIBLE NOTES

8.1 Earlier in the paper the Commission pointed out the limitations on a trustee purchasing rights to shares and convertible notes.[1] At present a trustee is so authorised in cases where a conditional or preferential right to subscribe for securities in a company is offered to him in respect of a holding in that company or any other company. A trustee does not have power to purchase such rights on a stock exchange even though he could purchase the actual shares themselves if they were offered for sale on an exchange.

8.2 The Stock Exchange has pointed out that to purchase rights sometimes provides cheaper terms of entry into a company than purchasing ordinary shares and should be available to trustees. The Commission sees no objection to such a proposal as once the rights were purchased and exercised the trustee would hold shares which he could have purchased directly under the present law. The power to purchase rights should be limited to rights in a company in which it would have been proper for the trustee to purchase ordinary shares.

8.3 As mentioned earlier[2] sometimes shareholders are given the right to take up convertible notes. If a trustee is a shareholder in such a company he may exercise such rights and take up the convertible notes in the same way as any other shareholder. Sometimes shareholders do not wish to take up such rights and they offer them for sale on a stock exchange. The Commission sees no objection to a trustee being authorised to purchase such rights in respect of qualifying companies.[3] It may provide an advantageous means of entry into the company concerned.

2. BANK ACCEPTED OR ENDORSED BILLS

8.4 The Stock Exchange has suggested that "bank bills" are suitable investments for trustees and should therefore be authorised by the *Trustees Act*, a view with which the Trustee

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1 Paras 2.18 to 2.19 above.

2 Para 2.19 above.

3 The Trustee Companies Association agreed that trustees should be able to purchase such rights on a stock exchange.

Companies Association agrees. At the time the Act was drafted such bills were not in general use as a form of investment.

8.5 Bank bills are a sophisticated form of investment but in view of their safety and the high returns which are often available, there would appear to be no good reason why they should not be authorised as trustee investments. Because of the large minimum sums involved this avenue of investment will not be open to all trustees.[4] A number of issues arise from a consideration of whether bank bills should be authorised trustee investments -

(a) should both bank endorsed and bank accepted bills be available?
(b) what should be the maximum permissible time to maturity for such bills?
(c) should any form of apportionment apply to the profits made on the investment?

8.6 The first of these issues is whether both bank endorsed and bank accepted bills should be available. As has been mentioned earlier,[5] the effect of acceptance or endorsement by a bank is for all practical purposes to make the bill of exchange safe, because a bank has agreed to honour the bill it has accepted, or to pay should the acceptor default if the bank is the endorser. Hence, it would seem that if a trustee is permitted to invest in bank bills he should be able to invest in both bank accepted and bank endorsed bills. This view derives support from the *Building Societies Act 1976-1978* which allows investment of liquid funds in both bank accepted and bank endorsed bills of exchange. [6]

8.7 The second issue is the maximum permissible time for maturity of such bills. The Stock Exchange has suggested 366 days but it will have been noted that Victoria allows only 200 days. According to the Stock Exchange bank bills normally only range up to 366 days. Bills are initially marketed by being sold at a discount, the discount rate being a reflection of the interest rate. If a bill is held to maturity then the holder will receive the amount stated on the bill. If, however, he wishes to sell the bill before maturity he may make a gain or loss depending on how interest rates have fluctuated. Sometimes the intention of an investor will not be to hold the bill to maturity but only for a short period of time and then sell it. If the prevailing rates of interest have moved against the investor he may find that he is unable to sell except at a loss. It would seem that the longer the bill has to go to maturity the greater the

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4 The bills are of a denomination of not less than $50,000: Allan and Others, 197.
5 Para 2.22 above.
6 *Building Societies Act 1976-1978* (WA), s 40(3).

risk of this happening as interest rates are more likely to fluctuate over a longer rather than a shorter period. Hence, there may be advantages in terms of safety in allowing a shorter period rather than a longer one. It is of interest to note that the *Building Societies Act 1976-1978*, stipulates not more than 200 days as the specified period to maturity for an authorised bill of exchange in which a building society may invest.[7] On the other hand the needs of the trust for liquidity impose a duty of prudence on the trustee and thus limitation to very short periods may perhaps be unnecessary.

8.8 As to the third issue, it could be argued that because the purchase of a bill is the purchase of an asset at a discount, it is comparable to the purchase of redeemable securities the subject of section 18 of the *Trustees Act*, and that some apportionment of profits should take place. However, the difference between the face value of the bill and the price paid for it is really in the nature of interest and should go to the life tenant or income beneficiary. To resolve any doubt about the matter an appropriate provision could be made to confirm that profits made on bills of exchange were of the nature of income not capital.

8.9 The Commission invites comments both on the general question of whether bank accepted or endorsed bills should be an authorised trustee investment and, if so, what the maximum maturity date for such bills should be. The Commission also seeks comment on any other appropriate conditions or restrictions on such a power.

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7 *Building Societies Act 1976-1978* (WA), s 40(3).

CHAPTER 9 - GRANT OF OPTIONS TO PURCHASE TRUST PROPERTY

9.1 As mentioned above[1] there is no statutory power to grant an option to purchase trust property except where a trustee leases property. There are, however, certain equitable powers.[2]

9.2 These powers contain an inherent element of uncertainty as to whether the courts would approve a trustee's grant of an option to purchase in any particular case. Even if he is acting in good faith and in what he considers to be in the best interests of the trust, a trustee may therefore be in breach of trust and held liable personally. Inevitably therefore trustees are reluctant to run the risks involved in granting an option. The Trustee Companies were in favour of an express statutory power limited by the time for exercise of the option. They suggested that in some cases the lack of such a clear power has resulted in the loss of an advantageous sale. The Trustee Companies Association, however, does not favour extension of the existing equitable principles.

9.3 In negotiations for the sale of land in Western Australia, it is not uncommon for a vendor to grant an option to a potential purchaser, where the purchaser wishes to buy a number of adjoining lots held by different owners for the purpose of redevelopment. In such cases it may be in the best interests of the beneficiaries of a trust for the trustees to have a clear power to grant an option in appropriate circumstances. On the other hand the grant of an option to purchase at a future time requires the trustee to forecast what would be a fair market price at some time in the future. If it were decided to grant a statutory power to trustees it would be necessary to provide sufficient protection for beneficiaries as well as suitable guidance for trustees.

9.4 The most important factor would appear to be the time for which an option could be given. The longer the interval between the grant of the option and the date of exercise the greater the risk that inflation or other factors may convert what was originally a fair market price into one at less than market price. Six months might be an appropriate maximum period of time though the Trustee Companies have suggested twelve months. However, a shorter

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1 Para 2.24 above.

2 Paras 2.25 and 2.26 above.

maximum period may be preferable. A trustee's overriding duty of prudence may, in given circumstances, indicate a much shorter period of time.

9.5 Consideration would also need to be given to the way in which such a power to grant an option were framed. One way would be to provide that a trustee would not be liable for breach of trust merely because he had granted an option to purchase of six months duration or less at a fair market price, provided the trustee had obtained and considered expert advice on what a fair price would be. If the power were expressed in this way it would be subject both to the overriding duty of trustees to act prudently in other respects and to any contrary directions in the trust instrument. Other safeguards might include provisions as to minimum option fees.

9.6 Alternatively, a simple power to grant options to purchase could be given without specifying any safeguards as to time. This is presently the situation under section 27(3)(b) of the *Trustees Act* which empowers a trustee to grant an optional or compulsory purchasing clause in a lease. However, a broad power in unlimited terms may be so uncertain as to cause difficulties and hence a reluctance to act.

9.7 The Commission has no concluded view on whether a statutory power to grant options to purchase should be given to trustees or if such a power were given the form it should take. The Commission would welcome comment on the matters raised.

CHAPTER 10 - EXEMPTION OF TRUSTEES FROM THE APPORTIONMENT PROVISIONS OF THE PROPERTY LAW ACT 1969-1979 PART XV (SECTIONS 130-134)

10.1 A number of issues arise in relation to the application of sections 130-134 of the *Property Law Act 1969-1979* to trusts. The Commission is informed that the provisions cause administrative delays and little benefit and as a result are often expressly excluded by wills and trusts and sometimes ignored by trustees. These issues include the following -

(a) Are the present apportionment provisions intrinsically unfair or unreasonable or is it only in certain circumstances that the result is not what the testator would have wished for had he been properly advised?

(b) If the rules are unfair or sometimes produce an unfair result what reforms should be effected?

10.2 The principles involved in the provisions are themselves sound. The testator's death represents a starting point for both the life tenant and the remainderman. The capital of the estate is comprised of the testator's net assets at the date of his death and it is on that sum that a life tenant is entitled to the income. Hence, where a dividend is declared after the testator's death but has accrued over a period of time before the testator's death, it ought in principle to be apportioned between capital and income and it would appear to be reasonable to do so. If this were not done the life tenant would receive what ought to be regarded as part of the capital which ought to belong to the remainderman. Thus, on one view, the provisions are a commendable procedure to balance the interests of the life tenant and the remainderman. However, this may be considered an overly technical viewpoint.

10.3 Most trusts and wills involve a family situation and the life tenant is often the surviving spouse of the testator. The aim of granting a life estate is often to ensure that the family income from investments will flow to that person to be used for the rest of his or her life for his or her maintenance. In this situation the application of the apportionment provisions could frustrate the testator's real intentions (if he is unaware of the provisions) by converting into capital a sum he would have preferred to be distributed as income. Although this can be avoided by express stipulation[1] it might be thought that the law should be amended

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1 *Property Law Act 1969-1979*, s 134(2).

to prevent this result from occurring simply because the testator is not aware of the provisions.

10.4 The requirement to apportion can also cause delay in the winding up of an estate as well as additional costs for the extra work involved. An alternative would be to provide that the whole of the accrued income should pass to the person entitled to income at the moment of receipt by the trust. At first sight this may appear unfair to the remaindermen but the loss to capital will be comparatively small though depending on the size of the estate the actual sum may be substantial. In fact testators very often choose to exclude the apportionment provisions of the *Property Law Act 1969-1979* after being advised on the matter. In addition, there is already precedent for the abolition of technical rules of apportionment. The special apportionment rules embodied in *Howe v Lord Dartmouth*[2] and *Re Chesterfield's Trusts*[3] have now be excluded by statute[4] (subject to any contrary stipulation expressed by will[5]).

10.5 If it were decided to exclude the apportionment rules of the *Property Law Act 1969-1979* the question would then arise as to the scope of such exclusion. The Trustee Companies thought that it would be sufficient to exclude from the provisions dividends on quoted securities. However, there may be advantages in excluding wills, and trusts arising under wills, from the provisions altogether as suggested by the Trustee Companies Association. To return to the example outlined above,[6] to exclude quoted securities would mean that the widow would retain the full annual dividend which was paid one month after the testator's death. If this were an appropriate result why should it be restricted only to dividends on quoted securities? If the payment which had been about to fall due had been dividends on unquoted securities, or annual rental due, then the widow would still incur the same shortfall of income. It could be argued that the nature of the periodic payment should make no difference and that the apportionment provisions should be excluded from all wills and all trusts and interests arising out of deceased estates. If this were done it may be appropriate to allow a testator to stipulate in favour of apportionment if he so desired.[7]

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2 (1802) 7 Ves 137; 32 ER 56.
3 (1883) 24 Ch D 643.
4 *Trustees Act*, s 105.
5 Id, s 105(3).
6 Paras 2.30 to 2.32.
7 This would reflect the way in which the rules in *Howe v Lord Dartmouth* and *Re Chesterfield's Trusts* were dealt with; *Trustees Act*, s 105.

10.6 The Commission has reached no concluded view on the matter and seeks public comment.

CHAPTER 11 - TRUST FUNDS INVESTMENT ACT 1924-1926

11.1 The *Trust Funds Investment Act 1924-1926*, section 2 provides as follows:

> "(1) Whenever under any Act trustees or other persons are authorised to invest money in the debentures or other securities issued by a municipality, such authority shall extend to the investment in the debentures issued by any Road Board of a Road District to which this Act is applied by order of the Governor published in the Gazette.
>
> (2) The securities which a life assurance company is required to deposit with the Colonial Treasurer under section four of the *Life Assurance Companies Act*" 1889, shall extend to such debentures of a Road Board."

11.2 There are no other substantive provisions in the statute. It would appear that the provisions of section 2(1) are no longer of any significance, and the subsection could be repealed. Road Districts are now municipalities[1] and section 16(1)(c) of the *Trustees Act 1962-1978* authorises a trustee to invest "in debentures or other securities charged on the funds or property of any municipality in the State". The fact that Road Districts are now municipalities means that the provisions of subsection (2) could also be repealed.[2]

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1 *Local Government Act 1960-1981* (WA), s 9.

2 The subsection is doubly obsolete in that life assurance companies themselves are now governed not by the *Life Assurance Companies Act 1889-1944* (WA), but by the *Life Insurance Act 1945-1978* (Cth).

CHAPTER 12 - QUESTIONS AT ISSUE

12.1 The Commission would welcome comment, with reasons wherever possible, on any of the issues arising out of its terms of reference and in particular on the questions set out below. A questionnaire containing these questions has been separately printed with space for answers and comments. Copies are available free of charge from the Commission.

GENERAL

1. Should the *Trustees Act* -

   (a) continue to provide a list of types of investment in which trustees are (subject to the trust instrument, other statutory provisions and court orders) authorised to invest trust funds,

   (paragraphs 4.1 to 4.10)

   OR

   (b) be amended to give trustees a general authorisation to invest, subject to principles of prudence and impartiality, in lieu of a list of authorised investments?

   (paragraphs 4.1 to 4.10)

2. If the answer to question l(a) is "yes", should there be some more expeditious way of adding to the list of authorised investments than by statutory amendment? If so, how should this be done?

   (paragraph 4.11)

Assuming the list approach is to continue, what amendments do you suggest should be made to the present list? In particular your views are invited in respect of the following matters:

MORTGAGES

3. Apart from restrictions or contrary directions imposed by the trust instrument (if any) -

(a) Should the protection given by section 22 of the *Trustees Act* be extended to a trustee who lends on the security of a first legal mortgage over a property a sum which is in excess of two-thirds of the value of the property? If so, what should the proportion be?

(paragraphs 5.2 to 5.4)

(b) (i) Should the protection given by section 22 of the Act be extended so that if the loan is protected by mortgage insurance a trustee can lend a greater proportion than otherwise?

(paragraphs 5.5 to 5.9)

(ii) If so, what should the proportion be?

(paragraphs 5.5 to 5.9)

(iii) Should any distinction be drawn between loans secured on residential property and those not so secured?

(paragraphs 5.5 to 5.9)

(iv) If the loan is protected by mortgage insurance, should mortgages other than first legal mortgages be authorised as trustee investments? If so, what restrictions should be imposed?

(paragraph 5.10)

(v) If the answer to question 3(b)(i) is "yes", should the protection given by section 22 extend only to housing loan insurance provided by the Housing Loans Insurance Corporation or should it extend to insurance by commercial insurers? If the protection is to extend to commercial insurers should section 22 require the State Treasurer to approve such insurers?

(paragraphs 5.11 to 5.12)

(c) Should authorised trustee investments in mortgages be restricted to mortgages over Western Australian land?

(paragraphs 5.13 to 5.15)

4. Should the statutory obligations of a trustee-mortgagee be extended so as to require him to compel a mortgagor to insure the mortgaged property against all the usual risks against which a property of that nature is normally insured?

(paragraph 5.16)

DEPOSITS IN BANKS

5. Which of the following types of bank certificates of deposit should be authorised trustee investments, whether purchased direct from a bank or from a third party -

(i) Convertible? Yes/No
(ii) Negotiable? Yes/No
(iii) Transferable? Yes/No

(paragraphs 6.2 to 6.3)

DEPOSITS IN BUILDING SOCIETIES

6. Should call deposits in approved building societies be authorised trustee investments?

(paragraphs 6.4 to 6.6)

PREFERENCE OR ORDINARY STOCK OR SHARES

7. (a) Should the period for which a company must pay dividends in order that its shares can qualify as an authorised trustee investment be reduced? If so, to what period?

(paragraphs 6.7 to 6.10)

(b) Should the minimum paid-up capital of such a company remain at two million dollars? If not, what figure should be substituted?

(paragraph 6.11)

COMPANY DEBENTURES

8. (a) Should the requirement that debentures must be quoted on a Stock Exchange in order to be authorised trustee investments, be repealed?

(paragraphs 6.12 to 6.14)

(b) (i) What are the appropriate criteria for debentures as authorised trustee investments?

(paragraphs 6.15 to 6.17)

(ii) Should the debentures of wholly owned subsidiaries of banks be authorised trustee investments?

(paragraphs 6.15 to 6.17)

(iii) What other company debentures should be authorised trustee investments?

(paragraphs 6.15 to 6.17)

(c) If unquoted debentures are permitted to be authorised trustee investments should there be any maximum time limit on their term and, if so, what should this be?

(paragraph 6.18)

(d) Should debentures be required to constitute a charge on the company's assets in order to be authorised trustee investments?

(paragraph 6.19)

DEPOSITS AND NOTES

9. What should be the maximum time limit on the term of deposits and notes authorised as trustee investments by section 16(1)(m)?

(paragraph 6.20)

DWELLING HOUSE FOR THE USE OF A BENEFICIARY

10. Should the power given to a trustee by section 17 to purchase a dwelling house for the use of a beneficiary extend to land outside Western Australia?

(paragraph 6.21)

LAND

11. Apart from restrictions or contrary directions imposed by the trust instrument (if any) -

(a) Should trustees be authorised by the *Trustees Act* to invest in the purchase of land?

(paragraphs 7.1 to 7.4)

(b) Should a trustee be permitted to purchase interests in land other than an estate in fee simple? If so, what interests should a trustee be allowed to purchase?

(paragraph 7.5)

(c) Should the property purchased necessarily be income-producing?

(paragraph 7.6)

(d) Should the sum of $10,000 which is the maximum sum a trustee may expend without a special court order in the improvement or development of property pursuant to section 30 of the *Trustees Act* be increased? If so, to what sum?

(paragraph 7.7)

(e) Should any distinction be drawn between different types of land, such as farming, residential, industrial, commercial or vacant unimproved land? If so, on what basis?

(paragraph 7.8)

(f) What advice, if any, should a trustee be required to consider on the exercise of a power to invest in land, if one is granted?

(paragraphs 7.9 to 7.10)

(g) Should a trustee be able to purchase land on the unsworn advice of a valuer rather than on sworn valuation?

(paragraph 7.10)

(h) Should the trustee have power to bid up to 10% above such advice at auction?

(paragraph 7.10)

(i) Should there be any restrictions as to the proportion of trust funds which may be invested in land, or on the size of the trust estate before such an investment may be made?

(paragraphs 7.11 to 7.13)

(j) Should the power be granted to all trustees, or limited to some trustees? If so, on what basis?

(paragraph 7.14)

(k) Should a trustee be confined to investment in Western Australian land?

(paragraph 7.15)

RIGHTS TO SHARES AND CONVERTIBLE NOTES

12. Should trustees be authorised to purchase on a stock exchange rights to shares and convertible notes.

(paragraphs 8.1 to 8.3)

BANK ACCEPTED OR ENDORSED BILLS

13. (a) Should bank accepted bills be authorised trustee investments?

(paragraphs 8.4 to 8.6)

(b) Should bank endorsed bills be authorised trustee investments?

(paragraphs 8.4 to 8.6)

(c) In either case, what should be the maximum permissible time for maturity of such bills?

(paragraph 8.7)

(d) Should apportionment provisions apply to gains made on trustee investments in bills of exchange?

(paragraph 8.8)

GRANT OF OPTIONS TO PURCHASE TRUST PROPERTY

14. (a) Should trustees be given a statutory power to grant options to purchase over trust property?

(paragraphs 9.1 to 9.4)

(b) If so, what restrictions, if any, should be placed on this power?

(paragraphs 9.5 to 9.6)

APPORTIONMENT

15. (a) Should the application of the apportionment provisions of the *Property Law Act 1969-1979* be excluded from all property which is the subject of wills or trusts arising under wills?

(paragraphs 10.1 to 10.4)

(b) Alternatively should those provisions be excluded only in respect of certain property the subject of such wills or trusts, such as, for example, quoted securities?

(paragraph 10.5)

OTHER MATTERS

16. Should the provisions of the *Trust Funds Investment Act 1924- 1926* be repealed?

(paragraphs 11.1 to 11.2)

17. Are there any other forms of investment which should be authorised as trustee investments? Give details and also any appropriate safeguards.

18. Are there any other matters arising in respect of Part III of the *Trustees Act* to which the Commission should direct attention?

19. What economic implications (if any) flow from the various issues raised in the working paper?

(paragraph 1.31)

APPENDIX I
TRUSTEES ACT 1962-1978

PART I - PRELIMINARY

s 6 (1) In this Act, unless the context otherwise requires,-

"authorised investments" means investments authorised for the investment of money subject to the trust by the instrument (if any) creating the trust or by this Act or any other Act;

. . .

"land" includes -

(a) land of any tenure;

(b) mines and minerals, whether or not severed from the surface;

(c) buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way;

(d) any other corporeal hereditament;

(e) a rent and other incorporeal hereditaments; and

(f) an easement, right, privilege, share, interest or benefit in, over or derived from land;

and, in this definition, "mines and minerals" includes any strata or seams or minerals or substances in or under any land, and powers of working or getting them and "hereditament" means real property that under an intestacy might at common law have devolved on an heir ;

. . .

"securities" includes stock, funds, and shares; and "securities payable to bearer" includes securities transferable by delivery or by delivery and endorsement;

. . .

"trust" does not include the duties incidental to an estate conveyed by way of mortgage, but with that exception "trust" extends to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative ; and "trustee" has a corresponding meaning and includes a trustee corporation and every other corporation in which property subject to a trust is vested and every person who immediately before the commencement of this Act was a trustee of the settlement or in any way a trustee under the *Settled Land Act of 1892* and, where the context admits,

includes a personal representative; and "new trustee" includes an additional trustee;

. . .

(2) Any reference to the investment, loan or advance of trust money by a trustee on the security of property shall be construed to include a reference to such investment, loan or advance on the transfer of an existing security as well as on a new security.

PART III – INVESTMENTS

s 16 (1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in any investments authorised by the instrument (if any) creating the trust for the investment of money subject to the trust, or in manner following, that is to say -

(a) in any of the Parliamentary stocks, public funds or Government Securities of the United Kingdom, of the Commonwealth of Australia, of any of the States of the Commonwealth of Australia, of the Dominion of New Zealand or of Fiji.

(b) on first legal mortgage of an estate in fee simple in land in the State;

(c) in debentures or other securities charged on the funds or property of any municipality in the State;

(d) in anyone or more of the following, namely -
  (i) on fixed deposits in any incorporated or Joint Stock Bank carrying on business in the State;
  (ii) on deposits in the Savings Bank Division of the Rural and Industries Bank of Western Australia; and
  (iii) on deposit in any savings bank authorised to carryon savings bank business under the *Banking Act 1959* of the Commonwealth or under any Act passed in amendment of, or in substitute for, that Act;

(e) on fixed deposits in or in the shares of any incorporated building society carrying on business in the State and certified by notice in the Gazette, signed by the Treasurer, as a society in which trustees may invest;

(f) with any dealer in the short term money market, approved by the Reserve Bank of Australia as an authorised dealer, that has established lines of credit with that bank as a lender of last resort;

(g) in any security in respect of which repayment of the amount secured and payment of interest thereon is guaranteed by the Parliament of the United Kingdom or the Commonwealth or any State of the Commonwealth or New Zealand;

(h) in debentures or other securities charged upon the property and revenue of the Western Australian Fire Brigades Board constituted under the *Fire Brigades Act, 1942*;

(i) in any of the stocks, funds or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court;

(j) in any security or in any manner authorised by, or under, any Act;

(k) subject to the provisions of subsections (3), (4), (5), (6), (7) and (8) of this section, in the purchase of the preference or ordinary stock or shares issued in the Commonwealth of Australia by a company incorporated in a State or Territory of the Commonwealth of Australia, being stock or shares registered in a State or Territory of the Commonwealth of Australia;

(l) subject to the provisions of subsections (3), (4), (5), (6), (7) and (8) of this section, in debentures, including debenture stock and bonds , and whether constituting a charge on assets or not, issued by any company in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares;

(m) subject to the provisions of subsections (4), (5), (6), (7) and (8) of this section, on deposit or notes, whether secured or unsecured, at interest either for a fixed term not exceeding seven years or at call, with any company in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares;

(n) subject to the provisions of subsections (5), (6), (7) and (8) of this section, in the units, or other shares of the investments subject to the trust, of a unit trust scheme in respect of which there is in existence at the time of investment an approved deed under any law of the State relating to Companies; and

(o) in the common trust fund of a trustee corporation.

(2) Any investments made under the powers conferred by this section may be varied from time to time.

(3) The stock, shares, and debentures mentioned in paragraphs (k) and (I) of subsection (1) of this section do not include -

(a) any stock, shares or debentures the price of which is not quoted on a Stock Exchange in a State or Territory of the Commonwealth; or

(b) shares or debenture stock not fully paid up, except shares or debenture stock that, by the terms of issue, are required to be fully paid up within nine months of the date of issue.

(4) An investment under paragraphs (k), (I) and (m) of subsection (1) of this

section shall not be made in any company that -

(a) has a paid up share capital of less than two million dollars;

(b) has not paid a dividend in each of the fifteen years immediately preceding the calendar year in which the investment is made on all the ordinary stock or shares issued by the company, excluding any shares issued after the dividend was declared; but for the purposes of this paragraph a company formed to take over the business of another company or other companies is deemed to have paid the requisite dividend in any year in which such a dividend was paid by the other company or all the other companies as the case may be.

(5) A trustee who proposes to make any investment under the power conferred by paragraphs (k), (l), (m) and (n) of subsection (1) of this section shall first obtain and consider proper advice in writing on the question whether the investment is satisfactory having regard -

(a) to the need for ensuring that investments of the trust are, so far as circumstances allow, sufficiently diversified in respect of the descriptions of investment and, where diversification within a particular description would be prudent, in respect of the investments within that description;

(b) to the suitability to the trust of investments of the description of investments proposed and of the investment proposed as an investment of that description.

(6) A trustee who retains any investment made under the power conferred by paragraphs (k), (1), (m) and (n) of subsection (1) of this section shall determine at what intervals the circumstances and in particular the nature of the investment make it desirable to obtain the advice mentioned in subsection (5) of this section, and shall obtain and consider that advice accordingly.

(7) For the purposes of subsections (5) and (6) of this section, proper advice is the advice of a person who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial matters; and that advice may be given notwithstanding that the person gives it in the course of his employment as an officer or servant.

(8) Subsections (5) and (6) of this section do not apply to one of two or more trustees where he is the person giving the advice required by this section to his co-trustee or co-trustees, and do not apply where powers of a trustee are lawfully exercised by an officer or servant competent under subsection (7) of this section to give proper advice.

(9) The Treasurer may, by notice in the Gazette, revoke any notice given under paragraph (e) of subsection (1) of this section.

s 17 (1) Where a trustee is of opinion that it is desirable to purchase a dwelling house for the use of any beneficiary under the trust, the trustee may invest any trust

funds in his hands, whether at the time in a state of investment or not, in the purchase of land in fee simple in the State used for the purpose of a dwelling house only, and may permit the beneficiary to reside on the land upon such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.

(2) A trustee purchasing land in exercise of the power conferred by this section shall not be chargeable with breach of trust by reason only of the relation borne by the purchase price to the value of the land at the time when the purchase was made if it appears to the Court that -

(a) in making the purchase the trustee was acting upon a report as to the value of the land made by a qualified valuer, instructed and employed independently of any owner of the land, whether that valuer carried on business in the locality where the land is situate or elsewhere;

(b) the purchase price did not exceed the value of the land as stated in the report;

(c) the valuer has stated in his report the net annual rental which the land produced or was capable of producing at the time of valuation; and

(d) that the purchase was made under the advice of the valuer expressed in the report.

(2a) For the purposes of paragraph (a) of subsection (2) of this section "qualified valuer" means -

(a) in relation to a report as to the value of land commissioned before the expiration of twelve months from the coming into operation of the *Land Valuers Licensing Act, 1978* -

(i) a person appointed as a sworn valuator under the provisions of the Transfer of Land Act, 1893 as enacted before the coming into operation of the *Land Valuers Licensing Act, 1978*; or

(ii) a person who is licensed under the *Land Valuers Licensing Act, 1978*;

(b) in relation to a report as to the value of land commissioned after the expiration of twelve months from the coming into operation of the *Land Valuers Licensing Act, 1978* - a person who is licensed under that Act.

(3) Land purchased under this section shall be held upon trust for sale.

(4) A trustee may retain as an asset of the trust any land purchased under this section, notwithstanding that no beneficiary under the trust is residing on the land.

(5) Where a trustee is of opinion that it is desirable that a dwelling house that forms part of the trust shall be retained for the use of any beneficiary he may, notwithstanding any trust for conversion contained in the instrument creating the trust, retain the dwelling house and permit the beneficiary to reside therein, upon such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.

s 18 (1) A trustee having authority to invest in any of the securities mentioned in section sixteen of this Act may invest in any of those securities notwithstanding that the securities may be redeemable, and that the price is greater or less than the redemption value.

(2) A trustee may retain until redemption any redeemable security that may have been purchased in accordance with the powers of this Act, or of any statute replaced by this Act.

(3) Where any security to which subsection (1) of this section applies is purchased by a trustee, after the commencement of this Act, at a price greater or less than its redemption value, and in terms of the trust the beneficial interest in the income from the security is not vested in the same persons as the beneficial interest in the capital thereof, then, subject to the provisions of section one hundred and three of this Act, -

(a) if the purchase price exceeds the redemption value, the trustee shall recoup to the capital out of which the purchase was made, by rateable instalments from the income derived from the security over the period between the date of purchase and the earliest date on which the security can be repaid or redeemed, the amount of the difference; and the amount so recouped to capital from time to time shall be deemed to be received as capital repaid;

(b) if the redemption value exceeds the purchase price, the amount of the difference shall be distributable as if it were income accruing from day to day over the period between the date of the purchase and the latest date on which the security can be repaid or redeemed; and the trustee may, by rateable instalments over the period, appropriate or raise out of the capital of the security or out of the capital of other assets subject to the same trusts the amounts required from time to time to be distributed as income; and, if the security is repaid or redeemed before the latest date on which the same can be repaid or redeemed, any remaining balance of the difference shall, on the repayment or redemption, immediately become distributable as if it were income then due and payable.

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

s 19 Every power conferred by the foregoing provisions of this Part shall be exercised according to the discretion of the trustee, but subject to any consent or

direction required by the instrument (if any) creating the trust or by statute with respect to the investment of trust funds.

s 20 A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment that has ceased to be an investment authorised by the trust instrument or by this or any other Act.

s 21 (1) A trustee may, unless expressly prohibited by the instrument creating the trust, retain or invest in securities payable to bearer that, if not so payable, would have been authorised investments; but any such securities retained or taken as an investment by a trustee (not being a trustee corporation) shall, until sold, be deposited by him for safe custody and collection of income with a bank.

(2) A direction that investments shall be retained or made in the name of a trustee shall, for the purposes of sub-section (1) of this section, be deemed not to be such an express prohibition as is therein mentioned.

(3) A trustee shall not be responsible for any loss incurred by reason of any deposit made pursuant to subsection (1) of this section and any sum payable in respect of any such deposit or the collection of income shall be paid out of the income of the trust property.

s 22 (1) A trustee lending money on the security of any property on which he may properly lend or extending the term of any mortgage on which he has lent money shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the Court that -

(a) in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be competent to value the property, being a person instructed and employed independently of any owner of the property, whether that valuer resided or carried on business in the locality where the property is situate or elsewhere;

(b) the amount of the loan does not exceed two-thirds of the value of the property as stated in the report; and

(c) the loan was made under the advice of the valuer expressed in the report.

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that, in making the loan, he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3) A trustee shall not be chargeable with breach of trust upon the ground only that in effecting the purchase of, or in lending money upon the security of, any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have

accepted.

(4) This section applies to transfers of existing securities as well as to new securities and to investments made before or after the commencement of this Act.

s 23 (1) Where a trustee improperly advances trust money on a mortgage security that would at the time of investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall be liable to make good only the sum advanced in excess of the smaller sum with interest.

(2) This section applies to investments made before or after the commencement of this Act.

s 24 (1) Where any property is held by a trustee by way of security and the trustee has power under this Act or otherwise to invest on mortgage and to vary investments, the trustee -

(a) may release part of the property from the mortgage, whether any part of the mortgage debt is repaid or not, provided that the unreleased part of the property would, at the time, be a proper investment in all respects for the amount remaining unpaid; and

(b) may, on a sale by the mortgagor of part of the mortgaged property and on receipt by the trustee of the whole of the purchase money thereof after deduction of the expenses of the sale, release that part from the mortgage.

(2) A subsequent purchaser of the released part of any property, or the Registrar of Titles or other person registering or certifying title, shall not be concerned to inquire whether the release was authorised by this section.

s 25 (1) A trustee lending money on the security of any property on which he may lawfully lend -

(a) may lend for any period not exceeding seven years from the time when the loan was made; or

(b) may contract that money so lent shall not be called in during any period, not exceeding seven years, from the time when the loan was made.

(2) The terms upon which a loan mentioned in subsection (1) of this section is made shall, in addition to such other provisions as the trustee may think proper, include provisions giving effect to the following, namely, that -

(a) interest shall be paid within a specified time, not exceeding thirty days after every half-yearly or other day on which it becomes due;

(b) the borrower shall maintain and protect the property, and keep all

buildings, if any, erected thereon insured against loss or damage by fire to the full insurable value thereof; and

(c) if the borrower fails to comply with any term of the mortgage, the whole of the moneys secured by the mortgage shall immediately become due and payable.

(3) Where any securities of a company are subject to a trust, the trustees may -

(a) concur in any scheme or arrangement -

(i) for, or arising out of, the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the company;
(ii) for the sale of all or any part of the property and undertaking of the company to another company;
(iii) for the amalgamation of the company with another company; or
(iv) for the release, modification or variation of any rights, privileges or liabilities attached to the securities or any of them; and

(b) accept or carry out any proposal made in writing by or on behalf of another company for the purchase by that other company of any securities in the firstmentioned company, in consideration of the allotment of securities in that other company, whether with or without any other consideration, where -

(i) the proposal is conditional upon the holders of a proportion (being not less than seventy-five per centum in value) of such of the securities in the firstmentioned company as have not already been acquired by that other company agreeing to deal with those securities in accordance with the proposal; and
(ii) a sufficient number of the holders of the securities in question (including the trustees) agree in writing to deal with the shares in accordance with the proposal,

in like manner as if they were entitled to such securities beneficially, with power to accept any securities or other property of any denomination or description in addition to, or in lieu of, or in exchange for, all or any of the first-mentioned securities; and the trustees shall not be responsible for any loss occasioned by any act or thing so done in good faith; and may retain any securities or other property accepted as in this paragraph provided for any period for which they could have properly retained the original securities.

(4) If any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in that company or any other company, the trustees may, as to all or any of those securities, -

(a) exercise the right and apply capital moneys subject to the trust in payment of the consideration, and retain the securities subscribed for

during any period during which they could properly retain the holding in respect of which the right to subscribe was offered; or

(b) renounce the right; or

(c) assign for the best consideration that can reasonably be obtained (which consideration shall be held as capital money of the trust) the benefit of the right, or the title thereto, to any person, including any beneficiary under the trust,

without being responsible for any loss occasioned by any act or thing so done by them in good faith.

(5) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by law or by the instrument (if any) creating the trust.

(6) Where the loan referred to in subsections (1) and (2) of this section is made under the order of the Court, the powers conferred by those subsections apply only if and as far as the Court may by order direct.

s 26 A trustee may apply capital money subject to a trust in payment of the calls on any shares subject to the same trust.

PART VII - FURTHER POWERS OF THE COURT

Division 3. - Jurisdiction to Make other Orders.

s 89 (1) Where in the opinion of the Court any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the Court, or it or they cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income.

(2) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order; but such a rescission or variation of any order shall not affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the Court to rescind or vary the order.

(3) An order may be made under this section, notwithstanding anything to the contrary contained or expressed in the instrument creating the trust.

(4) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

s 90 (1) Without limiting any other powers of the Court, it is hereby declared that, where any property is held on trusts arising under any will, settlement or other disposition, or on the intestacy or partial intestacy of any person, or under any order of the Court, the Court may, if it thinks fit, by order approve on behalf of -

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who, by reason of infancy or other incapacity, is incapable of assenting; or

(b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons; but this paragraph does not include any person who would be of that description or a member of that class, if that date had fallen or that event had happened at the date of the application to the Court; or

(c) any unborn or unknown person; or

(d) any person, in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

(2) Except where the Court approves an arrangement on behalf of a person referred to in paragraph (d) of sub-section (1) of this section, the Court shall not approve an arrangement on behalf of any person if the arrangement is to his detriment; and, in determining whether any such arrangement is to the detriment of a person, the Court may have regard to all the benefits that may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs.

(3) This section does not apply to any trust affecting property settled by any Act, other than the *Administration Act, 1903*.

(4) Any rearrangement approved by the Court under subsection (1) of this section is binding on all persons on whose behalf it was so approved, and thereafter the trusts as so rearranged shall take effect accordingly.

(5) In this section -
"discretionary interest" means an interest arising under the trust specified in subsection (3) of section sixty-one of this Act or any like trust;

"principal beneficiary" has the same meaning as in sub-section (1) of section sixty-one of this Act;

"protective trusts" means the trusts specified in subsections (2) and (3) of section sixty-one of this Act or any like trusts.

. . .

s 92 (1) Any trustee may apply to the Court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.

(2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the Court thinks expedient.

s 93 (1) An order under this Act for the appointment of a new trustee, or concerning any property subject to a trust, may be made on the application of any person beneficially interested in the property, whether under a disability or not, or on the application of any person duly appointed trustee of the property or intended to be so appointed.

(2) An order under this Act concerning any interest in any property subject to a mortgage may be made on the application of any person beneficially interested in the property, whether under a disability or not, or of any person interested in the money secured by the mortgage.

s 94 (1) Any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee in the exercise of any power conferred by this Act, or who has reasonable grounds to apprehend any such act, omission or decision of a trustee by which he will be aggrieved, may apply to the Court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision; and the Court may require the trustee to appear before it, and to substantiate and uphold the grounds of the act, omission or decision that is being reviewed, and may make such order in the premises as the circumstances of the case may require.

(2) An order of the Court under subsection (1) of this section shall not -

(a) disturb any distribution of the trust property, made without breach of trust, before the trustee became aware of the making of the application to the Court; or

(b) affect any right acquired by any person in good faith and for valuable consideration.

(3) Where any application is made under this section, the Court may, -

(a) if any question of fact is involved, direct how the question shall be determined; and

(b) if the Court is being asked to make an order that may adversely affect the rights of any person who is not a party to the proceedings, direct that that person shall be made a party to the proceedings.

APPENDIX II

PROPERTY LAW ACT 1969-1979

PART XV. - APPORTIONMENT

s 130 (1) In this Part of this Act, unless the contrary intention appears -

"annuities" includes salaries and pensions ;

"dividends" includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other companies or corporations, divisible between all or any of the members thereof, whether those payments are usually made or declared at any fixed times or otherwise; but "dividends" does not include payments in the nature of a return or reimbursement of capital;

"rent" includes rents and all periodical payments or renderings in lieu of or in the nature of rent.

(2) All such divisible revenue as is referred to in the interpretation "dividends" shall for the purposes of this section be deemed to have accrued by equal daily increments during and within the period for or in respect of which the payment of the same revenue is declared or expressed to be made.

s 131 All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

s 132 The apportioned part of any such rent, annuity, dividend, or other payment as is referred to in section 131 of this Act is payable or recoverable in the case of a continuing rent, annuity, or other payment as soon as the entire portion of which the apportioned part forms part becomes due and payable, and not before; and where the payment is determined by re-entry, death, or otherwise, as soon as the next entire portion of the rent, annuity, dividend or other payment would have become payable if it had not so determined, and not before.

s 133 (1) Subject to subsection (2) of this section, all persons and their respective personal representatives and assigns, and also the personal representatives and assigns respectively of persons whose interests determined with their own death, have such or the same remedies, legal and equitable, for recovering such apportioned parts as are referred to in section 132 of this Act when payable (allowing for a proportionate part of all just allowance) as they respectively would have had for recovering such entire portions as are so referred to if entitled thereto respectively.

(2) Where a person is liable to pay rent reserved out of or charged on lands or other hereditaments of any tenure, that person and the lands or other hereditament shall not be resorted to for any apportioned part forming part of an entire or continuing rent as provided in section 132 of this Act; but the entire or continuing rent, including the apportioned part, shall be recovered and received by the person

who, if the rent had not been apportionable under this Part of this Act or otherwise, would have been entitled to the entire or continuing rent; and the apportioned part is recoverable from the last mentioned person by the personal representatives, or other parties entitled thereto under this Part of this Act.

s 134 (1) Nothing in this Part of this Act renders apportionable any annual sums payable under policies of assurance of any description.

(2) This Part of this Act does not extend to any case in which it is expressly stipulated that apportionment shall not take place.

APPENDIX III

Comparative Table of Authorised Investments*	WA	NSW	QLD	VIC	SA	TAS	ACT	NT	NZ	ENG
Investments in:-										
A. Specified government securities.[1]	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
B. Specified semi-government securities.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
C. Mortgages										
(a) of an estate in fee simple in land	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
(b) of other specified interests in land	No	Yes	Yes	Yes[2]	Yes	Yes	Yes	Yes	Yes	Yes
(c) Limited to own jurisdiction	Yes	Yes	Fee simple anywhere in Aust. In other cases limited to Qld.	Yes	Yes	Yes	Fee simple anywhere in Aust. In other cases limited to ACT.	Fee simple anywhere in Aust. In other cases limited to NT.	Yes	Yes
(d) Statutory protection for trustee if not more than 2/3 of the value of property advanced.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes-for fee simple. Not more than one half of value for leases	Yes
(e) (i) Statutory protection extends to a greater proportion advanced if loan insured	No	No	Yes	Yes	Yes	Yes	No	Yes	No	No
(ii) Insurer										
(a) Housing Loans Insurance Corporation	N/A	N/A	Yes	Yes	Yes	Yes	N/A	Yes	N/A	N/A
(b) approved commercial insurers also	N/A	N/A	No	No	No	Yes	N/A	No	N/A	N/A
(f) Trustee to insert covenant in mortgage to require the mortgagor to keep all buildings insured against "loss or damaged by fire to the full insurable value thereof".	Yes	Yes	Broader provision[3]	Yes	Yes-but only if trust property sold and mortgage back taken.	No provision	Yes	No provision	No provision	Yes-but only if trust property sold and mortgage back taken
D. Debentures or other securities of any municipality.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
E. (a) Deposits in specified banks	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
(b) (i) Bank certificates of deposits[4] (including negotiable convertible and transferable certificates) issued direct by a bank.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	-
(ii) Bank certificates of deposits purchased from a third party.[4]	?Yes	?Yes	?Yes	?Yes	?Yes	?Yes	?Yes	?Yes	-	-

F.	Approved building societies										
	(a)	Fixed deposits	Yes	No	No	Yes[5]	Yes	Yes	No	Yes	Yes	Yes
	(b)	Deposits at call	Probably not	No	No	Yes[5]	Yes	Yes	No	Yes	Yes	Yes
	(c)	Shares.	Yes	No	No	No	No	No	No	Yes	No	Yes
G.	(a)	Approved dealer in short term money market	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	(b)	Bills of Exchange										
		(i) Bank accepted	No	No	Yes	Yes[6]	No	No[7]	No	No	No	No
		(ii) Bank endorsed	No	No	No	No	No	No	No	No	No	No
		(iii) Other bills.	No	No	No	No	No	No	No	No	No	No
H.	Stocks, funds or securities authorised for investment of cash under the control of the court.		Yes	Yes	Yes	No	No	Yes	No	No	No	No
I.	(a)	Preference or ordinary stock or shares in qualified companies	Yes	No	No	No	Yes	No	No	Yes	Yes	Yes
	(b)	Qualified companies										
		(i) Amount of paid up share capital required	$2,000,000	N/A	N/A	N/A	$4,000,000	N/A	N/A	$2,000,000	$2,500,000	£1,000,000
		(ii) Dividend paying qualifying period	15 years	N/A	N/A	N/A	10 years	N/A	N/A	7 years	for preceding 3 yrs. 5 years	5 years
		(iii) Amount of dividend	No Provision	N/A	N/A	N/A	No Provision	N/A	N/A	No Provision	At least 5% per annum	No Provision
	(c)	Right to take up shares in respect of existing shareholding	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
	(d)	Purchase of rights to shares on a stock exchange.	No	No	No	No	No	No	No	No	No	No
J.	(a)	Debentures of qualified companies.[8]	Yes	No	No	No	Yes[9]	No	No	Yes	Yes[10]	Yes
	(b)	Must the debentures be quoted on a stock exchange?	Yes	N/A	N/A	N/A	No	N/A	N/A	Yes	Yes	Yes
	(c)	Debentures of wholly owned subsidiaries of banks.[11]	No	No	No	No	Yes	No	No	No[11]	No	Yes
K.	(a)	Deposits or notes in qualified companies.[12]	Yes	No	No	No	Yes-and deposits in life insurance corp-oration as well.	No	No	Yes-and in companies declared by the Minister.	Yes-convertible notes only	Yes
	(b)	Must the deposit or notes be listed on a stock exchange?	No	N/A	N/A	N/A	No	N/A	N/A	No	Yes- quotable convertible notes only	Yes
	(c)	Rights to convertible notes in respect of existing shareholding	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
	(d)	Purchase of rights to convertible notes on a stock exchange.	No	No	No	No	No	No	No	No	No	No

L.	Units or other shares of the investments subject to the trust of a unit trust scheme whose deed is approved under Part IV Division 5 of the *Companies Act 1961-1979* (WA), or its equivalent.		Yes	No	No	No	No	No	No	No	No	Yes
M.	Common trust fund of either a statutory trustee corporation or the Public Trustee.		Yes	No	Yes	Yes	Yes-as specified	No	No	Yes	Yes	-
N.	Dwelling house for use of a beneficiary within the jurisdiction.		Yes	Yes- If Public Trustee or Statotory Trustee Company. (within NSW & ACT)	Yes	Yes	Yes- No Limit expressed as to location.	Yes	Yes	Yes- No Limit expressed as to location.	Yes	No
O.	Land	(a) Fee simple	No	No	Yes	Yes	No	Yes	No	No	Yes-but only adjoining land	No
		(b) Other interests in land	No	No	Yes	No	No	No	No	No	No	No
		(c) In own jurisdiction only.	N/A	N/A	i) Fee simple anywhere in Commonwealth ii) Other interests only in Qld	Yes	N/A	Yes	N/A	N/A	Yes	N/A
Other Matters:-												
P.	(a)	General statutory power to grant option to purchase.[13]	No	No	No	No	No	No	No	No	No	Yes
	(b)	Power to grant option to purchase as term of lease.	Yes	No	Yes	No	No	No	No	No	Yes	Yes
Q.	Apportionment provisions similar to the *Property Law Act 1969-1979* (WA) Part XV (sections 130 to 134).		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

* The provision as to authorised investments mentioned in this table include only those referred to in the text being primarily the *Trustees Act* 1962-1978 (WA), *Trustee Act 1925-1981* (NSW), *Trusts Act 1973-1981* (Qld), *Trustee Act 1958-1981* (Vic), *Trustee Act 1936-1980* (SA), *Trustee Act 1898-1981* (Tas), *Trustee (Insured Housing Loans) Act 1970-1977* (Tas), *Trustee Act 1925-1978* (ACT), *Trustee Act 1893-1981* (NT), *Trustee Act 1956-1978* (NZ), *Trustee Investments Act 1961* (Eng) and *Trustee Act 1925-1961*. There are a number of other statutes both State and Federal expressly empowering trustees to invest in specific securities mainly government, semi-government and municipal: see Meagher and Gummow 360 for some examples.

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1 Each jurisdiction permits investment in a wide range of government securities both of the jurisdiction concerned and of other governments. Western Australia, for examp le, includes "any of the Parliamentary stocks, public funds or Government Securities of the United Kingdom, of the Commonwealth of Australia, of any of the States of the Commonwealth of Australia, of the Dominion of New Zealand or of Fiji" but this would appear not to extend to the Northern Territory.

2 In Victoria a trustee is permitted to invest in "real securities". This term includes a first mortgage of freehold land but the Act excludes second mortgages and mortgages of an equity of redemption or other equitable interest in land. It is unclear what other interests in land come within the term "real securities".

3 "Loss or damage by fire and by storm and tempest to the full insurable value thereof".

4 See the reservations expressed in the text.

5 See para 3.7 footnote 7.

6 Subject to certain further restrictions described in the text.

7 But note para 3.21 footnote 1.

8 In Western Australia, New Zealand and the Northern Territory debentures of such companies may only qualify as authorised trustee investments if quoted on a stock exchange and fully paid up or required to be fully paid up within nine months of issue and if the stocks or shares of the company are so quoted. See para 2.13 footnote 2 as to the contrary argument.

9 Also the debentures of unqualified companies if guaranteed by a qualified company.

10 Also the debentures of qualified dairy finance companies.

11 Debentures of wholly owned subsidiaries of banks could not comply with all the Acts' requirements for debentures because the shares of such companies could not be quoted on a stock exchange: see note 8 above.

12 See para 2.15 footnote 4 as to whether the stocks and shares of the company must also be authorised trustee investments.

13 The equitable power to grant an option would seem to be available in all jurisdictions: see para 2.25 *et seq*.