



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 34 – Part V

**Trusts And The Administration Of Estates
Part V - Trustees' Powers Of Investment**

REPORT

JANUARY 1984

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

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ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on trustees' powers of investment (Project No 34 Part V).

H H Jackson
Chairman

10 January 1984

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PART I: SCOPE OF THE PROJECT AND APPROACH OF THE COMMISSION

CHAPTER 1 - INTRODUCTION

1. SCOPE OF THIS REPORT

1.1 The Commission has a general project to review the law of trusts and the administration of estates, which it has divided into a number of parts.¹ This report deals only with certain matters relating to trustees' powers of investment, and some ancillary matters. This is in accordance with the request of the former Attorney General that the Commission submit a report on submissions made to him that the investments presently authorised by Part III of the *Trustees Act 1962-1978*² are inadequate to preserve the capital of the trust fund in the prevailing inflationary circumstances or to enable trustees to take advantage of certain new forms of investment now available.

1.2 Accordingly, the Commission's principal aim in this report has been to ensure that trustees have adequate investment opportunities under present conditions. It has not attempted to review in detail every investment presently authorised, or to make recommendations as regards every form of investment which could possibly be included. In paragraphs 2.28 to 2.30 below, the Commission recommends the setting up of an advisory committee to review periodically the then current list of authorised investments so as to take account of changing conditions and to consider other possible forms of investment for inclusion.³

2. WORKING PAPER AND PUBLIC COMMENT

1.3 The Commission issued a working paper in December 1981. The paper sought comment on the matters raised in the submissions made to the Attorney General⁴ and also

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 of the *Trustees Act* and certain other provisions of that Act are reproduced in Appendix I.

³ See also paras 7.7, 11.3 to 11.8 where the Commission recommends that certain items in the present list be reviewed by the committee.

⁴ Hereinafter referred to as the "preliminary submissions". Preliminary submissions were made by Perpetual Trustees WA Ltd and West Australian Trustees Limited (hereinafter called the "Trustee Companies") in a joint submission, the Stock Exchange of Perth Limited (hereinafter called the "Stock

invited views on the other provisions of the *Trustees Act* dealing with powers of investment. The paper contained a description of the relevant legislation in Australia, New Zealand and the United Kingdom both in narrative and chart form. The account in this report of the legislation in other jurisdictions includes subsequent changes.

1.4 The working paper attracted comment from a wide range of persons and organisations with expertise or interest in some or all of the issues. A list of the commentators is set out in Appendix II.⁵ They included the Trustee Companies, the Commercial Law Committee of the Law Society of Western Australia Inc,⁶ the Stock Exchange, the Public Trustee, the Australian Finance Conference, the Council of Authorised Money Market Dealers, the Western Australian Permanent Building Societies Association (Inc), the Institute of Finance Brokers of Western Australia Limited and REIWA. The Commission also held a number of meetings with various commentators to discuss their submissions. The Commission is grateful to all those who commented or otherwise assisted the Commission. All the views expressed have been taken into account in preparing this report.

3. THE DEFINITION AND PURPOSE OF A TRUST

1.5 In order to place the Commission's recommendations in context, the Commission outlines below the general nature of a trust, the duties of a trustee and the power of the Supreme Court to extend a trustee's powers of investment.

1.6 A trust may be broadly defined⁷ 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

Exchange"), the Real Estate Institute of Western Australia Incorporated (hereinafter called "REIWA") and the (then) Commissioner for Corporate Affairs. The Trustee Companies and the Stock Exchange supported each other in their respective preliminary submissions.

The Commission also discussed a number of issues with the Trustee Companies Association of Australia and New Zealand (hereinafter called the "Trustee Companies Association"). The Association represents all except two of the private statutory trustee companies of Australia and New Zealand.

⁵ Two commentators requested anonymity and accordingly their names have not been included in the list.

⁶ Hereinafter called the "Law Society".

⁷ It is difficult to provide a comprehensive and unobjectionable definition of a trust: see the discussion in R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia*, (4th ed 1977) 4-6 (hereinafter cited as "Jacobs"); P H Pettit, *Equity and the Law of Trusts*, (4th ed 1979) 17-18 (hereinafter cited as "Pettit") and H A J Ford and W A Lee, *Principles of the Law of Trusts* (1983) 3-4 (hereinafter cited as "Ford and Lee").

another person, called the "beneficiary",⁸ 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.⁹ In fact, a wide range of persons, including specialised companies, are trustees. As a result, the skill and capacity of trustees varies considerably, from those who are expert in the field to those who have no experience in such matters at all.

1.7 Another important feature of trusts is the varying circumstances in which they are created. Some 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*. In other cases the trust may not be created with such care or knowledge, or may be created by law¹⁰ without a written instrument. In these circumstances a trustee may find that his only powers of investment are those contained in the *Trustees Act*. These may or may not be adequate depending on such factors as the duration and purpose of the trust.¹¹

4. THE DUTY OF TRUSTEES AS REGARDS INVESTMENT

1.8 The traditional view has been that a trustee is under a duty to invest trust funds in his hands so that income will be earned for the beneficiaries.¹² If he fails to do so, he will be charged interest.¹³

1.9 In considering whether to invest in a particular venture, a trustee must first determine whether he is authorised to do so.

⁸ There may be more than one beneficiary and the trustee in such a case may himself be a beneficiary: Jacobs, 5.

⁹ Jacobs, 258.

¹⁰ Trusts created by law arise where there is no express declaration of intention on the part of the settlor and may be either resulting or constructive trusts. Resulting trusts (sometimes known as implied trusts) arise where equity presumes it was the intention of the settlor to create a trust while constructive trusts arise where it would be inequitable to allow the person who has control of the property to hold it other than for the benefit of another, although no intention to create a trust can be discerned: Jacobs, 45.

¹¹ See also paras 2.35 and 2.36 below as to certain further situations in which, by statute, certain moneys are required to be invested in accordance with the provisions of the *Trustees Act*.

¹² Jacobs, 349 and Pettit, 275. Although this view was appropriate in the context of nineteenth century family trusts for successive beneficiaries, it may not now be appropriate in all cases because of the changing role of trusts: Ford and Lee, 443-444. See also paras 6.8 to 6.13 below.

¹³ *Gilroy v Stephens* (1882) 46 LT 761; *Stafford v Fiddon* (1857) 23 Beav 386, 53 ER 151; *Re Jones* (1883) 49 LT 91; *Adamson v Reid* (1880) 6 VLR (E) 164; *Hutchings v Snowden* (1897) 23 VLR 118. He may also be liable to make good the capital fund if it is lost: *Moyle v Moyle* (1831) 2 Russ & Myl 710, 39 ER 565.

1.10 A trustee may invest trust funds in the manner and upon the securities authorised -

- (1) by the trust instrument (if any),¹⁴
- (2) by the *Trustees Act*,
- (3) by any other statute giving trustees authority to invest trust funds, or
- (4) by the Supreme Court under section 89 of the *Trustees Act*.¹⁵

The powers of investment 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 only so far as, a contrary intention is not expressed in that instrument, and have effect subject to its terms.¹⁶ If the trust has been created by an instrument, the instrument may authorise, or specifically direct, investment in specified classes of security not otherwise permissible for trustees. Alternatively, it may forbid investment in securities otherwise allowed by law. 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.

1.11 A beneficiary may challenge an investment made by the trustee. This will normally only happen where the return on the investment is inadequate or where a loss has occurred. If the investment is found to be unauthorised the trustee will be liable no matter how prudent the investment was at the time it was made.¹⁷ A trustee who makes a number of unauthorised investments some of which have made a profit while others have made a loss is in a difficult position. Any profit¹⁸ 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.¹⁹

¹⁴ 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: Pettit, 275. The onus is still on the trustee to show that he has acted within the terms of the clause: *ibid*.

¹⁵ The Supreme Court also has an inherent equitable jurisdiction to extend a trustee's power of investment: para 1.19 below.

¹⁶ *Trustees Act*, s 5(2) and (3).

¹⁷ The Supreme Court does, however, have power to excuse a trustee who has acted honestly and reasonably and who ought fairly to be excused, either wholly or partly, from personal liability for breach of trust: *Trustees Act*, s 75. The trustee will also be held not liable where he acts at the request of all the beneficiaries if they are adults: Jacobs, 499-502 and see also *Trustees Act*, s 76.

¹⁸ A beneficiary may be able to elect to take interest rather than the profit.

¹⁹ 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, 538.

1.12 A trustee 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.²⁰ In *Re Whitely, Whitely v Learoyd*²¹ Lindley J described the duty imposed upon trustees in the following terms:

"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."

1.13 A trustee must also act impartially. He must not exercise the powers of investment for the benefit of one beneficiary at the expense of the others. Thus he must act impartially²² between the income beneficiaries²³ and those interested in the remainder. This duty can create substantial difficulties for a trustee, particularly in times of high inflation, when some investments may earn a high income but have little or no potential for capital growth while other investments have a high capital growth but produce little or no income.²⁴ In periods of inflation the conflict of interest between income and capital beneficiaries is difficult to resolve satisfactorily if authorised investments are restricted to fixed interest securities. Although such investments may provide an appropriate return for the income beneficiary, they may be deficient as long term capital investments and so do little to protect the residuary beneficiaries. Some may prove inadequate for both purposes. For example, in October 1982 the Commonwealth Government redeemed certain Treasury Bonds and Inscribed Stock which had been issued in 1960 at an interest rate of five percent per annum. A trustee who had invested in, and retained, these securities would have made a substantial capital loss in real terms and moreover the income earned would have been inadequate for much of the time.²⁵

²⁰ D J Hayton, *Underhill's Law of Trusts and Trustees* (13th ed 1979) 502 (hereinafter cited as "Underhill").
²¹ (1886) 33 Ch D 347, 355.

²² *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").

²³ Income beneficiaries are those who are presently entitled to receive the income of the trust.

²⁴ Phillips, 94.

²⁵ Some forms of mortgage investment have developed which link repayments of capital and 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, *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 and *Klonis v Charmelyn Enterprises Pty Ltd* (unreported) Supreme Court of New South Wales, noted in [1980] *Australian Current Law Cases* No 598 and in (1981) 55 ALJ 820. In this way possible increases

1.14 There are also other matters a trustee must consider in making an investment, including a need to diversify²⁶ and a duty to take advice as to certain investments.²⁷ The latter will be referred to at appropriate points throughout this report.

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

(a) Statutory power

1.15 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. This section provides inter alia that where in the opinion of the 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."

The order can be revoked or varied and may be made notwithstanding anything to the contrary contained or expressed in the trust instrument.²⁸ An application to invoke the section may be made by any trustee or beneficiary.²⁹

1.16 In granting such an application the Court may either confine itself to a particular investment or confer a general power on the trustee to invest amongst a class of investments.³⁰ It may also stipulate conditions for the exercise of the extended power, for example, that not more than a certain percentage of funds may be invested in a particular way.³¹

in capital repayments in money terms can be joined to a traditional interest-bearing trustee investment. These forms of investment do not appear to be common in Western Australia.

It is of interest in this context that the Commonwealth Treasurer has announced that some Commonwealth Government securities will be issued with an interest rate which will vary with inflation: *The West Australian*, 21 December 1983.

²⁶ Underhill, 474.

²⁷ *Trustees Act*, s 16(5).

²⁸ *Trustees Act*, s 89(2) and (3).

²⁹ *Id.*, s 89(4).

³⁰ *National Trustees Executors and Agency Company of Australasia Limited v Attorney-General for the State of Victoria* [1973] VR 610, 614-615.

³¹ *Ibid.*

1.17 Any such application would be decided on the merits.³² The result may depend on the nature of the trustee as well as the circumstances of the trust. In *National Trustees Executors and Agency Company of Australasia Limited v Attorney-General for the State of Victoria*,³³ McInerney J said:

"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."³⁴

In this case the Court authorised the trustee to invest up to one-half of the trust assets in land.

1.18 In the same case³⁵ McInerney J also 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.

(b) Inherent power

1.19 The Supreme Court also has inherent equitable jurisdiction to sanction deviations from the terms of a trust so as to permit a trustee to enter into a transaction, or to make an 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.³⁶

³² In England and Wales a practice note has been issued by the Chancery Division 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. There is no equivalent practice note in Western Australia.

³³ [1973] VR 610, 613.

³⁴ The judge noted that he 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.

³⁵ *National Trustees Executors and Agency Company of Australasia Limited v Attorney-General for the State of Victoria* [1973] VR 610, 611.

³⁶ Jacobs, 306-307.

CHAPTER 2 - APPROACH OF THE COMMISSION

1. INTRODUCTION

2.1 In England and Western Australia, as in the other Australian jurisdictions, the use of statutory provisions to list authorised trust investments dates from the mid nineteenth century.

2.2 Prior to that time the rules to be followed by trustees as regards investment had been laid down by the courts themselves. The need for the courts to do so was emphasised by the rash speculation of trustees in the South Sea Company and similar hazardous ventures. The Court of Chancery repeatedly decided that whilst commercial speculation was not a risk that could properly be incurred by a trustee unless the trust deed expressly authorised it, the trustee would be free from liability if he invested funds under his control in Government stock or on mortgage. The general principle which emerged was stated as being:¹

"that when an executor or trustee, instead of executing the trust, as he ought, by laying out the property either in well-secured real estates² or upon Government securities, takes upon him to dispose of it in another manner the [beneficiaries] may call him to an account."

2.3 The rapid growth of industry and commerce in the nineteenth century brought a demand for a wider field of trustee investment. In 1859 section 32 of the English *Law of Property Amendment Act (Lord St Leonard's Act)* permitted a trustee, unless forbidden by his trust instrument, to invest in the stocks of the Banks of England or Ireland or East India stock, which were at the time private stocks although of a quasi-government nature. Further English Acts slightly extended these powers. Nevertheless, the field of permissible investment still excluded wide and important classes of investments - for example, municipal and colonial loans.³

2.4 In Western Australia a number of these Imperial statutes were adopted in 1867.⁴ In 1889 the *Trustee Investment Act* empowered trustees to invest in "parliamentary stocks or public funds, or Government securities, in Great Britain, or any of the Australasian Colonies, or in first mortgages of freehold estates, or in securities charged on the funds of

¹ *Pocock v Reddington* (1801) 5 Ves 794, 800.

² That is, lending on mortgage.

³ The foregoing account is taken from G W Keeton, *The Law of Trusts*, (9th ed 1968) 248.

⁴ 31 Vic No 8.

Municipalities, or in fixed deposit in incorporated or chartered joint stock banks, in Western Australia". These provisions were replaced by the *Trustees Act 1900* which as amended from time to time was eventually replaced by the *Trustees Act 1962*.

2.5 In the United States of America the position developed 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*⁵ when he said: ⁶

"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."

2.6 There are therefore a number of possible approaches which could be adopted in relation to trustees' powers of investment. At one extreme is the American prudent man rule which permits trustees to invest in any investment objectively considered prudent,⁷ while at the other there is the strict and narrow list approach which applied in England and in Western Australia under the early statutes. Between these extremes there are a variety of positions which could be taken.⁸ In the remainder of this chapter the Commission discusses the list approach and the American prudent man rule. It then outlines the issues which it has considered in arriving at its conclusions on trustee investments.

2. A STATUTORY LIST OR THE AMERICAN PRUDENT MAN RULE

(a) Statutory list

2.7 The statutory list approach was developed in England in circumstances in which the returns on government securities yielded an adequate income for the income beneficiary while at the same time preserving the capital in real terms for the remainderman. Interest rates were

⁵ 26 Mass (9 Pick) 446.

⁶ Id, 461.

⁷ Subject to the trust instrument.

⁸ Paras 2.7 to 2.15 below.

low, currency values stable and inflation as it is now known non-existent.⁹ Moreover, before the development of limited liability public companies avenues for investment were restricted. These factors tended to support the concept of a list which was heavily reliant on government securities. In this century economic and other circumstances have been much more volatile. By 1962 there had been two world wars and a major economic depression.

2.8 Following a general review of the law of trusts,¹⁰ the Western Australian *Trustees Act* was re-enacted in 1962 and for the first time included in the list the shares of companies meeting certain criteria. The reasons for doing so included the potential of company shares for capital growth. Since then rapid inflation has made it even more important that investments which can retain their real value are available to trustees. There is no real safety in the capital of a trust retaining a certain nominal value if in the meantime its real value has substantially been reduced.

2.9 General economic factors will in part determine whether a particular investment is a good one or not. For example, certain shares may be a good investment if bought at the bottom of a stock market cycle but a bad investment if bought at the top. A simple list cannot be expected to take account of such subtleties. This highlights the need for inexperienced trustees to obtain expert advice and to appreciate the difference between long and short term investments. The provisions of the *Trustees Act* requiring trustees to take advice¹¹ and the equitable rule requiring them to exercise prudence¹² recognise the existence of these subtleties and endeavour in an uncomplicated way to overcome them.

2.10 Flexible investment in the face of changing economic circumstances is increasingly important. If the list approach is to be retained the list should be periodically reviewed, particularly as new forms of investment are being developed from time to time.¹³

⁹ At the outbreak of World War I price levels in England were apparently about the same as they had been in 1660: P Deane and W A Cole, *British Economic Growth 1688-1959* (2nd ed 1969) ch 1 and pull-out chart at end of book, also cited in Ford and Lee, 444.

¹⁰ This was conducted by the Law Reform Sub-Committee of the Law Society of Western Australia. The results were submitted to the Government in 1961 in a report, *The Law of Trusts*.

¹¹ *Trustees Act*, s 16(5)-(8). See paras 2.20 to 2.25 below for a discussion of the present provisions regarding advice.

¹² In paras 2.18 and 2.19 below the Commission recommends the enactment of a statutory reference to this duty.

¹³ As foreshadowed in para 1.2 above the Commission recommends the establishment of a trust investments review committee in paras 2.28 and 2.29 below.

(b) The American prudent man rule

2.11 This rule is described in paragraph 2.5 above. The rule gives a greater discretion to trustees to invest than a statutory list although the degree of difference depends on the range of investments included in the list. The rule also contains a potential for flexibility and development if new forms of investment arise or economic conditions change.

2.12 In 1970, the Uniform Law Conference of Canada recommended that the prudent man rule be adopted throughout Canada. To date New Brunswick, the Northwest Territories and the Yukon Territory have done so. The Manitoba Law Reform Commission in a recent report¹⁴ has recommended that that Province follow suit, principally because of the rule's flexibility.¹⁵

2.13 Only one commentator¹⁶ on the working paper supported the adoption of the prudent man rule in Western Australia. The remainder were of the view that the list approach should be retained on the ground that it is desirable to give inexperienced trustees guidance on investment.¹⁷ However, they were generally of the opinion that the range of investments should be extended.

2.14 The Commission agrees that it would not be desirable to abandon the concept of a statutory list in favour of a prudent man rule in Western Australia at this stage, for the reason advanced by the commentators.¹⁸ No other jurisdiction in Australia or New Zealand has done so. Although eighty percent of United States jurisdictions now follow the prudent man rule only one Canadian province and two Canadian territories so far do so. Further, although in

¹⁴ Manitoba Law Reform Commission, *Report on Investment Provisions under "The Trustee Act"* (1982).

¹⁵ The Manitoba Commission suggested the following formulation of the rule (at 15 and 37):

"Unless otherwise authorised or directed by an express provision of the law or of the will or other instrument creating the trust or defining the duties and powers of the trustee,

- (a) subject to paragraph (b), a trustee is authorised to invest in every kind of property, real, personal or mixed; and
- (b) in investing money for the benefit of another person, a trustee shall exercise the judgment and care that a man of prudence, discretion and intelligence would exercise if he were administering the property of others."

The Commission said it was informed by professional trustees that whenever they were consulted prior to the preparation of a will or trust they would suggest the prudent man rule being inserted as setting out the power of investment of the trustee: *id.*, 7.

¹⁶ The commentator requested anonymity.

¹⁷ Nevertheless, a trustee must still exercise prudence in selecting from the list: para 1.12 above.

¹⁸ The English Law Reform Committee has recently reached the same conclusion: Law Reform Committee, *The Powers and Duties of Trustees*, Report No 23 (Cmnd, 1982) (hereinafter cited as the "English Report"), 16-17.

theory the prudent man rule would give substantially greater freedom for a trustee to invest, limitations could arise in practice as a result of judicial decisions. According to some American commentators¹⁹ the courts in the United States have ruled that certain investments are "prima facie" imprudent and have thus reached a result not dissimilar to that reached by a list approach: the restriction of investment opportunities to certain classes of securities.

(c) Possible modifications of the list approach

2.15 Before deciding to recommend retention of the concept of a statutory list as it presently operates, the Commission considered, but rejected, three possible ways of modifying it, as follows.

- (i) A list of investments could be set out in the Act which not only provided authorisation but deemed such investments to be prudent so that no beneficiary could challenge any investment from the list on the ground that it was not prudently made. The difficulty with this suggestion is that the investments selected for listing would have to strike a proper balance between income and residuary beneficiaries in all circumstances. Before the rate of inflation reached its present general level such a list could possibly have been confined to government securities. However, in inflationary times the real value of a sum so invested steadily diminishes to the detriment of residuary beneficiaries. Hence it would be necessary to include in the list a range of investments adequate to cover different economic circumstances with a concomitant requirement that a trustee exercise prudence in choosing from the list.
- (ii) A narrow list of investments could be enacted, together with a provision permitting trustees to invest in any other investment if it was prudent to do so. A trustee who was inexperienced could confine himself to the list. If he was skilled he could invest in investments outside the list, subject only to the requirement of prudence. The difficulty is that the suggestion blurs the concept of "authority" with that of "prudence". If an investment is not authorised, and it fails, the trustee is liable to the beneficiaries no matter how prudent the investment was at the time it was made. The object of the list is to protect

¹⁹ See, for example, D Grosh, *Trustee Investment: English Law and the American Prudent Man Rule* (1974) 23 ICLQ 748.

beneficiaries from inexperienced trustees who might otherwise be tempted to try their hand at speculative investments. Under the suggestion, however, this would not be so. Any investment would be "authorised". In fact, the suggestion would in practical terms be little different from adopting a pure prudent man rule.

- (iii) Greater investment powers could be given to skilled trustees than to unskilled ones, either by providing a much wider list for the former alone or by permitting them to operate completely under the American prudent man rule. While such a distinction may at first sight seem attractive, the Commission has concluded that it would be undesirable to adopt it. Not only would there be difficulties of classification but restricting the powers of an unskilled trustee beyond those placed on a professional trustee may penalise the beneficiaries of the trust concerned rather than protect them.²⁰

2.16 Accordingly, while recognising the limitations of the present authorised list approach applicable to trustees generally, the Commission recommends its retention as preferable to possible alternatives. The Commission has, however, attempted to avoid some of the difficulties associated with it by proposing that -

- (i) Certain changes be made to the list with the object of ensuring that trustees who are required to rely on it have sufficiently wide powers of investment in the light of current circumstances.
- (ii) A statutory reference to a trustee's general equitable duties, including those of prudence and impartiality, be included in Part III of the *Trustees Act*.
- (iii) The present obligation on trustees to obtain expert advice in certain cases be extended to apply to certain proposed new forms of investment. Care should be taken in drafting the changes to ensure that the matters to which the adviser should have regard are consistent with the statutory reference to a trustee's general duties (see (ii) above).

²⁰ Similar conclusions have been reached in other jurisdictions: see for example the *English Report*, 6-7.

- (iv) A provision be added at the end of the list giving the Supreme Court a power to authorise extended powers of investment in particular cases. This is intended to encourage trustees to apply for wider powers if the circumstances of the trust warrant it.
- (v) A trust investments review committee be established to review the list periodically to ensure that it is up to date and in accordance with current sound investment practices.

2.17 The Commission's recommendations under (i) are contained in chapters 5 to 9 below. Its recommendations under (ii), (iii), (iv) and (v) are contained in the following paragraphs.

3. PROPOSALS OF A GENERAL NATURE DESIGNED TO MAKE THE LIST APPROACH MORE SATISFACTORY

(a) Statutory reference to the duties of a trustee²¹

2.18 The Commission has already emphasised²² that the enactment of an authorised list does not absolve a trustee from his general duties as regards investment. These include the duty of prudence, the duty to diversify, to choose investments suitable to the circumstances of the trust and to review the investments so made.²³ The *Trustees Act* at present refers to a trustee's equitable duties only in relation to certain classes of investment (company securities and unit trusts) and only as ancillary to the requirement for obtaining proper advice in relation to such investments. An inexperienced trustee could well draw the incorrect inference that these general duties applied only in those cases.

2.19 To avoid this misconception, the Commission recommends that an appropriate provision be added at the beginning of Part III of the *Trustees Act* drawing the attention of trustees to the need, in making **any** investment, to have regard to the general equitable duties imposed on them as trustee, including the duties of prudence and impartiality.²⁴ The

²¹ Para 2.16(ii) above.

²² Para 1.12 above.

²³ Income earning rates, potential for capital growth, relative tax advantages and other factors vary over time and make a regular review important.

²⁴ This general approach has also been adopted in Victoria (*Trustee Act 1958-1983*, s 12A), England (*Trustee Investments Act 1961-1982*, s 6(1)) and Manitoba (The *Trustee Act CCSM T160*, s 70(2)).

provision should also draw attention to the need for trustees to review the investments they have made in the light of their general duties.

(b) Advice²⁵

(i) Advice as to valuation of land

2.20 At present, the *Trustees Act* makes provision for two types of advice. The first relates to the value of the land concerned where the trustee proposes -

(a) to lend money on the security of a mortgage on land,²⁶ or

(b) to purchase a dwelling house for a beneficiary.²⁷

In both cases the advice must be of a valuer.²⁸ As explained below,²⁹ it is not a precondition of making the investment that the trustee either obtain or act on such advice, but if he does not he loses the protection afforded by the sections. The Commission considers that the provisions as to this type of advice are satisfactory.³⁰ A trustee should not be liable for breach of trust as regards the amount of the loan advanced or, as the case may be, the price paid for the dwelling house, if he acted on a valuer's valuation. The Commission recommends below³¹ that a broadly similar provision should be included in relation to the proposed general power to invest in land.³²

(ii) Advice as to the suitability of proposed investments for the trust

²⁵ Para 2.16(iii) above.

²⁶ *Trustees Act*, s 22.

²⁷ *Id*, s 17.

²⁸ In the case of the purchase of a dwelling house for a beneficiary, the advice must be of a "qualified valuer". In the case of a mortgage, the advice must be of a "person whom [the trustee] reasonably believed to be competent to value the property".

²⁹ Paras 3.5 and 3.14.

³⁰ Subject to the minor clarification recommended in footnote 19 to para 3.14 below.

³¹ Paras 6.14 to 6.16.

³² The Commission also recommends below that it should be a condition for the exercise of the power to invest in land that the trustee obtain and consider proper advice relating to the suitability of the proposed purchase having regard to the circumstances of the trust: para 6.20.

2.21 The second type of advice relates to investment in company securities and unit trusts.³³ Unlike the advice referred to in the previous paragraph, obtaining and considering this advice is a precondition of the exercise of a trustee's power to invest in these securities. In other words, such investments are unauthorised unless the advice has been obtained and considered. However, it is not a necessary condition that the advice be followed.³⁴ The *Trustees Act* defines "proper advice" as "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".³⁵

2.22 The advice, which is required to be in writing, is on the question whether the proposed investment is satisfactory, having regard to -

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

A trustee who makes any such investment is required to determine at what intervals the circumstances, and in particular the nature of the investment, make it desirable to obtain advice as to its retention, and to obtain and consider that advice.³⁶

2.23 There are difficulties with provisions requiring "proper advice" to be obtained. A person qualified to advise in general terms on whether the investments of a trust are sufficiently balanced over the whole portfolio, having regard to the circumstances of the trust, may not necessarily be qualified to give advice on the suitability of any particular investment in terms of its likely level of income, potential for capital growth and so on. Further, a person

³³ *Trustees Act*, s 16(5)-(8).

³⁴ However, the fact that the advice was not followed would in general be a significant factor in determining whether a trustee had failed in his duty of prudence.

³⁵ *Trustees Act*, s 16(7).

³⁶ It is to be noted that although the advice is only required in relation to investment in company securities and unit trusts in reality the questions of diversification and suitability to the trust arise in respect of all authorised investments. Even Government securities may be unsuitable in some circumstances.

qualified to advise on one class of investment may not be qualified to advise on another.³⁷ There is also the general problem that there is no readily identifiable category of persons to whom a trustee can turn to give skilled advice adequate for all cases, either on the question of an appropriate investment portfolio for the trust or on any particular investment.³⁸

2.24 Nevertheless, in spite of its limitations, the provision as to proper advice has value in that, if approached with commonsense,³⁹ obtaining such advice would do much to ensure that a trustee makes appropriate investment decisions. The Commission accordingly considers that it should remain a requirement that "proper advice" be obtained as a precondition of the exercise of a trustee's power to invest in company securities or unit trusts. The Commission also recommends below that obtaining such advice should be a precondition of the exercise of a trustee's power to invest in certain proposed new forms of investment (namely the purchase of land⁴⁰ and the purchase of rights to shares or convertible notes⁴¹) and the power to spend above a certain amount on the improvement or development of property.⁴²

2.25 However, to avoid confusion it is important that the legislation setting out the matters to which the adviser must have regard should be consistent with the statutory reference proposed above to the duties imposed under the general law on trustees in making any investment. This is a matter for the Parliamentary draftsman.

³⁷ For example, a sharebroker may be the appropriate person to advise on a company security whereas a licensed valuer may be the appropriate person to advise on the purchase of units in a property trust scheme.

³⁸ It should be mentioned that a person licensed as an "investment adviser" under the *Securities Industry (Western Australia) Code* is not required to have any specific qualification as to knowledge or experience as a condition of obtaining a licence. He may accordingly not necessarily be an appropriate person from whom to obtain expert advice either on the general balance of a trust's portfolio or on a particular investment.

The National Companies and Securities Commission announced on 24 August 1983 that it was reviewing the securities industry legislation relating to the licensing of persons who carry on business in that industry.

³⁹ The Commission considers that it is unavoidable that the successful management of a trust depends to a significant extent on the commonsense of the trustee to distinguish between good and bad advice where the legislation requires him to obtain it and to seek advice even where he is not required by statute to do so.

⁴⁰ Para 6.20.

⁴¹ Para 8.31.

⁴² Para 6.36.

(c) Power of Court to extend a trustee's powers of investment⁴³

2.26 A statutory list of authorised investments cannot be expected to accommodate all the possible needs of all trusts or the skills of all trustees, even if kept up to date. In some cases the settlor or testator will therefore include a provision in the trust instrument giving the trustee very wide powers of investment so that he has no need to rely on the list. In other cases, however, there may be no trust instrument or, if there is, it may not give wider powers than are contained in the statutory list.

2.27 In chapter 1,⁴⁴ the Commission drew attention to section 89 of the *Trustees Act* which, inter alia, empowers the Supreme Court to extend a trustee's powers of investment where it is expedient in the management of the trust property or is in the interests of the beneficiaries of the trust to do so. The courts in England, which have a broadly similar power, have generally taken the view that special circumstances must be shown to justify an extension of a trustee's power of investment beyond those conferred by a recent statute.⁴⁵ To avoid a similar result in Western Australia, and to encourage trustees to seek wider powers of investment where appropriate, the Commission recommends that a paragraph be added at the end of the list of authorised investments to the effect that a trustee may also invest in any other investment, or class or classes of investment, authorised by the Supreme Court in the case of that trust. It should be provided that application to the Court may be made by the trustee or any beneficiary, and that the Court in making its determination shall have regard to the experience and skill of the trustee, the circumstances of the trust and any other matter it considers relevant and may in granting the application impose such conditions as it thinks fit. The enactment of such a provision would probably not extend the Court's power beyond that contained in section 89 of the *Trustees Act*. However, the proposal would highlight the Court's power in this regard and help ensure that it was readily availed of where appropriate. Section 89 should remain unaltered. That section is designed to enable a trustee to enlist the Court's aid in authorising any one or more of a wide range of transactions of which investment is only

⁴³ Para 2.16(iv) above.

⁴⁴ Paras 1.15 to 1.18.

⁴⁵ The grounds for this view are that the statutory powers of investment must be taken to indicate the extent to which, in ordinary cases, Parliament intended that trustees should be free to invest: *English Report*, para 3.25. See also *Pettit*, 289-90.

In a recent decision, *Trustees of the British Museum v The Attorney General* [1983] *The Times*, 25 October, the English High Court held that the passage of time since the enactment of the *Trustee Investments Act 1961-1982* (Eng), and the change in economic circumstances since then, had made it unnecessary for a trustee to prove special circumstances to justify an extension of his investment power. However, the Judge (Megarry VC) suggested that the approach of the Court might change if Parliament replaced the 1961 Act with wider powers of investment.

one. It may accordingly be convenient for a trustee to apply to the Court under this section to extend his powers of investment at the same time as he seeks authority for some other transaction.

(d) Periodic review of authorised trustee investments⁴⁶

2.28 It was the commentators' general view that the list of authorised trustee investments in the *Trustees Act* should be revised more regularly than in the past. An out-of-date list could expose trust funds to unnecessary risk if items remain in it when no longer suitable as trustee investments, or deny trusts access to new forms of investment. The Stock Exchange suggested that the most appropriate method of avoiding such a situation was for the Government to establish an expert committee whose function would be to review the list annually. The Stock Exchange proposed that the committee comprise representatives of the Crown Law Department, the Public Trustee, the two trustee companies, the building societies, the Stock Exchange and the banks. Other commentators supported the proposal for a review committee, but without expressing a view as to its constitution.

2.29 The Commission adopts the suggestion of the Stock Exchange, but with modifications. The Commission recommends that -

- (a) the committee should be appointed by and report to the Attorney General;
- (b) it should comprise about five persons who together would constitute a body expert in both investments and the law of trusts;
- (c) the members should be appointed on the basis of their knowledge and experience and not as industry representatives or on industry nomination;
- (d) the committee should be convened, and chaired, by a person with extensive knowledge and experience in the law of trusts;
- (e) it should operate on an informal basis (consequently it would not require staff or involve establishment costs).

⁴⁶ Para 2.16(v) above.

In the Commission's view it would be desirable for the committee to convene at three-yearly intervals or more often if necessary.

2.30 In chapter 11 below the Commission draws attention to certain items in the present list which should be reviewed, but which are not the subject of any recommendation in this report. The Commission suggests that these are matters which also should be considered by the proposed review committee.

2.31 There is at present no power to amend the list in the *Trustees Act* other than by statute.⁴⁷ The working paper invited comment on the question whether there should be some more expeditious means of doing so. The response of the commentators varied. A number⁴⁸ were in favour of empowering the Governor in Council to amend the list. Some⁴⁹ suggested that the power to do so should be given to a Minister of the Crown. Others,⁵⁰ however, were strongly of the opinion that any amendment should be by statute so as to ensure full public participation in, and scrutiny of, the proposed change. The Commission agrees with these last mentioned commentators, for that reason. It accordingly recommends that amendments to the list should continue to be made by Act of Parliament.

4. OTHER MATTERS THE COMMISSION HAS CONSIDERED IN DETERMINING ITS APPROACH

(a) Economic considerations

2.32 In the working paper,⁵¹ the Commission asked for comment on the economic implications of the various proposals discussed. The general view of those who commented on the issue, including the Under Treasurer,⁵² was that although it was difficult to forecast the precise economic consequences of particular proposals, they would probably be marginal. Whether or not that be so, the Commission considers that beneficiaries should not be disadvantaged because of economic considerations which would not affect them if they held

⁴⁷ In England amendments to the list can be made by Order in Council: *Trustee Investments Act 1961-1982* (Eng), s 12.

⁴⁸ Including the Public Trustee.

⁴⁹ Including the Trustee Companies and the Western Australian Permanent Building Societies Association (Inc).

⁵⁰ Including the Law Society and the Council of Authorised Money Market Dealers.

⁵¹ Working paper, paras 1.31 and 1.32.

⁵² The permanent head of the State Treasury Department.

the trust property directly, rather than through trustees,⁵³ and that the decision whether or not to include or retain an investment in the list should have as its justification the best interests of beneficiaries. Trust funds should not be regarded as a captive source of funds to be directed to particular ends for some broader economic purpose.

(b) Uniformity

2.33 The view that trust funds are not to be regarded as captive is broadly similar to that of the Committee of Inquiry into the Australian Financial System,⁵⁴ although that Committee was also concerned with the question of uniform legislation. The Report pointed out⁵⁵ that trustee status was often "granted as a way of promoting the sale of securities of particular local or semi-government authorities rather than as a measure of the security of the asset", so that "securities which may otherwise have similar risk and return characteristics become very different to investors in different States". This was said to work "against the integration of borrowers and lenders in different regions" and possibly to "produce significant variations in the cost of capital faced by borrowers and distortions in the process of resource allocation".⁵⁶ The *Campbell Report* concluded⁵⁷ that the Commonwealth and States should seek to ensure that arrangements for granting trustee status are on a consistent and uniform basis.⁵⁸

2.34 The Commission recognises the force of the *Campbell Report's* argument. However, the Commission was not asked to report on the question of uniformity. In the circumstances it does not consider that implementation of this report should be delayed to await moves towards uniformity of trustee investment legislation throughout Australia.⁵⁹ Some of the recommendations made in this report, for example those concerning company securities, would be relevant elsewhere in Australia and could be readily taken into account by other

⁵³ Only two submissions (one from Westralian Farmers Co-operative Limited and one from a commentator who requested anonymity) suggested that the list of authorised trustee investments should be chosen with regard to what was perceived to serve the economic interests of Western Australia.

⁵⁴ The report of the Committee is popularly known as, and hereinafter cited as, "the *Campbell Report*".

⁵⁵ *Id.*, para 10.62.

⁵⁶ The *Campbell Report* also recommended that Australian Trustees Acts should be brought up to date by the inclusion of modern investments in the list: *Campbell Report*, para 21.193. The Report also suggested that arrangements should be made for periodically reviewing the status of trustee securities: *id.*, para 21.194.

⁵⁷ *Id.*, para 10.63.

⁵⁸ The Trustee Companies Association thought that the list of authorised trustee investments should be uniform throughout Australia and also New Zealand.

⁵⁹ Implementation of this report would incidentally bring the Western Australian Act into line with some other Australian jurisdictions in certain respects, although not in others: see the comparative table in Appendix IV.

jurisdictions if reforms were contemplated. However, there are substantial differences in the legislative framework between the States in respect of other matters such as, for example, building societies. Regard might be had to the arguments advanced in this report and in the *Campbell Report* if the question of uniformity is pursued.

(c) Impact on other legislation

2.35 There are several Acts under which various bodies are empowered, or required, to invest certain moneys held by them in authorised trustee investments. In these cases the provisions of the *Trustees Act* have become a shorthand way of conferring investment powers on the bodies concerned. These Acts include -

- (a) *Building Societies Act 1976-1982*, section 47 (investment of funds not immediately required for the objects of a building society);
- (b) *Local Government Act 1960-1983*, sections 527(3) (investment of surplus loan funds) and 626(5a) (investment of any money standing to the credit of any fund established by a council until required for use);
- (c) *Friendly Societies Act 1894-1983*, section 15(1)(h) (investment of the funds of the society);
- (d) *Superannuation and Family Benefits Act 1938-1982*, section 25(1)(a) (investment of the Superannuation Fund);
- (e) *Real Estate and Business Agents Act 1978-1982*, section 108(1)(b) (investment of moneys in the Fidelity Guarantee Fund);
- (f) *Coal Mine Workers (Pensions) Act 1943-1982*, section 20(5) (investment of the Coal Mine Workers' Pensions Fund);
- (g) *Lotteries (Control) Act 1954-1983*, section 9(2) (investment of the balance of the moneys held by the Lotteries Commission); and

- (h) *Legal Contribution Trust Act 1967-1982*, section 17 (investment of Solicitors' Guarantee Fund).

2.36 Any changes made to the list of authorised investments in the *Trustees Act* would thereby be transmitted to these and similar statutes.⁶⁰ In recommending changes to the list the Commission has had regard to the needs of trust funds generally, and has not considered the impact the proposed changes would have on bodies whose powers of investment are given by these statutes.⁶¹ If the Government considered that these changes should not apply to a particular body, it would of course be open for it to introduce an amendment to the statute in question to exclude them.

5. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

2.37 The Commission recommends that -

- (a) A list of authorised investments continue to be included in the *Trustees Act* in preference to adoption of the "prudent man rule".
(paragraphs 2.7 to 2.17)
- (b) A provision be added at the beginning of Part III of the *Trustees Act* drawing the attention of trustees to the need, in making **any** investment to have regard to the general equitable duties imposed on them as trustees. The provision should also draw attention to the need for trustees to review the investments they have made in the light of their general duties.
(paragraphs 2.18 and 2.19)
- (c) The matters to which the adviser should have regard in offering his advice in those cases where the trustee must obtain it should be made consistent with the statutory reference to a trustee's duties which the Commission has recommended be included in the *Trustees Act* (see recommendation (b) above).
(paragraph 2.25)

⁶⁰ In some statutes the body is given broader powers of investment than presently exist in the *Trustees Act*. For example, the State Superannuation Board has power to invest in land: *Superannuation and Family Benefits Act 1938-1982*, s 25(1)(c).

⁶¹ The Commission notes that if the amendments proposed in this report are implemented they will affect the investment powers of the Trustee Companies and the Public Trustee in respect of their common trust funds: see s 21A of the *Perpetual Trustees WA Ltd Act 1922-1982*; s 21A of the *West Australian Trustees Limited Act 1893-1982* and s 40(2) of the *Public Trustee Act 1941-1982*.

- (d) A paragraph should be added at the end of the list of investments specifically authorised by the *Trustees Act* empowering a trustee to invest in any other investment or class of investment authorised by the Supreme Court in the case of that trust. It should be provided that application to the Court may be made by the trustee or any beneficiary, and that the Court in making its determination shall have regard to the experience and skill of the trustee, the circumstances of the trust and any other matter it considers relevant, and may grant the application subject to such conditions as it thinks fit.

(paragraphs 2.26 and 2.27)

- (e) A trust investments review committee be established to review periodically the list of authorised investments in the *Trustees Act*, as follows -

- (i) the committee should be appointed by and report to the Attorney General;
- (ii) it should comprise about five persons who together would constitute a body expert both in investments and the law of trusts;
- (iii) the members should be appointed on the basis of their knowledge and experience and not as industry representatives or on industry nomination;
- (iv) the committee should be convened, and chaired, by a person with extensive knowledge and experience in the law of trusts;
- (v) it should operate on an informal basis (consequently it would not require staff or involve establishment costs);
- (vi) it should convene at three-yearly intervals or more often if necessary.

(paragraphs 2.28 and 2.29) ⁶²

- (f) Amendments to the list of authorised investments should continue to be made by Act of Parliament.

(paragraph 2.31)

⁶² See also paras 11.3, 11.4, 11.8, 11.11 and 11.12 below.

PART II: THE EXISTING LAW

CHAPTER 3 - THE LAW IN WESTERN AUSTRALIA

1. INTRODUCTION

3.1 As mentioned earlier,¹ this report deals with certain matters relating to trustees' powers of investment, and a number of ancillary matters. In this chapter the Commission briefly outlines the existing position in Western Australia in relation to these areas.

2. INVESTMENTS AUTHORISED BY PART III OF THE TRUSTEES ACT

3.2 Part III of the *Trustees Act* authorises trustees to invest in various investments including -

- * certain government and semi- government securities;
- * first legal mortgages;
- * certain deposits in banks;
- * certain deposits and shares in certified building societies;
- * with an approved dealer in the short term money market;
- * certain quoted stocks and shares of certain public companies and certain specified debentures, deposits and notes of such companies;
- * the units of a unit trust scheme in respect of which there is an approved deed under "any law of the State relating to Companies";
- * the common trust fund of a trustee corporation; and
- * the purchase of a dwelling house for the use of a beneficiary.

The present law in relation to those categories of investment above which are the subject of recommendations in later chapters of this report is outlined in paragraphs 3.3 to 3.14 below.

(a) First legal mortgages in Western Australia

3.3 Subject to 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

¹ Para 1.1 above.

not exceeding seven years² 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.³ 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.

3.4 Section 22, however, 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. If the land is liable to deteriorate, is subject to fluctuation in value, or depends for its value on circumstances the continuation of which is precarious, prudence may indicate that no loan should be made on it at all.⁴

3.5 On the other hand, the mere fact that a trustee advanced in excess of two-thirds of the value of the land does not necessarily 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 out⁵ in relation to the English provision which is in similar terms, "Although the procedure is therefore in this sense voluntary, the protection which its adoption gives, both to trustees and to beneficiaries, is so valuable that it should be regarded as compulsory in any normal case". Trustees may be reluctant to risk lending more than two-thirds of the value of a property without increased statutory protection to do so.

(b) Deposits in banks

3.6 Section 16(1)(d) provides that trustees may invest in "fixed deposits" in any incorporated or joint stock bank carrying on business in Western Australia. Investment may also be made "on deposits" in the Savings Bank Division of the Rural and Industries Bank of Western Australia.⁶ Finally, investment may be made "on deposit" in any savings bank

² *Trustees Act*, s 25(1)(a).

³ *Id.*, s 22.

⁴ Jacobs, 363.

⁵ Underhill, 510.

⁶ In addition, s 116 of the *Rural and Industries Bank Act 1944-1981* provides that a trustee, executor or administrator may invest or deposit any trust money on deposit or current account in the Rural and Industries Bank.

authorised to carry on savings bank business under the *Commonwealth Banking Act 1959* and any amendments thereto. These provisions are now outdated and require revision.

3.7 The receipt given by a bank for a fixed deposit may take the form of a "certificate of deposit" rather than a simple receipt. In recent years more sophisticated forms of certificates of deposit have developed. These include convertible certificates of deposit,⁷ negotiable certificates of deposit⁸ and transferable certificates of deposit.⁹ The acquisition of any of these certificates of deposit direct from a bank as a result of a deposit with that bank probably comes within the existing section 16(1)(d). There is some doubt, however, whether the purchase of these certificates 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.

(c) Deposits in building societies

3.8 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.¹⁰

(d) Preference or ordinary stock or shares

3.9 Trustees may purchase certain preference or ordinary stock or shares in companies which satisfy the requirements of sections 16(1)(k) and 16(4), that is in a company

⁷ Convertible certificates of deposit are issued when banks accept deposits for large sums on the basis that the depositor may later convert to negotiable certificates of deposit: G A Weaver and C R Craigie, *The Law Relating to Banker and Customer in Australia*, (1975) 64 (hereinafter cited as "Weaver and Craigie").

⁸ A negotiable certificate of deposit appears to be a negotiable instrument though not within the *Bills of Exchange Act 1909-1973* (Cth): Weaver and Craigie, 64.

⁹ 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.

¹⁰ The *Trustees Act*, s 16(1)(e), however, authorises trustees to invest in "the shares" of building societies. In the case of at least some building societies money invested in passbook savings accounts is in fact invested in the acquisition of "shares". Normally, this money is available at call although under the rules of the society a period of notice in writing may be required.

incorporated in Australia which has a paid up share capital of not less than two million dollars and which has paid a dividend on its ordinary stock or shares in each of the fifteen years immediately preceding the year of investment. The stock or shares must also 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.¹¹ These criteria for investment in company shares were established in 1962. Because of experience gained and inflation since then the Commission considers that they need reconsideration.

3.10 The trustee is required to obtain and consider "proper advice" before purchasing stocks or shares and if he retains them to obtain advice as to their retention.¹²

(e) Company debentures

3.11 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 paid up within nine months of the date of issue.¹⁴ The trustee is required to obtain and consider "proper advice" from time to time.¹⁵ Questions which arise include not only whether the debentures should be required to be quoted on a stock exchange but also whether they should be secured and be for not more than a certain term.

3.12 There are a number of companies whose debentures would otherwise qualify as authorised trustee investments by having a paid up capital of two million dollars and having paid a dividend in each of the previous fifteen years, but 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.

¹¹ *Trustees Act*, s 16(3).

¹² *Id.*, s 16(5)-(8).

¹³ Para 3.9 above.

¹⁴ *Trustees Act*, s 16(3).

¹⁵ *Id.*, s 16(5)-(8).

(f) Deposits or notes

3.13 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. There is, however, no requirement for the notes or deposits to be quoted on a stock exchange. The trustee is required to obtain and consider "proper advice" before purchasing and while retaining them.¹⁶ Questions which arise include whether seven years is an appropriate maximum term.

(g) Dwelling house for the use of a beneficiary

3.14 Pursuant to section 17(1) 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 conditions¹⁷ 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 house¹⁸ only. The trustee must follow certain procedures set out in section 17(2) if he wishes to obtain the protection offered by the subsection in relation to the purchase price. 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 "under the advice of the valuer".¹⁹ 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

¹⁶ Ibid.

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: *id*, s 17(1).

¹⁸ There is some doubt whether this term includes a strata title lot. The Commission recommends that the matter be clarified by providing that the term "dwelling house" includes a strata lot used for residential purposes. However, the Commission does not consider that the term should be extended to include a unit under the company or tenancy-in-common systems.

¹⁹ This phrase is ambiguous. The word "under" could mean either "with reference to" or "in accordance with". The Commission considers that to obtain the protection afforded by the section, the trustee should be required to make the purchase *in accordance with* the valuer's advice. Similarly, the protection afforded by s 22(1) of the *Trustees Act* (lending money on mortgage) should only apply if the loan was made in accordance with the valuer's advice. This appears to be the intention of the provision: *In Re Solomon; Nore v Meyer* [1912] 1 Ch 261, 283. Accordingly the Commission recommends that ss 17(2)(d) and 22(1)(c) be amended to make this explicit.

the land.²⁰ The main question which arises is whether the restriction to Western Australian land is necessary.

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

(a) Land

3.15 At present there is no general statutory power in Western Australian law which allows a trustee to purchase land as an investment.²¹

(b) Rights to shares and convertible notes

3.16 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. However, this power does not seem to authorise a trustee who does not have any holding in a company to purchase rights to shares or to convertible notes in that company on a stock exchange even though he could purchase the shares or notes themselves. It has been suggested that a trustee should in such circumstances be able to purchase the rights.

(c) Bank²² accepted or indorsed bills

3.17 Since the 1960's both an official²³ and unofficial²⁴ market has existed 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 to raise capital. Often the holder of a bill instead of

²⁰ *Trustees Act*, s 17(4).

²¹ A trustee may retain any land which forms part of an estate since at general law there is no duty on a trustee to convert land unless the trust instrument expressly instructs him to do so: Underhill, 431. 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: *Trustees Act*, s 27(4). Even where the trustee is under a duty to sell land the *Trustees Act* confers certain powers of postponement: ss 27(1)(c) and 27(5).

²² "Bank" in this context means any bank carrying on business as a bank in Australia.

²³ In 1964 the Reserve Bank of Australia conducted an inquiry into the scope for developing an Australian market in commercial bills. As a result of the inquiry, in 1965 the Reserve Bank permitted authorised dealers in the short term money market to trade in commercial bills which had been accepted or indorsed by specified banks.

²⁴ The unofficial money market consists of dealers who are not authorised by the Reserve Bank.

retaining it until maturity and thus waiting for payment sells it on the market at a discount and thereby receives cash in hand.

3.18 Where a bank is not involved the parties will simply rely on the reputation of the signatories to the bill to make the bill marketable and acceptable to buyers. Such bills are known as "non-bank bills".

3.19 In other cases, commercial bills are by prior arrangement accepted or indorsed²⁵ by a bank and are then known as "bank bills" and may be traded through either the official or unofficial money markets. The effect of acceptance or indorsement 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 indorsement. The rate at which commercial bills are discounted varies with the prevailing rate of interest, with bank bills generally attracting a lesser rate than non-bank bills.

3.20 The *Trustees Act* does not at present authorise a trustee to invest in bills of exchange.

4. MISCELLANEOUS MATTERS

(a) Grant of options to purchase trust property

3.21 The only statutory power given to trustees to grant an option to purchase trust property²⁶ is where the trustee has leased the property.²⁷

3.22 In equity there is a limited power to grant an option to purchase trust property but it arises only where a trustee has a power of sale. Even if he does have a power of sale, the general principle is that this does not authorise him to enter into a contract to sell at a future time²⁸ at a price fixed at the present time without regard to the value of the property at the

²⁵ Acceptance is where the drawee of a bill signifies his assent to the drawer's order. Acceptance must be written on the bill and signed by the drawee. Indorsement is where the holder of a bill transfers it by writing his name thereon and delivering it to the person to whom it is indorsed. For an outline of the bill markets in Australia see Weaver and Craigie, 383-384.

The Commission understands that in the market in practice, all acceptances are general and that indorsements "without recourse", which restrict the indorser's own liability to the holder, are not traded.

²⁶ "Property" includes both real and personal property: *Trustees Act*, s 6(1).

²⁷ *Trustees Act*, s 27(3)(b).

²⁸ There is a controversy as to the true nature of an option to purchase. 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.

future time.²⁹ "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."³⁰

3.23 Nevertheless, the giving by a trustee of an option to purchase trust property may be proper where, for example, it 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.³¹ The true position would appear to be that "...on principle an option granted by a 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".³² Such an option would have to be of short duration and be a prudent transaction in all other respects. On this basis a trustee who was careful not to tie up the trust property for long periods, though from time to time he extended the option and received consideration for giving it, has been held not to have departed from his duty as a trustee.³³ The practical difficulty for a trustee who wishes to rely on the equitable power is to know where to draw the line.

(b) Application to trustees of the apportionment provisions³⁴ of the Property Law Act 1969-1979 Part XV (sections 130-134)

3.24 The apportionment provisions of the *Property Law Act 1969-1979* affect a wide range of persons apart from trustees.

However, it was suggested by the Trustee Companies that some of the provisions cause difficulties in relation to the administration of trust estates involving life interests. The matter was raised by the Trustee Companies in the context of suggestions they made to the former Attorney General concerning authorised trustee investments and accordingly he asked the Commission to report on the matter at the same time.

3.25 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

²⁹ *Clay v Rufford* (1852) 5 De G & Sm 768; 64 ER 1337.

³⁰ *Rawcliff v Johnstone and Morton* [1921] NZLR 470, 473 per Hosking J.

³¹ *Meek v Bennie* [1940] NZLR 1.

³² *Rousset v Antunovich* [1963] WAR 52, 60.

³³ *Meek v Bennie* [1940] NZLR 1.

³⁴ These provisions are reproduced in Appendix III.

property but not payable until after his death. The question arises as to whether these payments when ultimately received 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 question 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.

3.26 This matter is now regulated by sections 130 to 134 of the *Property Law Act 1969-1979*. Their effect is that, unless the settlor or testator otherwise stipulates, every periodical payment in the nature of income is deemed to have accrued by equal daily increments³⁵ and must be 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.³⁶ 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.

3.27 The effect of the provisions can be demonstrated in the context of wills by a hypothetical example. Assume that 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. In the absence of a contrary direction in the will, 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. She will then have to wait another twelve months before she receives a full annual dividend from those shares. The same process of apportionment is repeated when she dies. If 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.

3.28 The question of the desirability of modifying the apportionment provisions as they apply to trust estates is discussed in chapter 10 below.

³⁵ *Property Law Act 1969-1979*, s 130(2).

³⁶ *Id.*, s 131. See also Jacobs, 392.

5. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

3.29 The Commission recommends that -

- (a) For the purposes of section 17 of the *Trustees Act*, the term "dwelling house" be defined to include a strata title lot used for residential purposes;

(paragraph 3.14, footnote 1)

- (b) Sections 17(2)(d) (purchase of a dwelling house for a beneficiary) and 22(1)(c) (lending trust money on the security of a mortgage) be amended to make it clear that to obtain the benefit afforded by the provisions, the trustee must act in accordance with the valuer's advice in relation to the purchase or loan, as the case may be.

(paragraph 3.14, footnote 2)

CHAPTER 4 - THE POSITION IN OTHER JURISDICTIONS

1. INTRODUCTION

4.1 In this chapter the Commission outlines the statutory provisions in each of the Australian States and Territories as well as in New Zealand and England. Appendix IV sets the provisions out in a comparative table.

2. THE POSITION ELSEWHERE

(a) First legal mortgages

4.2 There are similar provisions to section 16(1)(b)¹ and section 22² of the Western Australian *Trustees Act* in each of the other Australian jurisdictions as well as in England³ and New Zealand.⁴ In each case the traditional proportion which a trustee is protected in lending, that is two-thirds of the value of the secured property, is repeated.

4.3 Five Australian jurisdictions now also protect a trustee who lends a greater proportion provided mortgage insurance is effected.⁵ In Queensland, Northern Territory and Tasmania a trustee who is an approved lender⁶ is protected in lending such amount as he thinks fit but not exceeding such amount as is the subject of a contract of insurance in respect of the loan entered into by the Housing Loans Insurance Corporation.⁷ Tasmania also allows other approved insurers to participate in addition to the Housing Loans Insurance Corporation,

¹ *Trustee Act 1925-1983* (NSW), s 14(2)(e), *Trustee Act 1958-1983* (Vic), s 4(1)(1), *Trusts Act 1973-1981* (Qld), s 21(b), *Trustee Act 1936-1983* (SA), s 5(1)(b), *Trustee Act 1898-1981* (Tas), s 5(1)(f), *Trustee Act 1925-1982* (ACT), s 14(1)(g) (in the ACT the *Trustee Act 1925-1942* (NSW) applies by force of and is modified by the *Trustee Ordinance 1957-1982* (ACT), s 8. It is hereinafter cited as the "*Trustee Act 1925-1982* (ACT)".) and *Trustee Act 1893-1981* (NT), s 4(1)(f).

² *Trustee Act 1925-1983* (NSW), s 18, *Trustee Act 1958-1983* (Vic), s 8, *Trusts Act 1973-1981* (Qld), s 27, *Trustee Act 1936-1983* (SA), s 10, *Trustee Act 1898-1981* (Tas), s 10, *Trustee Act 1925-1982* (ACT), s 18 and *Trustee Act 1893-1981* (NT), s 9.

³ *Trustee Act 1925-1978* (Eng), s 8 and *Trustee Investments Act 1961-1982* (Eng), First Schedule, Part II, para 13.

⁴ *Trustee Act 1956-1983* (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 1958-1983* (Vic), s 8A, *Trusts Act 1973-1981* (Qld), s 23, *Trustee Act 1936-1983* (SA), s 10(1a), *Trustee (Insured Housing Loans) Act 1970-1982* (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 1965-1983* (Cth).

⁷ Formerly only certain types of loan qualified: *Housing Loans Insurance Act 1965-1983* (Cth), s 4. In 1983, however, the range of loans was extended: see para 5.11 below.

although the loans are restricted to housing loans as defined in the legislation.⁸ Victoria extends protection to housing loans insured by an "authorised" insurer while in South Australia protection is given to any loan insured by a "prescribed insurer".⁹

4.4 In Western Australia the Trustees Act¹⁰ 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 have similar provisions.¹¹ In Queensland¹² the provision is broader and requires the mortgagor also to insure against loss or damage by storm and tempest. There are no statutory requirements as regards insurance in the other States¹³ and Territories nor in England¹⁴ or New Zealand. However, the general duty of prudence imposed upon all trustees¹⁵ would seem to require them to obtain an appropriate insurance covenant from borrowers in any event.

(b) Deposits in banks

4.5 All Australian jurisdictions allow trustees to invest on deposit with banks, though the provisions vary.¹⁶ As mentioned earlier,¹⁷ 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 different types of certificates of deposit but do not expressly authorise purchase of these certificates from a third party. Queensland¹⁸ authorises investment "on the security of a certificate of deposit issued by any

⁸ *Trustee (Insured Housing Loans) Act 1970-1982* (Tas), s 2.

⁹ *Trustee Act 1958-1983* (Vic), s 8A(1), *Trustee Act 1936-1983* (SA), s 10(la).

¹⁰ S 25(2)(b).

¹¹ *Trustee Act 1925-1983* (NSW), s 16(2)(b), *Trustee Act 1958-1983* (Vic), s 11(2)(b), and *Trustee Act 1925-1982* (ACT), s 16(2)(b).

¹² *Trusts Act 1973-1981* (Qld), s 30(2)(b).

¹³ 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 1936-1983* (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: id, s 23a(4)(c).

¹⁴ In England a provision in similar terms to Western Australia is required where a trustee sells land and takes a mortgage back: *Trustee Act 1925-1978* (Eng), s 10(2).

¹⁵ Para 1.12 above.

¹⁶ *Trustees Act* (WA), s 16(1)(d), *Trustee Act 1925-1983* (NSW), s 14(2)(f), *Trustee Act 1958-1983* (Vic), ss 4(1)(h)(i) and 4(i), *Trusts Act 1973-1981* (Qld), s 21(1)(e), *Trustee Act 1936-1983* (SA), s 5(1)(c)(i), *Trustee Act 1898-1981* (Tas), s 5(1)(d), *Trustee Act 1925-1982* (ACT), s 14(1)(e) and (f), and *Trustee Act 1893-1981* (NT), s 4(1)(d) and (e).

¹⁷ Para 3.7 above.

¹⁸ *Trusts Act 1973-1981* (Qld), s 21(1)(e)(ii).

bank", while Victoria¹⁹ authorises investment "in certificates of deposit issued by a bank whether negotiable, convertible or otherwise".

4.6 New Zealand²⁰ merely permits investment "on deposit in any bank". England²¹ authorises investment "in deposits" in certain specified savings bank accounts.

(c) Deposits in building societies

4.7 Queensland is the only Australian jurisdiction in which there is no statutory power for a trustee to invest in building societies.

4.8 In the Northern Territory²² a trustee may invest "on deposit in or in the shares of an approved building society". Thus a trustee there may deposit money whether for a term or at call. However, the Minister may by notice limit the amount the trustees of a trust fund may invest in a particular society.²³ In South Australia²⁴ a trustee can also invest "on deposit" with a prescribed building society and hence at call as well as for a term. By contrast, Tasmania²⁵ only allows investment "on fixed deposit" with a building society. In Victoria a trustee may invest on "deposit or term deposit" with a building society in respect of which there is in force a declaration authorising trustees to do so.²⁶ In New South Wales a trustee may invest by way of "subscription of share capital in, deposit with, or loan of money to, a building society specified in Schedule 2 to the *Permanent Building Societies Act 1967*".²⁷ The Australian Capital Territory allows a trustee to invest "on deposit with an approved building society".²⁸

4.9 New Zealand²⁹ and England³⁰ permit trustees to invest on deposit whether for a term or at call with designated building societies. England, in addition, permits investment in the shares³¹ of any designated building society.

¹⁹ *Trustee Act 1958-1983* (Vic), s 4(1)(k).

²⁰ *Trustee Act 1956-1983* (NZ), s 4(1)(h).

²¹ *Trustee Investments Act 1961-1982* (Eng), First Schedule, Part I, para 2; First Schedule, Part II, para 11.

²² *Trustee Act 1893-1981* (NT), s 4(1)(k).

²³ *Trustee Act 1893-1981* (NT), s 4B.

²⁴ *Trustee Act 1936-1983* (SA), s 5(1)(c)(ii).

²⁵ *Trustee Act 1898-1981* (Tas), s 5(1)(e).

²⁶ *Trustee Act 1958-1983* (Vic), s 4(1)(ia).

²⁷ *Trustee Act 1925-1983* (NSW), s 14(2)(h).

²⁸ *Trustee Act 1925-1982* (ACT), s 14(1)(fa).

²⁹ *Trustee Act 1956-1983* (NZ), s 4(1)(hh).

³⁰ *Trustee Investments Act 1961-1982* (Eng), First Schedule, Part II, para 12.

³¹ *Id.*, First Schedule, Part III, para 2.

(d) Preference or ordinary stock or shares

4.10 Of the other Australian jurisdictions only South Australia³² and the Northern Territory³³ give trustees a power to invest in the purchase of preference or ordinary stock or shares similar to that given in section 16(1)(k) of the *Trustees Act*. In South Australia³⁴ the shares must be those 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 Territory³⁵ 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. In Victoria a sub-committee of the Chief Justice's Law Reform Committee recommended that company shares be an authorised trustee investment provided the company has a paid up capital of not less than two million dollars and has paid a dividend for each of the preceding five years.³⁶ A report of the Queensland Law Reform Commission³⁷ suggested corresponding figures of two million dollars and seven years. Neither of these suggestions has yet been implemented.

4.11 Both New Zealand³⁸ and England³⁹ 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. The English Law Reform Committee has recently recommended that any security quoted on an English stock exchange should be an authorised trustee investment.⁴⁰

³² *Trustee Act 1936-1983* (SA), s 5(1)(e).

³³ *Trustee Act 1893-1981* (NT), s 4(1)(h).

³⁴ *Trustee Act 1936-1983* (SA), s 5(3). In South Australia trustees are also authorised by the same subsection to invest in the stock, shares or debentures of a company that does not conform with the normal requirements but was formed for the purpose of taking over a company, or acquiring the whole of the undertaking of a company, that does comply with those requirements and is declared by regulation to be a company, in the stock, shares or debentures of which a trustee is authorised to invest trust funds.

³⁵ *Trustee Act 1893-1981* (NT), s 4(1B).

³⁶ Victorian Chief Justice's Law Reform Committee, Report of Sub-Committee on *Trustees' Statutory Powers of Investment* (1971) Appendix, 2.

³⁷ Queensland Law Reform Commission, *Report on the Law Relating to Trusts, Trustees, Settled Land and Charities* (1971), 23-24.

³⁸ *Trustee Act 1956-1983* (NZ), ss 4(1A)(a) and 4(1C).

³⁹ *Trustee Investments Act 1961-1982* (Eng), First Schedule, Part III, para 1, and First Schedule, Part IV, para 3.

⁴⁰ *English Report*, para 3.21.

(e) Company debentures

4.12 The criteria which must be satisfied before company debentures qualify as authorised investments in Western Australia are set out in paragraph 3.11 above. The criteria in the New Zealand⁴¹ and Northern Territory⁴² legislation are similar. None of the other Australian jurisdictions, except South Australia, authorise the purchase of any company debentures as trustee investments. In South Australia⁴³ the ordinary shares of the company must be quoted on a stock exchange although the debentures themselves 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 years⁴⁴ 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.

4.13 In England⁴⁵ a trustee may invest in quoted debentures issued and registered in the United Kingdom by a company incorporated in the United Kingdom. There is no requirement that the shares of the company concerned be quoted.

(f) Deposits or notes

4.14 In Australia, apart from Western Australia, only South Australia and the Northern Territory authorise trustees to invest in deposits or notes in companies. In the Northern Territory⁴⁶ the position is the same as in Western Australia. In South Australia⁴⁷ "deposits"

⁴¹ *Trustee Act 1956-1983* (NZ), s 4(1A)(b) and (1B).

⁴² *Trustee Act 1893-1981* (NT), s 4(1)(i) and 4(1A).

⁴³ *Trustee Act 1936-1983* (SA), s 5(1)(e), 5(2)(b) and (c), 5(3). The *Trustee Act Amendment Act 1983* (SA) (assented to 22 December 1983) enables trustees also to invest in the debentures of any company so declared by regulation.

⁴⁴ Also see footnote 12 to para 4.10 above.

⁴⁵ *Trustee Investments Act 1961-1982* (Eng), First Schedule, Part II, para 6; and Part IV, paras 2, 3(a) and (b).

⁴⁶ *Trustee Act 1893-1981* (NT), s 4(1)(j). The Northern Territory also permits investment on deposit with corporations declared by the Minister to be authorised to accept deposits of trust funds: id, s 4(1)(p).

⁴⁷ *Trustee Act 1936-1983* (SA), s 5(1)(e), (f) and 5(2)(b). South Australia also permits investment in the deposits and notes of life insurance corporations.

may be secured or unsecured and either 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 in the case of investment in 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 its shares must be quoted on a stock exchange.

(g) Dwelling house for the use of a beneficiary

4.15 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.⁴⁸ In New South Wales only the Public Trustee or a statutory trustee company may do so,⁴⁹ though other trustees may apply to the Supreme Court for such authority.⁵⁰ In England and the Australian Capital Territory⁵¹ a trustee has no such express statutory power.

(h) Land

4.16 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.⁵²

4.17 Queensland provides⁵³ that a trustee may invest in the purchase of land in fee simple in any State or Territory of Australia or leasehold land in Queensland 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*, in any "agricultural farm or grazing homestead freeholding lease" of land held from the Crown under that Act. In exercising the power, a trustee is not chargeable with breach of

⁴⁸ *Trustee Act 1958-1983* (Vic), s 4(3), *Trusts Act 1973-1981* (Qld), s 22, *Trustee Act 1936-1983* (SA), s 5a, *Trustee Act 1898-1981* (Tas), s 5(1)(g)(ii), *Trustee Act 1893-1981* (NT), s 4C, and *Trustee Act 1956-1983* (NZ), s 14(2)(b).

⁴⁹ *Trustee Act 1925-1983* (NSW), s 83(5A)-(5C).

⁵⁰ *Id.*, s 83(1).

⁵¹ A trustee may, however, apply to a judge for authorisation to purchase a home for an infant beneficiary: *Trustee Act 1925-1982* (ACT), s 83.

⁵² *Trustee Act 1956-1983* (NZ), s 14(2)(a).

⁵³ *Trusts Act 1973-1981* (Qld), s 21(c).

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, inter alia, he acted upon the advice of an independent registered valuer.⁵⁴

4.18 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 that State.⁵⁵ Guidelines laid down in the legislation provide that a trustee is not 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, inter alia, he acted on the advice of an independent registered valuer who must state the annual rental value and that the land has been substantially improved by the erection of buildings thereon. A sub-committee of the Victorian Chief Justice's Law Reform Committee had earlier recommended against a power to invest in land.⁵⁶ The sub-committee did not give any reasons for its view apart from saying that a power to invest in land had not been given in the United Kingdom, Western Australia or in the New Zealand Draft Bill then under consideration.

4.19 In Tasmania, a trustee may invest in the purchase of an estate in fee simple in land in that State.⁵⁷ The investment 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 fifty percent 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

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

⁵⁴ *Trusts Act 1973-1981* (Qld), s 22(2).

⁵⁵ *Trustee Act 1958-1983* (Vic), s 4A.

⁵⁶ Victorian Chief Justice's Law Reform Committee, Report of Sub-Committee on *Trustees' Statutory Powers of Investment* (1971) 2.

⁵⁷ *Trustee Act 1898-1981* (Tas), s 5(1)(g)(i) and 5(4).

(j) Bank accepted or indorsed bills

4.21 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.⁵⁸ South Australia has a similar provision as to time but includes bank indorsed bills as well.⁵⁹ In Queensland,⁶⁰ 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.⁶¹ In England trustees cannot invest in bank bills or in the money market generally.

(k) Grant of options to purchase trust property

4.22 No Australian jurisdiction has given trustees a general statutory power to grant options to purchase trust property though, of course, the equitable position applies.⁶² Moreover, only Queensland⁶³ has a provision similar to that of Western Australia⁶⁴ in the case of a trustee granting a lease.

4.23 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.⁶⁵

4.24 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 options to purchase to tenants and others, provided the option is made exercisable within ten years. Nevertheless, it has been suggested⁶⁶ that such an option should as a matter of prudence contain some built-in protection against inflation.

⁵⁸ *Trustee Act 1958-1983* (Vic), s 4(1)(j).

⁵⁹ *Trustee Act 1936-1983* (SA), s 5(1)(ca).

⁶⁰ *Trusts Act 1973-1981* (Qld), s 21(1)(e)(iv).

⁶¹ 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 indorses and delivers to the trustee a bank accepted bill of exchange: *Trustee Act 1898-1981* (Tas), s 5(1)(h)(ii).

⁶² Paras 3.22 and 3.23 above.

⁶³ *Trusts Act 1973-1981* (Qld), s 32(3)(b).

⁶⁴ *Trustees Act*, s 27(3)(b).

⁶⁵ *Trustee Act 1956-1983* (NZ), s 14(5)(b).

⁶⁶ Underhill, 465.

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

4.25 The provisions in Western Australia⁶⁷ follow closely the English *Apportionment Act 1870*. Similar provisions exist in other Australian States,⁶⁸ in the Territories⁶⁹ and in New Zealand.⁷⁰

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

4.26 The statutory power of the Court to extend the powers of investment of a trustee in Western Australia was discussed earlier.⁷¹ A similar power is to be found in all other Australian jurisdictions⁷² (except the Northern Territory), in New Zealand⁷³ and England.⁷⁴

⁶⁷ Paras 3.24 to 3.27 above.

⁶⁸ *Conveyancing Act 1919-1983* (NSW), ss 142 and 144, *Supreme Court Act 1958-1982* (Vic), ss 73-76, *Property Law Act 1974-1981* (Qld), ss 231-233, *Law of Property Act 1936-1980* (SA), ss 63-68, *Apportionment Act 1871-1954* (Tas) and see generally Jacobs, 390-396.

⁶⁹ *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.

⁷⁰ *Property Law Act 1952-1983* (NZ), ss 144-148.

⁷¹ Paras 1.15 to 1.18 above.

⁷² *Trustee Act 1925-1983* (NSW), s 81, *Trustee Act 1958-1983* (Vic), s 63, *Trusts Act 1973-1981* (Qld), s 94, *Trustee Act 1936-1983* (SA), s 59b, *Trustee Act 1898-1981* (Tas), s 47, *Trustee Act 1925-1982* (ACT), s 81.

⁷³ *Trustee Act 1956-1983* (NZ), s 64.

⁷⁴ *Trustee Act 1925-1978* (Eng), s 57.

PART III: DISCUSSION AND RECOMMENDATIONS

CHAPTER 5 - FIRST LEGAL MORTGAGES

1. INTRODUCTION

5.1 In this chapter the Commission discusses the existing power of trustees to lend on mortgage¹ and makes recommendations on certain matters, including whether the protection afforded by section 22 of the *Trustees Act* should be increased generally or only if the loan is protected by mortgage insurance.

2. LIMIT ON PROPORTION TO BE LENT

5.2 The Trustee Companies suggested² that the limitation of the protection given by section 22 to loans which do not exceed two-thirds of the value of the property limits significantly the range of persons to whom money can be lent and the type of property which can be financed. The relatively small sums that many trustees have available for investment on mortgage makes the housing market more suitable for them than commercial properties, which generally require larger amounts. However, the present provisions inhibit such trustee investment because in effect they require a house purchaser to have or borrow elsewhere a one-third deposit, whereas other lenders are prepared to lend a greater proportion. If money is thereby difficult to place on mortgage, trustees may invest in other, less attractive, fixed interest securities. The Trustee Companies also suggested that the effect of inflation on the value of real estate may increase the margin of security during the term of the loan, thus enhancing its safety.

5.3 The response of the commentators on the working paper varied. Some favoured increasing the proportion to as much as eighty percent, but others, including the Law Society, thought that the present two-thirds rule safeguarded trust funds and were against change.

5.4 The Commission agrees with those commentators who consider that the present rule should not be altered. The rules embodied in the *Trustees Act* must operate through a wide range of economic circumstances and the present recession, which has seen land values in many areas of Perth fall significantly, has demonstrated the validity of a cautious approach.

¹ As to the present position in Western Australia and elsewhere, see paras 3.3 to 3.5 and 4.2 to 4.4 above.

² In a preliminary submission.

Accordingly, it recommends that there should be no general change to the two-thirds rule in section 22.³

3. INCREASED PROPORTION IF MORTGAGE INSURANCE TAKEN OUT

(a) Introduction

5.5 However, where mortgage insurance is available to protect the money lent, the risk of lending money on the security of a mortgage is almost entirely eliminated. In recent years, insurance companies, including the Housing Loans Insurance Corporation,⁴ have offered policies guaranteeing the performance of the terms of mortgages as to the payment of principal, interest and costs of default. The premium is usually assessed as a once only fee payable by the borrower at the commencement of the loan. Such insurance is available even where the loan is up to one hundred percent of the value of the property offered as security, so that the risk undertaken by the lender is eliminated without cost to him.

5.6 Whilst nothing at present prevents a trustee-mortgagee from requiring that a loan be so insured, section 22 will not at present provide protection if he lends more than two-thirds of the value of the property. This may inhibit trustees from making such loans.

5.7 Four other States and the Northern Territory have acted to protect trustees who lend a greater proportion provided the loan is insured.⁵

(b) Extension of protection if loan insured

5.8 All those who commented on the issue, except the Law Society, were in favour of extending the protection given by section 22 if the loan is protected by mortgage insurance. The Law Society's opposition was on the ground that if the policy was held to be void because, for example, the insurance proposal form had been completed incorrectly, a trustee could suffer a substantial loss.⁶ The Society, however, conceded that there was less likelihood of problems arising with the Housing Loans Insurance Corporation.

³ The question of insured loans is discussed in paras 5.5 to 5.14 below.

⁴ *Housing Loans Insurance Act 1965-1983* (Cth), s 6.

⁵ Para 4.3 above.

⁶ A member of the Law Society informed the Commission of difficulties in recovering insurance benefits from a private insurer in two cases in which the insurance proposal was made out incorrectly by the

5.9 In view of the substantial advantages in doing so, the Commission recommends that the protection afforded by section 22 should be extended if the loan is insured, subject to its recommendation below on who may be an approved insurer. This would enable a trustee to lend a greater amount and still be secure, thus making it easier for trustees to place funds more advantageously.⁷

(c) Maximum proportion to be advanced

5.10 If it is accepted that, provided the loan is insured, a trustee should be protected notwithstanding that he lends more than a sum equal to two-thirds of the value of the property, to what proportion of that value should the protection extend? The working paper suggested that in such cases it did not matter what proportion was advanced. This is the view taken in other jurisdictions which have protected insured loans. Most commentators, however, were in favour of a fixed maximum proportion. After taking into account the comments the Commission has concluded that the maximum proportion which should be protected should be ninety percent of the value of the property, and recommends accordingly. If for some reason the policy was ineffective there should still be a margin of safety for the trustee. A statutory provision implementing this recommendation should be framed as a protection in the same manner as section 22, so that 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 if -

- (i) the loan, together with any other amount payable under the mortgage, is guaranteed by an authorised insurer;
- (ii) the amount of the loan does not exceed ninety percent of the value of the property as stated by a licensed valuer; and
- (iii) the loan was made in accordance with the advice of that valuer.⁸

The trustee's general duty of prudence would remain.

borrower, albeit without the knowledge of the lender. The cases fortuitously did not involve trustees. Generally, however, proposals are completed by the lender rather than the borrower. A trustee should always ensure that the form is completed correctly.

⁷ There may also be more funds available for housing although, as the Commission has emphasised earlier, its recommendations are directed towards advancing the interests of beneficiaries and not to other economic consequences: para 2.32.

⁸ Footnote 2 to para 3.14 above.

(d) Authorised insurers

5.11 The question then arises as to which insurance companies should be authorised insurers of loans made by trustees. The value of mortgage insurance obviously depends on the soundness of the insurer. Queensland and the Northern Territory extend the authorisation only to the Housing Loans Insurance Corporation. The Corporation, which is backed by the Commonwealth Government, was formerly limited to insuring loans for the purchase or erection of dwelling houses or for the development of land for housing. However, it is now also empowered to insure loans for the purchase or development of commercial properties.⁹

5.12 All the commentators¹⁰ on the issue were in favour of authorisation being extended to approved commercial insurers as well as the Housing Loans Insurance Corporation. The Commission agrees.

The *Commonwealth Insurance Acts 1973-1983* provides¹¹ for the licensing of insurers, one of the criteria being financial stability.¹² However, this legislation is not necessarily adequate for the purposes of trustee legislation, as the failure of insurance companies from time to time testifies.¹³ Accordingly, to obtain authorisation the Commission recommends that an insurer should be required to satisfy the State Treasurer of its financial stability and its capacity properly to carry on the business in Western Australia of insuring against losses arising in respect of mortgage loans.¹⁴ It should also be required as a condition of authorisation to undertake to remain in business in Western Australia for the period for which the loans are

⁹ *Housing Loans Insurance Amendment Act 1983* (Cth), s 5. This Act also repeals the legislation introduced by the previous Commonwealth Government authorising the sale of the Corporation to private enterprise: id, s 7.

¹⁰ These included the Trustee Companies, Mr Sanderson, the Public Trustee, REIWA and the Stock Exchange.

¹¹ *Insurance Acts 1973-1983* (Cth), s 22.

¹² Id, s 23.

¹³ The Commonwealth Minister for Housing and Construction announced on 2 December 1983 that the Commonwealth Government intended to introduce legislation to tighten the requirements in the Commonwealth Insurance Acts to ensure financial stability (Media Release 78/83).

¹⁴ The Trustee Companies supported this general approach.

In Tasmania the Governor approves insurers, presumably on the recommendation of the Treasurer. The legislation does not set out specific guidelines for the exercise of the 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": *Trustee (Insured Housing Loans) Act 1970-1982* (Tas), ss 5 and 6. The Housing Loans Insurance Corporation is approved as an insurer by the Act itself: id, s 2(1).

In deciding upon appropriate criteria, the State Treasurer would no doubt have regard to the provisions in any amending legislation enacted by the Commonwealth Parliament: footnote 3 above.

insured, submit an annual report accompanied by financial statements¹⁵ and to comply with such other conditions as the Treasurer thinks fit. The requirement of approval by the State Treasurer would allow for flexibility in the approval or withdrawal of approval as circumstances require.¹⁶

(e) No distinction between different types of property

5.13 A further issue discussed in the working paper¹⁷ was whether the extended protection to be given to trustees as regards insured mortgage loans should be confined to loans secured on residential property. All the commentators except one thought no such distinction should be drawn. The Commission agrees with the majority. Trustees are already authorised to lend on mortgage over non-residential land and there is no reason why the extended protection should not apply to such a loan if it is insured by an authorised insurer.¹⁸

(f) Second and subsequent mortgages

5.14 Section 16(1)(b) of the *Trustees Act* at present authorises trustees to invest only on first legal mortgage of an estate in fee simple. The working paper invited comment on the question whether trustees should be empowered to lend money on second and subsequent mortgages, provided the loan is insured with an authorised insurer.¹⁹ The Commission agrees with the majority of commentators that such a course should not be adopted. There could be practical problems for a trustee in ensuring that the terms of the insurance provided adequate protection in those cases where there is a prior mortgage or mortgages. In any case, the Commission is not aware that there is any real need for trustees to invest in this manner at this stage. Similar arguments apply as regards loans on leaseholds.

¹⁵ These are intended only as an outline of the appropriate criteria. The actual requirements would no doubt be elaborated in legislation giving effect to the recommendation.

¹⁶ A requirement that insurers who wish to undertake certain business obtain Ministerial approval is not without precedent: see the *Workers' Compensation and Assistance Act 1981-1983* (WA), s 160.

¹⁷ Working paper, para 5.9.

¹⁸ As a matter of prudence, of course, a trustee should exercise caution in lending on commercial property by distinguishing between the value of the land and that of the business.

¹⁹ Working paper, para 5.10.

4. SHOULD THE POWER TO INVEST IN MORTGAGES CONTINUE TO BE LIMITED TO LAND IN WESTERN AUSTRALIA?

5.15 The only Australian jurisdictions which authorise trustees to lend on mortgage outside the jurisdiction concerned are Queensland, the Northern Territory and the Australian Capital Territory.²⁰ In each case trustees are authorised to invest on mortgage of an estate in fee simple in any State or Territory of the Commonwealth, but only within the jurisdiction concerned in respect of mortgages of other interests.

5.16 Most commentators²¹ were in favour of authorising a trustee to lend on the security of mortgage over land elsewhere in Australia, although a substantial number thought the present limitation should remain. In supporting the present position the Law Society said that many trustees would be unlikely to be familiar with the circumstances of mortgage investment in another State and that there would be difficulties in practice in obtaining a valuation, inspecting the property from time to time, arranging for sale in the event of default and so on.²²

5.17 The Commission agrees with the Law Society, for the reasons advanced by it. It accordingly recommends that the power given by section 16(1)(b) of the *Trustees Act* should continue to be confined to land in Western Australia. A trustee who considered that the circumstances of the trust justified it could apply to the Court for power to make a loan on the security of land elsewhere in Australia, or even overseas.

5. INSURANCE COVENANT

5.18 The *Trustees Act* at present requires a trustee to include a term in the mortgage agreement obliging the borrower to keep all buildings on the land insured against "loss or damage by fire to the full insurable value thereof".²³ The Trustee Companies in their preliminary submission suggested that this section be broadened to require in addition

²⁰ *Trusts Act 1973-1981* (Qld), s 21(1)(b), *Trustee Act 1893-1981* (NT), s 4(1)(f), *Trustee Act 1925-1982* (ACT), s 14(1)(g).

²¹ This was also the view of the Trustee Companies Association.

²² Mr Sanderson, who is a licensed valuer and a former president of the Western Australian Division of the Australian Institute of Valuers (Inc), expressed similar views.

²³ *Trustees Act*, s 25(2)(b).

coverage against normal property risks such as storm, tempest, earthquake, and damage by vehicles and aircraft.²⁴ The working paper invited comment.

5.19 All those who responded agreed with the general thrust of the Trustee Companies preliminary submission. The Commission initially considered that it would be sufficient if the obligation on the trustee was expressed simply in terms that he require the mortgagor to "insure against all usual risks in respect of which property of that nature is normally insured". However, it has concluded that although this would have the merit of flexibility, it is too uncertain a requirement to impose on trustees. Accordingly, the Commission recommends that, with the exception set out in the following paragraph, the trustee should be obliged to require the mortgagor to insure the buildings against damage by fire, storm and tempest, lightning, explosion, earthquake, damage by vehicles and aircraft, and malicious damage.²⁵ A trustee could of course require the mortgagor to insure against further risks, such as flood,²⁶ where the situation warranted it.

5.20 One of the commentators pointed out that the requirement to insure any buildings on the mortgaged land may cause needless expense. In some cases the trustee's security would not be jeopardised by non-insurance, for example where the building is a derelict house on a site which is intended to be redeveloped. The Commission agrees that insurance would be unnecessary in such cases. It accordingly recommends that section 25(2)(b) of the *Trustees Act* be clarified so as to oblige a trustee, unless satisfied on reasonable grounds that his security would not be diminished if any building was not insured, to include a provision in the mortgage that the mortgagor insure any buildings to their replacement value.

6. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

5.21 The Commission recommends that -

- (a) The present maximum proportion of the value of the property which a trustee can lend on the security of a mortgage on that property and obtain the

²⁴ This submission was supported by the Trustee Companies Association.

²⁵ These are normally included in what is known as a "comprehensive policy" which is readily available in Western Australia.

²⁶ Flood is not covered by ordinary insurance policies in Western Australia and must be separately negotiated.

protection afforded by section 22 of the *Trustees Act* should remain at two-thirds of the value of the property unless -

- (i) the loan is insured by an authorised insurer;
- (ii) the amount of the loan does not exceed ninety percent of the value of the property as stated by a licensed valuer; and
- (iii) the loan was made in accordance with the advice of that valuer.

If (i), (ii) and (iii) apply, a trustee should not be chargeable with breach of trust by reason only of the proportion the amount of the loan bears to the value of the property.

(paragraphs 5.2 to 5.10)

- (b) Authorisation as an insurer for the purposes of (a)(i) above should be extended to approved commercial insurers as well as the Housing Loans Insurance Corporation.

(paragraphs 5.11 and 5.12)

- (c) To obtain approval, an insurer should be required to satisfy the State Treasurer of its capacity properly to carry on the business in Western Australia of insuring against losses arising in respect of mortgage loans. The insurer should also be required to undertake to remain in business in Western Australia for the period for which the loans are insured and to submit an annual report on its financial affairs.

(paragraph 5.12)

- (d) The extended protection to be given to trustees as regards insured mortgage loans should not be confined to loans on residential property.

(paragraph 5.13)

- (e) The power given by section 16(1)(b) of the *Trustees Act* to lend on mortgage should continue to be confined to land in Western Australia.

(paragraphs 5.15 to 5.17)

- (f) The trustee, unless satisfied on reasonable grounds that his security would not otherwise be diminished, should be obliged to require the mortgagor to insure any buildings on the mortgaged land to their replacement value against damage by fire, storm and tempest, lightning, explosion, earthquake, damage by vehicles and aircraft, and malicious damage.

(paragraphs 5.18 to 5.20)

CHAPTER 6 - LAND, INCLUDING A DWELLING HOUSE FOR THE USE OF A BENEFICIARY

1. INTRODUCTION

6.1 At present the only form of investment in land authorised by the *Trustees Act* is that of the purchase of a dwelling house for the use of a beneficiary. In this chapter the Commission first considers whether there should be a power to invest in land generally and, if so, the limits of such a power. It then deals with the special case of the power to purchase a dwelling house for a beneficiary, and finally with two miscellaneous matters (the maximum sum to be spent on development of trust land and the grant of an option to purchase trust property).

2. PURCHASE OF LAND AS AN INVESTMENT

(a) Generally

6.2 The Trustee Companies suggested that trustees should be given power to invest in land.¹ Their view is that the provisions in those States which have such a power have been of substantial benefit to trusts by enabling trustees to make investments which are both reasonably secure and which retain the real value of the trust capital.

6.3 All those who commented on the issue agreed with the Trustee Companies' suggestion.² The Commission also agrees and recommends accordingly.³ Land is an important form of investment for many people. Not only does it tend to increase in nominal value with inflation but it may also increase in value in real terms in line with the general development of the area in which it is situated. Of course, this is not true of all land at all times. For example, some land in the Perth metropolitan area has at times declined in real or even nominal value. Rural land and land in country towns has also been subject to changes in value as a result of unfavourable climatic or economic conditions. An investment in land may accordingly lead to real losses if the trustee is required to realise the investment in periods of economic downturn.

¹ 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 power under their trust instrument.

² Some, however, suggested restrictions which should be placed on the power.

³ At present in England trustees under the *Settled Land Act 1925* have the power to invest in land. The English Law Reform Committee recommended that the power should be extended to all trustees: *English Report*, para 3.2.

6.4 However, similar factors can affect other forms of investment such as company shares, the purchase of which in certain circumstances has been an authorised trustee investment since 1962.⁴ The 1962 legislation recognised the risks associated with these newly authorised forms of investment by imposing certain restrictions including the duty to obtain proper advice before investment. The question therefore is whether restrictions should be placed on the proposed power to invest in land. Relevant issues include -

- (i) the nature of the interest in land which trustees should be authorised to purchase;
- (ii) whether the land should be income-producing;
- (iii) the advice which should be required before a purchase can take place;
- (iv) whether any restriction should be imposed on the proportion of the trust estate that can be invested in land;
- (v) whether the power should be only available to a particular class of trustee;
- (vi) whether the power should be restricted to land in Western Australia.

These are considered below.

(b) Nature of interest

6.5 Assuming that a power to invest in land⁵ is granted, should a trustee be able to purchase a lesser interest than an estate in fee simple? There is undoubtedly an argument in favour of permitting trustees to do so. 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.⁶ However, many

⁴ Mortgages, which have long been an authorised investment, may also result in loss in some circumstances.

⁵ It should be noted that the definition of land in the *Trustees Act* is very wide: see s 6(1).

⁶ Underhill, 430.

leaseholds are of very long duration. If trustees were given power to purchase a leasehold they should still be under an obligation to act prudently in the exercise of the power, in addition to obeying any restrictions imposed by legislation. It should be noted that the *Queensland Trusts Act* permits the purchase of certain leaseholds.⁷

6.6 The commentators were evenly divided. Most of those in favour of permitting the purchase of leasehold interests stipulated that the lease should be of sufficiently long duration and suggested terms ranging from 20 to 40 years. Some also suggested that the leasehold property to be purchased should be the subject of a report by a licensed valuer supporting the price to be paid for the lease. Most of those who were against granting power to purchase leaseholds did not give reasons. One commentator, however, submitted that it would be difficult to define in legislation the types of lease which would be acceptable and those which would not.

6.7 After reviewing the matter, the Commission has concluded it would be wise to proceed cautiously in the extent of the grant of the new power and that, at least initially, it should be confined to the purchase of a fee simple interest in land.⁸ This would give a trustee reasonable scope for investment in land without exposing him, and the trust fund, to the greater risks inherent in the purchase of leasehold interests. If a trustee considered it desirable to purchase a pastoral lease or other leasehold interest he could apply to the Supreme Court for authority.⁹

(c) **Income-producing land**

6.8 Traditionally the purchase of non-income-producing land was thought to be speculative and hence unsuitable as a trustee investment, if indeed it was an "investment" at all.¹⁰ It certainly would provide no income for the beneficiaries presently entitled. However, a trustee may not be faced with the need for all or part of the trust fund to be income-producing, and thus may wish to invest for capital gain. Where there are beneficiaries presently entitled, the purchase of land may present problems to the trustee in balancing their interests against

⁷ *Trusts Act 1973-1981* (Qld), s 21(1)(c)(ii) and (iii).

⁸ The power could be reviewed in the future: para 2.29 above.

⁹ Paras 1.15 and 2.27 above.

¹⁰ Pettit, 275, suggests that in the context of the law of trusts "to invest" would probably be construed to mean "to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income it will yield".

those of the remaindermen, but this problem may confront trustees at present under trust instruments containing power to invest in land and those who utilise the present statutory power to invest in shares.¹¹

6.9 Nearly all of the commentators on the issue thought that the land need not be income-producing (though some suggested limitations on the proportion of the trust fund that could be so invested or the amount that the trustee could spend on development¹²). As one commentator put it, the purchase of a vacant site in St George's Terrace could be a better investment for the trust than a tenanted factory in Wanneroo. Those who thought the land should be income-producing included the Law Society and the Western Australian Permanent Building Societies Association (Inc). The Law Society suggested a minimum income of five percent unless all the beneficiaries otherwise agreed.

6.10 After taking into account the views expressed, the Commission has concluded that it would be unduly restrictive to limit the proposed power to the purchase of income-producing land.¹³ The appropriateness of the purchase should be left to be determined by the trustee having regard to the circumstances of the trust.¹⁴ The Commission recommends below that a trustee should be required to take expert advice before purchasing.¹⁵

6.11 An associated matter is whether there should be any restriction placed on the type of land that a trustee can purchase (for example, farming, residential, industrial or commercial land). The relevance of this lies in the different management skills required of a trustee and the different risks associated with different types of land. The expertise required to manage a block of flats, for example, is of a different order from that required for the management of passive investments of the traditional type, such as interest bearing securities. While a trustee can delegate the management of income-earning real estate to experts¹⁶ he must be careful because he may still remain liable.¹⁷

¹¹ *Trustees Act*, s 16(1)(k). Some shares have a substantial capital growth but earn small dividends, while with others the situation is the reverse.

¹² This was seen as discouraging trustees from becoming property developers.

¹³ The trustee would, of course, be under a duty to the beneficiaries of the trust to produce income where the land was reasonably capable of doing so.

¹⁴ To be effective, the legislation should expressly provide that the land need not be income-producing. Otherwise the courts may construe the power to invest as impliedly being limited to the purchase of income-producing property: see footnote 2 to para 6.8 above.

¹⁵ Para 6.20 below. See also paras 6.14 to 6.16 as to the protection which should be afforded a trustee who acts on a valuer's advice as to the purchase price.

¹⁶ *Trustees Act*, s 53.

¹⁷ Jacobs, 318-325.

6.12 Most commentators on the issue, however, thought that it was unnecessary to impose any limitation. The exceptions were the Institute of Legal Executives and the Law Society. The Law Society suggested that it may be desirable to restrict the type of land that could be purchased while the Institute favoured the limitation adopted in Tasmania, namely that the land must be purchased in order to obtain income by letting a building on it.¹⁸

6.13 The Commission agrees with the majority of commentators and recommends that no statutory restriction or limitation should be imposed on the type of land which can be purchased. This is the position in Queensland.¹⁹ The circumstances of the trust may be such that the purchase of a farm for example may be appropriate, and scope should be left for the trustee to do so.²⁰

(d) Advice

(i) Advice as to value

6.14 Section 17 of the *Trustees Act* contains a provision which protects a trustee who obtains the advice of a qualified valuer before purchasing a dwelling house for a beneficiary.²¹ It would seem desirable to incorporate a similar provision if a general power to purchase land is to be given. This was also the view of the commentators. REIWA emphasised the importance not only of the valuer being licensed but also of his having relevant experience.

6.15 The Commission recommends accordingly.²² The legislation should provide that a trustee is not liable for breach of trust by reason only of the relation borne by the purchase price to the value of the land at the time of purchase if the purchase price does not exceed the value of the land as estimated by a licensed valuer.²³ The provision should go further than section 17 by providing that the trustee should believe on reasonable grounds that the valuer was experienced in valuing the type of land concerned in the locality in which it is situated.

¹⁸ If there is no income from the land the outgoings must be met either from other income or from capital. This could cause difficulties where there are both capital and income beneficiaries.

¹⁹ *Trusts Act 1973-1981* (Qld), ss 21 and 22.

²⁰ The requirement of advice recommended in para 6.20 below provides a safeguard against a trustee purchasing land which is an inappropriate investment for the trust.

²¹ Para 3.14 above.

²² This is the approach adopted in Victoria and Queensland. Tasmania, which is the only other jurisdiction authorising trustees to invest in the purchase of land, makes it mandatory to act on the advice of a valuer; that is, it is of itself a breach of trust to purchase land except on a valuer's advice.

²³ But see paras 6.21 to 6.23 below.

6.16 It should be required that the valuer's report be in writing, and contain a statement as to -

- (a) the value of the land;²⁴
- (b) the actual or potential income from the land; and
- (c) the outgoings associated with owning it.

Except as recommended below, the purchase price should not exceed the value of the land as stated in the report.²⁵

6.17 Comment was invited in the working paper on a suggestion that a trustee should be able to obtain the protection referred to above even if the valuer's advice is informal,²⁶ the aim being to reduce the cost of obtaining the advice. Formal advice is given for a substantial fee which normally must be paid regardless of whether the property is purchased or not. The process of valuation with its attendant cost may have to be repeated in respect of several properties before a suitable one is found.

6.18 The majority of commentators were opposed to the suggestion though some, including West Australian Trustees Limited and the Institute of Legal Executives, were in favour.

6.19 The Commission does not recommend its adoption. The advice the valuer will be required to give is important²⁷ and in order to ensure that the appropriate professional standard is brought to bear formal advice should be obtained for which a fee will of course be payable. There would appear to be nothing improper in a trustee obtaining "informal" advice during the course of reviewing a number of properties for possible purchase. The only

²⁴ Including the value of any buildings or other improvements on the land.

²⁵ In contrast to ss 17 and 22 of the *Trustees Act* the valuer will not be giving advice on the desirability of making the purchase: see footnote 2 to para 3.14 above. In para 6.20 below the Commission recommends that the trustee should be required to obtain and consider "proper advice" as to whether the proposed purchase is satisfactory having regard to the need for diversification and to the circumstances of the trust generally. This would include advice whether or not the purchase was acceptable as an investment for the trust.

²⁶ Formerly this would have been called an unsworn valuation and would have been given by a sworn valuer appointed under s 14 of the *Transfer of Land Act 1893*. This provision was repealed and now such persons are valuers licensed under the *Land Valuers Licensing Act 1978*.

²⁷ Para 6.16 above.

requirement is that, before committing himself to purchase one of them, he must obtain formal advice.²⁸

(ii) General advice

6.20 The safeguard of a valuer's report is intended amongst other things to ensure that the land being purchased is not overpriced. There is also the question whether the purchase is appropriate, having regard to the need for diversification and the circumstances of the trust generally. Accordingly the trustee should also, as a precondition of purchasing the land, be required to obtain and consider proper advice of this more general sort. As with the purchase of company securities, 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.²⁹

(iii) Power to deviate from advice as to value

6.21 Another suggestion upon which comment was invited was whether a trustee should be permitted to pay up to ten percent more than the valuation given by the valuer. This is aimed at overcoming the difficulty that a conservative valuation could result in a trustee foregoing the opportunity to make a purchase at an auction where a bid (that is, an offer) must be made on the spot.

6.22 Most commentators were in favour of the proposal³⁰ though two would restrict the power to five percent above such valuation.

6.23 In the Commission's view the proposal has merit and subject to the qualification which follows it recommends its adoption.³¹ Valuation is not an exact art. The market value of a property may be stated either as an exact figure or as within a certain range. In either case the valuation is a skilled statement of approximation. In this context the Commission assumes that the valuer will state his valuation as an exact figure. The Commission, however, agrees

²⁸ The flexibility on price which the Commission recommends should be allowed to a trustee may also help overcome the problem of fees being incurred unnecessarily: paras 6.21 to 6.23 below.

²⁹ Paras 2.21 to 2.25 above.

³⁰ Those against included the Law Society and REIWA.

³¹ One member of the Commission (Mr Ogilvie) does not agree. His view is that since the valuer's advice would not be a precondition of the exercise of the power to purchase land, a trustee could without breach of trust pay a higher price if it was prudent to do so. However, he considers that the legislation should not give the trustee statutory protection if he does not follow the valuer's advice.

with those commentators who considered that protection should be restricted to those cases where the trustee pays no more than five percent more than the valuation given by the valuer. The Commission also agrees with one commentator that the proposal should not be restricted to auctions and accordingly recommends that it should apply to private treaty sales as well.

(e) No restriction on proportion of trust fund to be invested in land

6.24 Trustees are under a general duty to diversify investments as much as practicable³² in order to minimise loss to the trust by the failure of any single investment. If the trust fund is small it may be difficult both to diversify the investments and purchase land. To make even a modest purchase could mean that most or even all of the estate would be invested in the one asset.

6.25 The question is whether the legislation should prescribe a limit, as in Victoria and Tasmania, or whether it should be left to the general duty of the trustee to diversify investments, as in Queensland.³³ In Victoria a trustee may not invest more than one-third of the trust funds in his hands in the purchase of land.³⁴ In Tasmania the proportion that can be invested is limited to fifty percent and such investment is only permissible where the trust estate exceeds \$20,000.³⁵

6.26 The commentators on the working paper were divided on the question. Of those in favour of a restriction, most supported fifty percent of the value of the trust estate as the limit.

6.27 The Commission's view is that no restriction should be imposed. As a matter of prudence, a trustee should not invest the whole of the trust fund in the same type of asset. However, the appropriate proportion may depend on the particular circumstances of the trust and a statutory limitation would not permit him to take these into account.³⁶ The requirement

³² Underhill, 474.

³³ *Trusts Act 1973-1981* (Qld), s 21(1)(c).

³⁴ *Trustee Act 1958-1983* (Vic), s 4A(1). This is more restrictive than the Supreme Court in Victoria insisted upon in *National Trustees Executors and Agency Company of Australasia Limited v Attorney-General for the State of Victoria* [1973] VR 610 where the Court authorised investment in land of up to fifty percent of the trust capital.

³⁵ *Trustee Act 1898-1981* (Tas), s 5(4).

³⁶ For example, a small trust estate may be of long duration and hence in need of an asset with a potential for capital growth.

as to proper advice³⁷ in respect of diversification and suitability to the circumstances of the trust should help ensure appropriate investment decisions.

(f) Power to be available to all trustees

6.28 As the working paper pointed out,³⁸ the courts appear to have been amenable to giving extended powers of investment to skilled trustees, particularly statutory trustee companies.³⁹ Accordingly the Commission invited views on whether any amending legislation should draw a similar distinction. All those who commented on the issue thought that no such distinction should be drawn. As foreshadowed,⁴⁰ the Commission agrees with the commentators and recommends that the power to invest in land should be available to all trustees. As has already been emphasised, the Commission considers that the solution to the problem of the inexperienced trustee is to enact a requirement to obtain advice before investing in land, rather than imposing what might be an arbitrary restriction on some trustees.

(g) Land in Western Australia only

6.29 Another issue is whether, in exercising the proposed statutory power to purchase land, trustees should be restricted to land in Western Australia. Tasmania⁴¹ and Victoria⁴² restrict investment to their respective States, while Queensland⁴³ permits investment anywhere in Australia as far as a fee simple is concerned but only within the State for lesser interests such as leaseholds.

6.30 All but one of those who commented on this issue were opposed to confining investment in land to Western Australia.⁴⁴

³⁷ Para 6.20 above.

³⁸ Paras 1.19 to 1.21.

³⁹ The other side of the coin is that a professional trustee may be required to exercise a higher standard of care than a lay trustee because he has held himself out as having expertise and has charged a fee for his services: *National Trustees Co of Australasia v General Finance Co of Australasia* [1905] AC 373; *Jacobs*, 509; *Bartlett and Others v Barclays Bank Trust Co Ltd* [1980] 1 Ch 515, 534.

⁴⁰ Para 6.3 above.

⁴¹ *Trustee Act 1898-1981* (Tas), s 5(1)(g).

⁴² *Trustee Act 1958-1983* (Vic), s 4A(1).

⁴³ *Trusts Act 1973-1981* (Qld), s 21(1)(c).

⁴⁴ The commentator in favour of limiting investment in land to Western Australia was Mr Sanderson. However, he suggested that the power to purchase a dwelling house for a beneficiary should not be so limited: paras 6.32 and 6.33 below. Some commentators suggested confining the power to the purchase of land within the Commonwealth of Australia.

6.31 However, notwithstanding the general view of the commentators, the Commission has concluded that it would be undesirable to extend the power to invest in land outside the State. To do so would raise a number of practical problems. Trustees may be unfamiliar with the area or its market conditions and may have difficulty in obtaining appropriate advice on the purchase. Adequate supervision of the property could also be a problem. The Commission's conclusion might perhaps have been otherwise if adequate opportunities did not exist to invest in Western Australian land but clearly that is not the case. If the circumstances warranted it a trustee could make application to the Supreme Court for power to purchase land in another jurisdiction.

3. DWELLING HOUSE FOR USE OF A BENEFICIARY

6.32 The Commission's view expressed in the preceding paragraph relates only to the purchase of land as an investment. The special case of the purchase of a dwelling house for the use of a beneficiary raises different considerations. At present, that power is confined to the purchase of a dwelling house in this State. The Commission agrees with all those who commented on the question that the power should extend to land outside Western Australia. As the Trustee Companies Association pointed out, beneficiaries under Western Australian trusts are often resident outside the State and in an increasingly mobile society this situation is likely to become more common.

6.33 The Commission considers that the needs of beneficiaries in these special cases outweigh the additional risks in the purchase of land outside the State. In any case the risks are unlikely to be as great in making an occasional purchase of a dwelling house for a beneficiary. The Commission accordingly recommends that section 17 of the *Trustees Act* should be amended to authorise trustees to purchase a dwelling house for the use of a beneficiary anywhere within the Commonwealth of Australia.⁴⁵ To gain the protection afforded by section 17(2) of the *Trustees Act* the trustee should be required to act on the advice of an independent valuer licensed in the relevant jurisdiction. Where there is no system

⁴⁵ The Commonwealth of Australia currently includes all the Australian States, the Northern Territory, the Australian Capital Territory and the external territories of Norfolk Island, Cocos Islands, Christmas Island, Ashmore and Cartier Islands and the Coral Sea Islands: R D Lumb and K W Ryan, *The Constitution of the Commonwealth of Australia Annotated*, 3rd ed (1981), 59.

It may be suggested that trustees should be empowered to purchase land outside Australia if a beneficiary's needs so require. However, the Commission considers that the difficulties involved in ensuring that the purchase was prudent make it undesirable to extend the power so far. A trustee could make application to the Court for such authority if the circumstances justified it.

of licensing of valuers in the jurisdiction concerned, the trustee should take the advice of a Fellow or Associate of the Australian Institute of Valuers (Inc) who carries on the business of valuation in that jurisdiction. Such a person should be employed independently of the owner of the land.

4. MAXIMUM SUM A TRUSTEE MAY SPEND ON IMPROVEMENT OR DEVELOPMENT

6.34 Under the *Trustees Act* a trustee can expend money subject to the same trusts in the improvement or development of any property for the time being vested in him⁴⁶ up to a limit of \$10,000, or such greater sum as the Supreme Court authorises.⁴⁷ In the working paper⁴⁸ the Commission suggested that this figure, which was set in 1962, should be increased.⁴⁹

6.35 The commentators expressed a variety of views. The Law Society opposed any increase on the basis that \$10,000 was sufficient unless the Court ordered otherwise. Some commentators proposed amounts ranging up to \$100,000 while others suggested that there should be no monetary limit at all. Some considered that the limit should not be fixed in absolute terms but should relate to the value of the property concerned.

6.36 The Commission agrees with the commentators who submitted that an increase in the sum is warranted. However, it considers that any formula geared to the size of the estate or the value of the land is too restrictive. The Commission accordingly recommends that the sum should be increased to \$20,000, provided that if the trustee obtains and considers proper advice⁵⁰ he should be able to spend up to \$50,000. Beyond that figure he should apply to the Supreme Court as at present.

⁴⁶ *Trustees Act*, s 30(1)(c). This power is additional to that contained in s 30(1)(a) to expend money for the repair, maintenance, upkeep or renovation of the property.

⁴⁷ *Trustees Act*, s 30(1)(c). It should be noted that s 43(1) of the *Trustees Act* empowers a trustee to raise the sum by selling, converting, calling in or mortgaging all or any part of the trust property for the time being in his possession.

⁴⁸ Para 7.7.

⁴⁹ In Queensland the figure is also \$10,000: *Trusts Act 1973-1981* (Qld), s 33(1)(b). 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 1925-1983* (NSW), s 82A(1A). In the ACT a trustee can spend \$2,000 or one-third of the value of the land whichever is the lesser: *Trustee Act 1925-1982* (ACT), s 82A(1). In other Australian jurisdictions there seem to be no statutory amount specified, though a trustee can apply to the Court for authority.

⁵⁰ Paras 2.21 to 2.25 above.

5. GRANTS OF OPTIONS TO PURCHASE TRUST PROPERTY

6.37 As pointed out above⁵¹ there is at present no statutory power for a trustee to grant options to purchase trust property except where he leases property, although in equity there is a limited power to grant options to purchase trust property where trustees have a power of sale.

6.38 Usually trustees are reluctant to run the risks involved in granting options under the equitable power because of uncertainty about the limits of their authority to do so. The Trustee Companies in their preliminary submission favoured express statutory power, limited as to time for exercise of the option. They suggested that in some cases the lack of such a power has resulted in the loss of an advantageous sale.

6.39 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 who 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 trustee to have clear power to grant an option in appropriate circumstances. On the other hand the grant of an option to purchase requires the trustee to forecast what would be a fair market price at some future time, or to fix a contract price by reference to market conditions at that future time. 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 desirable transaction from the trustee's point of view into one that was undesirable. Accordingly if statutory power is granted to trustees it would be necessary to provide sufficient protection for beneficiaries as well as suitable guidance for trustees.⁵²

6.40 All commentators on this issue agreed that trustees should be given clear statutory power to grant options over trust property, subject to a time limit and other safeguards. Their views as to the time limit ranged from three to twelve months. A number also suggested that the advice of a licensed valuer should be obtained on the price. One submitted that the sale price specified in the option should reflect the bank overdraft rate on the sum over the period

⁵¹ Paras 3.21 to 3.23.

⁵² For this reason the Commission rejected the alternative of recommending that a simple power to grant options be given along the lines of that contained in s 27(3)(b) of the *Trustees Act* in the special case of a lease.

of the option in addition to the current market value. While the Commission accepts the principle behind this last suggestion its introduction would introduce considerable complexity, not least because the relevant overdraft rate would not be known at the time of granting the option.

6.41 After considering the views of the commentators, the Commission recommends that the *Trustees Act* should include a provision 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 price fixed at the time of granting the option, provided the price was considered reasonable by an independent licensed valuer.⁵³ The option fee should be not less than that considered reasonable by such a valuer. If the power were expressed in this way, it would be subject both to the overriding duty of trustees to act prudently in all other respects and to any contrary directions in the trust instrument. It would also preserve the present equitable powers in case a situation arose in which their use was warranted.

6. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

6.42 The Commission recommends that -

- (a) Trustees should be authorised to invest in land.
(paragraphs 6.2 and 6.3)
- (b) The power to invest in land should be confined to the purchase of a fee simple interest in land in Western Australia.
(paragraphs 6.5 to 6.7 and 6.29 to 6.31)
- (c) No statutory limitation should be imposed on the type of land which can be purchased and nor should the land be required to be income-producing.
(paragraphs 6.8 to 6.13, footnote 2 to para 6.10)

⁵³ If there is no system of licensed valuers in the jurisdiction where the land is situated, then the valuer should be a Fellow or Associate of the Australian Institute of Valuers (Inc) carrying on business as a valuer in that jurisdiction.

- (d) The legislation should provide that a trustee is not 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 of purchase if he obtains beforehand -
 - (i) a report by a licensed valuer who he believes on reasonable grounds is experienced in valuing the type of land concerned in the locality in which it is situated; and
 - (ii) the price the trustee pays for the land does not exceed by more than five percent the value of the land, as stated in the valuer's report.

(paragraphs 6.14, 6.15 and 6.21 to 6.23)

- (e) The valuer's report referred to in (d) above should be in writing and contain a statement as to -
 - (i) the value of the land;
 - (ii) the actual or potential income from the land;
 - (iii) the outgoings associated with owning it.

(paragraph 6.16)

- (f) A trustee should also, as a precondition of purchasing land, obtain and consider proper advice as to whether the purchase is appropriate having regard to the need for diversification and the circumstances of the trust generally.

(paragraph 6.20)

- (g) No restriction should be imposed on the proportion of the trust estate which a trustee may invest in land.

(paragraphs 6.24 to 6.27)

- (h) The power to invest in land should be available to all trustees.

(paragraph 6.28)

- (i) Section 17 of the *Trustees Act* should be amended to authorise trustees to purchase a dwelling house for the use of a beneficiary anywhere within the Commonwealth of Australia. To gain the protection afforded by section 17(2)

of the *Trustees Act* the trustee should act on the advice of an independent valuer licensed in the relevant jurisdiction or, if there is no licensed valuer available in that jurisdiction, then on the advice of a Fellow or Associate of the Australian Institute of Valuers (Inc) carrying on business as a valuer in that jurisdiction.

(paragraphs 6.32 and 6.33)

- (j) The maximum sum a trustee can expend on improvement or development pursuant to section 30(1)(c) of the *Trustees Act* should be increased to \$20,000, provided that if the trustee obtains proper advice he should be able to spend up to \$50,000. If he wishes to spend more than \$50,000 he should apply to the Supreme Court for authorisation to do so as at present.

(paragraphs 6.34 to 6.36)

- (k) The *Trustees Act* should be amended 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 price fixed at the time of granting the option, provided the price and option fee was considered reasonable by an independent licensed valuer.

(paragraphs 6.37 to 6.41)

CHAPTER 7 - DEPOSITS IN BANKS AND BUILDING SOCIETIES

1. BANKS

(a) Certificates of deposit

7.1 The present position in Western Australia¹ and elsewhere² was outlined earlier. Section 16(1)(d) of the *Trustees Act* provides that trustees may invest in "fixed deposits" in any incorporated or joint stock bank carrying on business in the State, "on deposits" in the Savings Bank Division of the Rural and Industries Bank of Western Australia and "on deposit" in any savings bank authorised to carry on savings bank business under the *Commonwealth Banking Act 1959-1982*. As pointed out, although it seems reasonably clear that the acquisition of a negotiable, convertible or transferable certificate of deposit direct from a bank as a result of a deposit with the bank falls within section 16(1)(d), there is considerable doubt whether the provision also authorises the purchase of such a certificate from a third party.

7.2 No commentator objected to the Commission's provisional view expressed in the working paper that section 16(1)(d) of the *Trustees Act* should be amended so as expressly to authorise a trustee's acquisition of a negotiable, convertible or transferable certificate of deposit from a bank as a result of a deposit he has made with the bank. Such an amendment would merely make explicit what is probably already implicit. The Commission recommends accordingly. The Commission also agrees with the majority of the commentators on the further issue that trustees should also be authorised to purchase such certificates from a third party, since there may be advantages to the trust in terms of the discounted price.³ An objection to the proposal may be that it would expose the trustee to risk of fraud or forgery. However, in the Commission's view such a risk is remote and in any case would be no greater than with the purchase of some other securities which are presently authorised investments.⁴ Because of the changing pattern of investment, any legislative amendment should enable investment in any new forms of certificates of deposit which might be developed.⁵

¹ Para 3.7.

² Paras 4.5 and 4.6.

³ Those opposed to the purchase of such certificates from third parties included the Law Society and the Trustee Companies.

⁴ Even a mortgage can be forged.

⁵ As has been done in Victoria: *Trustee Act 1958-1983* (Vic), s 4(1)(k).

(b) Deposits in State banks outside Western Australia

7.3 Section 16(1)(d)(i) of the *Trustees Act* restricts deposits in trading banks to those carrying on business in Western Australia and therefore precludes deposits with other State trading banks such as those of New South Wales and South Australia, which do not carry on business in this State. Similarly, deposits in savings banks are limited to deposits in the Savings Bank Division of the Rural and Industries Bank of Western Australia and on deposit in any savings bank authorised under the *Commonwealth Banking Act 1959* and any amendments thereto. This excludes State savings banks outside Western Australia. In the view of the Commission such restrictions are now artificial and unnecessary for the protection of beneficiaries. Collection of maturing investments at other State banks does not pose a problem in practical terms as local banks will arrange collection of funds.

7.4 The Commission accordingly recommends that the *Trustees Act* should authorise trustee investment in interest-bearing deposits in any bank authorised under Commonwealth⁶ or State legislation to carry on banking business.⁷

2. DEPOSITS IN CERTIFIED BUILDING SOCIETIES

7.5 As pointed out in paragraph 3.8 above, although investment in shares in, or on fixed deposit with, certified building societies are presently authorised trustee investments, investments on "call deposit" or "deposit of no fixed term" are probably not. This seems anomalous. There is no reason to distinguish between fixed and call deposits as regards safety since deposits, whether at call or not, would be repayable in priority to share capital⁸ and hence would be a safer investment. There was general agreement amongst those who

⁶ Commonwealth power does not extend to State banking unless such banking extends beyond the limits of the State concerned: *Commonwealth of Australia Constitution*, s 51(xiii) and see also Weaver and Craigie, 4.

⁷ Such a provision would incidentally have the advantage of authorising a trustee to invest in a current account in a trading bank if such an account carries interest. At present the authorisation under the *Trustees Act* extends only to "fixed deposits". However, s 116 of the *Rural and Industries Bank Act 1944-1981* empowers a trustee to invest any trust money on current account in the Rural and Industries Bank. Presumably a trustee will only do so at interest.

⁸ *Building Societies Act 1976-1982* (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).

commented on the specific issue that call deposits in certified building societies should be authorised trustee investments and the Commission recommends accordingly.⁹

7.6 The Commission's recommendation applies only to building societies which qualify as authorised trustee investments under the *Trustees Act*. In order to qualify, a building society must be certified by notice in the *Gazette*, signed by the State Treasurer, as a society in which trustees may invest.¹⁰ The State Under Treasurer has stated¹¹ the requirements for certification in the following terms -

- "1. The society is to have been in operation for at least three years.
2. The society must demonstrate expertise in building society management over at least a three year period.
3. The total assets of the society are not to be less than \$2,500,000.
4. The total liabilities of the society (as reduced by the aggregate amount due to holders of the society's shares, and the principal amount unpaid by the society on long term loans) are not to exceed seventy-five percent of the value of the society's tangible assets (as reduced by the principal amount unpaid by the society on long term loans).
5. The society shall not approve of an advance unless, at the time the approval is given, the society holds liquid funds equal to not less than ten percent of the

⁹ The Stock Exchange suggested that when the *Trustees Act* was enacted in 1962 building societies generally did not have a category of call deposits and that this may explain why s 16(1)(e) does not refer to them.

¹⁰ *Trustees Act*, s 16(1)(e).

¹¹ These requirements were set out in the annexure to a letter to the Commission dated 1 June 1983. The requirements were last revised in 1976.

In introducing an amendment to the Victorian *Trustee Act* in 1981 to authorise trustee investment in prescribed building societies the then Attorney General of that State indicated that to achieve that status a society must -

- (a) have been registered for at least ten years;
- (b) have had a satisfactory history of operation for five years immediately preceding its application;
- (c) except in special cases, hold withdrawable funds - deposits, borrowings and paid up share capital but not fixed share capital - of not less than \$50 million;
- (d) have always furnished financial and other information relating to its business operations as required by the registrar; and
- (e) have complied with all statutory requirements relating to reserves, liquidity, profitability, investments and lending Victorian *Parliamentary Debates* (Legislative Council) 27 October 1981, 2023-2024.

total of members' paid-up share capital, deposits held with and loans to the society (as defined in section 40 of the *Building Societies Act, 1976*).

6. The secretary or manager of the society to be engaged full time in building society operations.
7. Other matters at the discretion of the Building Societies Advisory Committee.
8. The society to maintain the requirements."

The Under Treasurer informed the Commission that it is a function of the Registrar of Building Societies to monitor the affairs of certified building societies to ensure that they continue to meet standards required by the Treasurer.

7.7 The Commission's recommendation in paragraph 7.5 above is designed merely to rectify the minor anomaly referred to in that paragraph. The Commission has not considered whether the present requirements for certification are adequate or whether in any case they should be the subject of a statutory provision rather than left to be formulated by the Treasurer. Some commentators¹² raised issues of a broader nature. These are all matters which the Commission suggests should be dealt with by the proposed trust investments review committee.¹³

3. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

7.8 The Commission recommends that -

- (a) Section 16(1)(d) of the *Trustees Act* should be amended so as expressly to authorise a trustee's acquisition of a bank certificate of deposit whether in a negotiable, convertible, transferable or other form and whether purchased direct from a bank or a third party.

(paragraphs 7.1 and 7.2)

¹² These included the Council of Authorised Money Market Dealers, Martin Corporation Limited and Mr W R Munro. Details of these submissions are on file with the Commission.

¹³ Paras 2.28 to 2.30 above.

- (b) The *Trustees Act* should be amended to authorise trustee investment in interest-bearing deposits in any bank authorised under Commonwealth or State legislation to carry on banking business.

(paragraphs 7.3 and 7.4)

- (c) Call deposits in certified building societies should be an authorised trustee investment.

(paragraph 7.5)

- (d) The proposed trust investments review committee be asked to consider the adequacy of the present provisions for certifying a building society as one in which a trustee may invest.

(paragraph 7.7)

CHAPTER 8 - COMPANY SECURITIES

1. INTRODUCTION

8.1 As pointed out above,¹ only three Australian jurisdictions presently authorise the purchase of company securities as trustee investments. These are Western Australia, South Australia and the Northern Territory. However, the United Kingdom² and New Zealand also permit investment in certain company securities.

8.2 In Western Australia, trustees were given statutory power to invest in company securities by section 16 of the *Trustees Act 1962*.³ The object was to provide a form of investment which would help guard the trust fund from the risk of capital depreciation generally associated with traditional trustee securities, or which might earn a higher income for the trust than traditional securities. Although some risk is inevitably involved in the purchase of company securities, the provisions were aimed at reducing the risks as much as practicable. There was no question of trustees being permitted to engage in speculation or to "play the market" with trust funds.⁴ In outline, the Act limits investment to the securities of companies -

- (i) which are incorporated in Australia;
- (ii) which have a minimum paid up share capital of two million dollars;
- (iii) the ordinary shares⁵ of which are quoted on an Australian stock exchange; and
- (iv) which have paid a dividend on their ordinary shares in each of the fifteen years preceding the year in which the investment is made.

¹ Para 4.10.

² The English Law Reform Committee has recently recommended a substantial widening of a trustee's power to invest in company securities: para 4.11 above.

³ Appendix I reproduces s 16 in full.

⁴ Report of the Law Reform Sub-committee of the Law Society of Western Australia on *The Law of Trusts*, (1961), 13.

⁵ However, if preference shares are to be purchased it is only those shares which must be listed.

The Act also lays down certain specific requirements relevant to the type of security concerned.⁶ In all cases the trustee is required to obtain expert advice before the purchase of company securities.

8.3 The Commission considers that the present approach, which aims at ensuring reasonable safety for trust funds by confining trustee investment to the securities of substantial, listed, Australian companies, is the correct one. However, it believes that certain of the existing requirements require modification to take account of experience gained in the working of the legislation and changes in the pattern of commercial investment since 1962. In particular, the Commission considers that the conditions under which a trustee can lend money to a company on an unsecured basis should be tightened. Its recommendations for amendment follow. The Commission should be taken as endorsing the present requirements except where it indicates otherwise.

2. REQUIREMENTS APPLICABLE TO ALL COMPANY SECURITIES

(a) Qualifying capital

8.4 Section 16(4)(a) of the *Trustees Act* provides that a trustee may not invest in the securities of a company unless the company has a paid up share capital of at least two million dollars.

8.5 This safeguard has been weakened by inflation since 1962.⁷ Accordingly, the Commission invited comment in the working paper on the question whether the present prescribed minimum paid up share capital should be increased. Most commentators considered that it was not necessary to make any change in this respect. However, others submitted that an increase was justified. Martin Corporation Limited suggested ten million dollars as the minimum amount while the Stock Exchange and Australian United Corporation Limited suggested five million dollars.

8.6 The Commission agrees with those who submitted that the present minimum amount of two million dollars of paid up share capital is inadequate and recommends that the sum be

⁶ These are referred to below where appropriate.

⁷ The equivalent in real terms in 1983 of two million dollars in 1962 is approximately eight million dollars: *Commonwealth Year Book* 1983, 155.

increased to five million dollars. Although of course there are exceptions, companies with a lesser amount of paid up capital are less likely to have the skilled management and financial capacity to survive adverse economic conditions.

8.7 The use of paid up share capital as a test of a company's present financial stability has limitations. Paid up capital broadly⁸ represents the amount the shareholders have contributed to the company to enable it to commence or carry on operations. However, the amount so contributed could have subsequently diminished in trading. It was accordingly suggested to the Commission⁹ that a better criterion would be one which prescribes a minimum amount of shareholders' funds currently available. The term "shareholders' funds" is often used in company balance sheets and is intended to represent the amount by which the value of the company's assets exceeds that of its liabilities, that is, the company's net worth.¹⁰ However, a balance sheet is to some extent an artificial document, intended to be construed in the light of accounting conventions, and the monetary value ascribed to shareholders' funds may to some extent be a subjective assessment of a company's financial position. Furthermore, directors have some latitude as to what terms they use in the company's accounts. Although it is a current statutory requirement that the balance sheet include an item specifying the company's paid up share capital,¹¹ there is no similar requirement relating to shareholders' funds.¹² Accordingly, the substitution of a prescribed amount of shareholders' funds for that of paid up share capital could produce uncertainty as to whether a company's securities qualified as a trustee investment. For these reasons, the Commission has concluded that the criterion of a minimum paid up share capital should remain.¹³ It must be emphasised that the condition does not stand alone: it is only one of a number which must be satisfied before a company's securities qualify as an authorised trustee investment.

⁸ An exception would be where the company revalues its assets, thereby creating a revaluation reserve. It may then declare a bonus issue of shares which would then become part of the paid up share capital.

⁹ During the course of a discussion with various interested groups.

¹⁰ Those who made the suggestion, however, considered that the amount specified in the balance sheet representing goodwill should be disregarded because of its subjectivity.

¹¹ *Companies (Western Australia) Regulations*, Schedule 7, para 5(1)(a).

¹² The National Companies and Securities Commission has suggested in a green paper that there should be a requirement placed on all companies to publish in their accounts an item disclosing shareholders' funds: National Companies and Securities Commission, *Financial Reporting Requirements of the Companies Act and Codes* (1983), para 7.2.7. If this suggestion is ultimately adopted the proposed trust investments review committee could reconsider the matter.

¹³ In the Commission's view the tests in the *Trustees Act* should be simple to apply, even though they may not provide an absolutely certain guide as to safety. The requirement that the trustee obtain proper advice before investing in company securities will help ensure that regard is had to other factors.

8.8 Adoption of the Commission's recommendation that the paid up share capital requirement be increased from two million dollars to five million dollars would result in some company securities which are presently authorised trustee investments being no longer so. It was suggested to the Commission¹⁴ that in effecting the change it should be provided that those companies whose securities presently have trustee status should continue to have that status, notwithstanding that they no longer comply with the new requirement as to paid up capital. On balance the Commission considers that such an exception should not be made. To exempt existing companies from the change would in effect mean that trustees would continue to be authorised to invest in securities in respect of which there are, in the view of Parliament, insufficient safeguards.¹⁵

8.9 However, trustees who hold company securities when the amendment comes into force and which are no longer authorised trustee investments would not necessarily be obliged to dispose of them. Section 20 of the *Trustees Act* provides that 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 *Trustees Act*. Since a trustee is subject to the general equitable duty of prudence, he should no doubt consider carefully whether he should retain them.

(b) Dividend qualifying period

8.10 Section 16(4)(b) of the *Trustees Act* provides that a trustee shall not invest in the securities of a company if it 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". Various dividend periods are specified in other jurisdictions which permit trustee investment in company securities. England and New Zealand have the shortest period, five years.

8.11 The Stock Exchange suggested in its preliminary submission that the present dividend paying period of fifteen years is too long and excluded many worthy companies. Of those who commented on this issue, only the Western Australian Permanent Building Societies

¹⁴ The suggestion was made by two prominent companies whose securities would cease to be authorised trustee investments under the Commission's proposals.

¹⁵ The inclusion of an exemption would also add to the complexity of the legislation. It would also be unnecessary. There is a sufficiently wide range of listed companies which have a paid up share capital of five million dollars or more to provide adequate opportunities for trustee investment. See also para 8.12 below.

Association (Inc) considered that the present period should remain. Most favoured a five year period, though a few suggested ten years.

8.12 After consideration the Commission has concluded that a five year dividend qualifying period is adequate and it recommends accordingly.¹⁶ In making its recommendation the Commission has had regard to the following -

- * Courts have sometimes specified a five year dividend period when they have granted trustees additional powers to invest in company shares.¹⁷
- * Trustees are required to obtain proper advice before investing in company securities¹⁸ and are in any case under a general duty to exercise prudence.¹⁹
- * The present period of fifteen years may tempt companies to declare dividends when sound management would dictate otherwise.

3. INVESTMENT IN SHARES

8.13 Apart from the changes recommended above relating to a trustee's power to invest in company securities generally, the Commission considers that the present requirements for investment in company shares are adequate and does not recommend any other change. However, it considers that substantial changes should be made to the conditions under which a trustee can lend money to a company. Its recommendations in this regard appear below.

¹⁶ A number of experts in the field with whom the Commission had discussions suggested that five years was an appropriate period.

¹⁷ *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.

¹⁸ Paras 2.21 to 2.25 above.

¹⁹ Para 1.12 above.

4. LOANS TO COMPANIES

(a) Debentures

(i) *Quotation on a stock exchange*

8.14 The Stock Exchange submitted that it was inappropriate to maintain the present requirement that trustees may invest only in debentures quoted on an Australian stock exchange.²⁰ The Stock Exchange's argument can be summarised as follows -

Availability

- * It is becoming increasingly rare for companies to seek stock exchange listing for their debenture issues²¹ and accordingly the requirement increasingly limits the opportunity of trustees to invest in company debentures.

Marketability

- * Debentures issued by companies whose shares are quoted on a stock exchange are readily marketable regardless of whether or not the debentures themselves are quoted.
- * The market value of debentures is determined by current interest rates and the financial strength or weakness of the company which issued them, and their quotation on an exchange is not a factor.

Other safeguards

- * Strict controls are imposed on the public issue of debentures under the *Companies Codes*²² and accordingly it is unnecessary to retain the additional requirement of stock exchange quotation.

²⁰ *Trustees Act*, s 16(3)(a).

²¹ This is partly because of the cost involved but mainly because companies can usually obtain subscriptions for their debentures without listing them.

8.15 After examining the position, the Commission agrees with the conclusions of the Stock Exchange. This was also the view of the majority of the commentators.²³ The Commission accordingly recommends that the present requirement that debentures²⁴ must be quoted on a stock exchange to be an authorised trustee investment should be repealed.

(ii) *Charge on assets*

8.16 Section 16(1)(1) of the *Trustees Act* does not require a debenture to constitute a charge on the company's assets in order to be an authorised trustee investment.²⁵ The Commission regards this as unsatisfactory. Trustees should not be permitted to make loans to companies on a long-term basis, or to purchase from a third party a certificate acknowledging such a loan,²⁶ unless the loan is adequately secured. In recent years members of the public have in a number of instances not received full repayment of their unsecured loans following the company's collapse. Accordingly, to provide reasonable safety, the Commission recommends that, except for short term loans,²⁷ a trustee should be confined to investing in public offerings of what are described as "mortgage debentures" or "debentures"²⁸ in accordance with section 97 of the *Companies (Western Australia) Code* or its equivalent elsewhere in Australia. That section lays down requirements which are designed to ensure that the document can only be so described if the loan is adequately secured in accordance with that section.²⁹ These and other

²² That is, the *Companies (Western Australia) Code* and its counterparts in other Australian jurisdictions. The Northern Territory has not joined the national companies scheme though its provisions in this regard are broadly similar.

²³ The majority included the Western Australian Permanent Building Societies Association (Inc) and the Council of Authorised Money Market Dealers. Those against removing the requirement included the Law Society and the Public Trustee.

²⁴ By "debentures" the Commission is referring in this para, and in paras 8.19 and 8.22, to documents which can be described as such under s 97 of the *Companies Codes*: para 8.16 below.

²⁵ S 5(1) of the *Companies Codes* defines "debenture" as including "debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a corporation in respect of money that is or may be deposited with or lent to the corporation, *whether constituting a charge on property of the corporation or not....*" (emphasis added). A trustee could thus at present invest in what is *in law* a debenture but which is not secured.

²⁶ That is, to purchase a debenture or note on the market.

²⁷ Para 8.26 below.

²⁸ These are intended to include, as the case may be, certificates of mortgage debenture stock or certificates of debenture stock.

²⁹ S 97 provides that a document associated with a public offering may only be described as a "mortgage debenture" or "certificate of mortgage debenture stock" if -

- (a) the repayment of all money lent in response to the invitation is secured by a first mortgage given to the trustee for the debenture holders over land vested in the company or any of its guarantor companies;
- (b) the mortgage is registered; and

requirements in the *Companies Codes* as to public offerings of debentures³⁰ appear to provide appropriate conditions for safety in respect of trust investment.

(iii) *Time to maturity*

8.17 The Stock Exchange submitted that if its view as to unquoted debentures is adopted consideration should be given to limiting trustee investments in unquoted debentures to those which have only a certain time to run to maturity. The Stock Exchange suggested that quoted company debentures should continue to be unrestricted as to the time to maturity but that unquoted debentures should be limited to a term not exceeding seven years.

8.18 The commentators expressed a range of views. Those in favour of finite terms made suggestions ranging from three to twenty years. Others said that they could see no advantage in a maximum time limit and that it should be left to the discretion of the trustee.

8.19 After consideration of the views expressed, the Commission has concluded that there should be a time limit of five years on debentures from the date of acquisition, whether quoted or unquoted, and recommends accordingly. There are a number of reasons for this recommendation. First, while it is difficult to predict the fortunes of many companies with reasonable certainty even within a period of five years, beyond that period the task becomes extremely difficult. Secondly, fluctuating interest rates could cause serious problems for the sale of long-term debentures. Finally, the imposition of a time limit may help ensure that trustees kept the appropriateness of their debenture holdings under review.

-
- (c) the liability to repay those debentures does not exceed sixty percent of the value of the land: s 97(4)(a).

In addition, the prospectus must include a written valuation of the company's interest in the land by an independent qualified valuer: s 97(4)(b).

S 97 also provides that a document can only be described as a "debenture" or "certificate of debenture stock" if -

- (a) the prospectus includes a statement that repayment of all moneys has been secured by a charge in favour of the trustee for the debenture holders over the whole or any part of the tangible property of the company and of its guarantor companies;
- (b) the relevant tangible property is sufficient, and is reasonably likely to be sufficient to meet the liability for the repayment of all such moneys; and
- (c) the statement in (a) is supported by a summary by a registered company auditor showing the aggregate values of the tangible property: s 97(5)(b).

All other public offerings which are not so secured can only be described as an unsecured (deposit) note: s 97(3).

³⁰

See, for example, the requirement in s 152 for the appointment of a trustee for debenture holders.

(iv) Subsidiaries of banks

8.20 In its preliminary submission the Stock Exchange suggested that trustees should also be permitted to invest in debentures issued by a company which is the wholly owned subsidiary of a bank.³¹ At present such debentures do not qualify because the shares of the issuing company cannot be quoted on a stock exchange.³² A number of finance companies are now wholly owned subsidiaries of banks and have lost stock exchange listing of their shares as a result.

8.21 Only one commentator was not in favour of debentures issued by wholly owned subsidiaries of banks being authorised trustee investments.³³ Some, however, were in favour only if the parent bank unconditionally guaranteed the debentures.³⁴

8.22 The Commission recommends that the debentures of wholly owned Australian subsidiaries of banks should be authorised trustee investments, provided the debentures have a maximum maturity date of five years from the date of acquisition and are a public offering which complies with section 97 of the *Companies (Western Australia) Code* or its equivalent elsewhere. It should not be a condition that the parent bank has guaranteed the debentures. In practical terms debentures of wholly owned subsidiaries of banks are safe³⁵ and also pay competitive rates of interest. In the event of a financial crisis a "rescue operation" would be very likely.³⁶ To add a requirement that the parent bank guarantee the investment would seem likely to result not in such a guarantee being given but in the debentures not having authorised trustee status.³⁷ However, the Commission does not consider that it is desirable to go further and extend the exemption to the debentures of partly owned subsidiaries of banks. While it is

³¹ That is, companies authorised under Commonwealth or State legislation to carry on the business of banking: paras 7.3 and 7.4 above.

³² See para 8.2(iii) above.

The Australian Stock Exchanges' listing requirements state that a company must have at least three hundred shareholders in order to qualify for share listing: *Australian Associated Stock Exchanges Official Listing Requirements*, s 1(3)(b).

³³ This was the Law Society. Those in favour included the Trustee Companies, the Australian Finance Conference and a number of merchant banks.

³⁴ These included the Western Australian Permanent Building Societies Association (Inc) and the Public Trustee.

³⁵ Banks are either Government owned or licensed and are of substantial size.

³⁶ An example of this is the takeover by the ANZ Banking Group Limited of the Bank of Adelaide in 1979. The Bank of Adelaide's subsidiary, the Finance Corporation of Australia Limited, was in financial difficulty.

³⁷ The Australian Finance Conference said that no bank currently guaranteed the public offerings of its subsidiary company and was unlikely ever to do so because of Reserve Bank requirements. See also Campbell Report, para 19.169.

unlikely that a bank would let a wholly owned subsidiary collapse, the same attitude may not be taken in relation to a partly owned subsidiary³⁸ or a company in which the bank has only a minority shareholding.³⁹ It should be noted that debentures of such companies may, however, qualify for authorised trustee status under the general criteria.⁴⁰

(v) *Wholly owned subsidiaries of other companies*

8.23 It was suggested to the Commission that the debentures of subsidiaries of certain other large companies, as distinct from banks, should also be granted authorised trustee status separately from the criteria relating to debentures generally. However, the Commission is not satisfied that such a course would be desirable.⁴¹ There have been examples where public companies have refused to meet the obligations of their subsidiaries. Such a situation may well occur again.

(b) Unsecured deposits, notes and convertible notes

8.24 In the preliminary submissions only one issue was raised in relation to such securities,⁴² namely whether trustees should continue to be authorised to lend to a company on an unsecured basis for up to seven years. The then Commissioner for Corporate Affairs suggested a maximum maturity date of three months.

8.25 Some commentators on the working paper thought that no change was necessary in respect of the maximum maturity date. Others submitted that the maximum period for unsecured deposits or notes, other than convertible notes, should be shorter than seven years with suggested terms ranging from six months to five years.

³⁸ Generally a company is a subsidiary of another company if that other company controls the composition of the board of directors, controls more than half the votes at a general meeting or holds more than half the issued share capital: *Companies (Western Australia) Code*, s 7.

³⁹ The Commission considers that it would also be undesirable to grant authorised trustee status to the debentures of subsidiaries of overseas banks which do not carry on the business of banking in Australia. Such a bank may not be supported by the banking system in its own country to the extent that banks are in Australia.

⁴⁰ That is, their shares may be listed and they may have the required minimum paid up capital and meet the dividend qualifying period.

⁴¹ Companies which are only partly owned subsidiaries may, however, qualify for authorised trustee status under the general criteria: see footnote 1 above.

⁴² S 16(1)(m) of the *Trustees Act* includes a reference to **secured** deposits or notes. The Commission's recommendation as to the maximum maturity date of unsecured deposits or notes is intended also to cover the case where, although the loan is secured, it is not secured to the extent required by s 97 of the *Companies Codes*: footnote 4 to para 8.16 above.

8.26 The Commission's view is that trustees should no longer be authorised to lend trust funds to companies, except for a short period, unless the loan is secured as specified in paragraph 8.16 above. The Commission accordingly recommends that for loans not so secured, the loan⁴³ should be a public offering and either be at call or have a maximum maturity date of six months. Lending for a longer period without adequate security involves the risk of the trustee being unable to sell notes in a failing company and thus having little chance of recovering his money. The Commission considers that this is a risk which trustees should not be authorised to take.

8.27 However, an exception to the recommendation in the previous paragraph is justified in the case of convertible notes, that is notes which give the holder the right to have the loan redeemed by the issue of shares by the company. A trustee who takes up an issue of convertible notes or who purchases convertible notes on the open market has the opportunity of eventually making a capital gain if he converts to shares and thus the risk to the trust fund is at least to some extent justified by this possibility. In order to allow this to happen, a trustee should be permitted to acquire convertible notes of a reasonable duration. After taking advice from a number of persons with special knowledge in the field, the Commission recommends that the maximum permitted period to maturity for convertible notes should be five years from the date of acquisition. This is the time limit the Commission has proposed for secured loans. Similar considerations as those expressed in paragraph 8.19 above would also apply to convertible notes.

5. RIGHTS TO SHARES AND CONVERTIBLE NOTES

8.28 At present a trustee is only authorised to take up rights to shares or convertible notes in cases where they are offered to him in respect of an existing holding in that company or any other company.⁴⁴ Apart from these circumstances a trustee does not have power to acquire such rights even though he could purchase the actual shares themselves if they were offered for sale.

⁴³ This is intended to cover a direct loan to a company or the purchase of an unsecured (deposit) note on the open market: footnote 5 to para 8.16 above. Restriction to public offerings will ensure the application of the safeguards in the *Companies Codes* to such securities.

⁴⁴ *Trustees Act*, s 25(4).

8.29 The Stock Exchange argued that to purchase rights to shares sometimes provides cheaper terms of entry into a company than purchasing the shares themselves on the open market and accordingly the power to do so should be given to trustees. In the working paper the Commission said it could see no objection to such a proposal since, once the rights were purchased and exercised, the trustee would hold shares which he could have purchased directly under the existing law. The Commission, however, suggested that a trustee should be obliged to obtain advice before purchase.

8.30 Similarly, shareholders are sometimes given the right to take up convertible notes. If a trustee is a shareholder in such a company he may exercise such rights in the same way as any other shareholder but, if he is not, he cannot purchase them. Sometimes shareholders do not wish to take up rights and offer them for sale. In the working paper the Commission said it could see no objection to a trustee being authorised to purchase such rights since it might provide an advantageous means of entry into the company concerned.

8.31 All those who commented supported the Commission's tentative views. The Commission accordingly recommends that trustees should be authorised to purchase the rights to shares and convertible notes in those cases where the trustee is authorised to purchase the shares or convertible notes themselves, provided that he first obtains proper advice as to the purchase.⁴⁵

6. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

8.32 The Commission recommends that -

- (a) The minimum paid up share capital of a company in which a trustee may invest should be increased to five million dollars.

(paragraphs 8.4 to 8.9)

- (b) The dividend qualifying period of a company in which a trustee may invest should be reduced to five years.

(paragraphs 8.10 to 8.12)

⁴⁵ Paras 2.21 to 2.25 above.

- (c) The requirement that debentures must be quoted on a stock exchange to be an authorised trustee investment should be repealed, but the requirement that they should be public offerings should continue.
(paragraphs 8.14 and 8.15)
- (d) Except as provided in (e) below, a trustee should no longer be able to lend to a company (or to purchase a company debenture or note from a third party) unless -
- (i) the loan is secured in accordance with the requirements specified for "mortgage debentures" or "debentures" in section 97 of the *Companies (Western Australia) Code* or its equivalent elsewhere in Australia; and
(paragraph 8.16)
- (ii) there is a maximum time of five years to maturity from the date of acquisition of the debenture .
(paragraphs 8.17 to 8.19)
- (e) Loans to companies other than those complying with (d)(i) above, that is unsecured notes or unsecured deposit notes, should be a public offering and either be at call or have a maximum maturity date of six months, unless it is an investment in a convertible note of a maximum duration of five years from the date of acquisition.
(paragraphs 8.24 to 8.27)
- (f) The debentures of wholly owned Australian subsidiaries of banks should be specifically authorised trustee investments provided they are public offerings complying with (d) above.⁴⁶
(paragraphs 8.20 to 8.22)
- (g) The *Trustees Act* should be amended to authorise trustees to purchase the rights to shares and convertible notes in those cases where the trustee is

⁴⁶ At present, such debentures are not authorised trustee investments because the shares of the subsidiary are not listed on a stock exchange.

authorised to purchase the shares or convertible notes themselves, provided that he first obtains proper advice as to the purchase.

(paragraphs 8.28 to 8.31)

- (h) In all other respects the existing requirements for trustee investment in company securities should be maintained.

(paragraph 8.3)

CHAPTER 9 - BANK ACCEPTED OR INDORSED BILLS

1. GENERAL

9.1 The Stock Exchange and the Trustee Companies Association suggested in their preliminary submissions that "bank bills"¹ were suitable investments for trustees and should therefore be included in the list of authorised investments in the *Trustees Act*. The Stock Exchange pointed out that at the time the *Trustees Act* was enacted in 1962 bank bills were not in general use as a form of investment and suggested that this may have been the reason why they were not then included.

9.2 Bank bills are a sophisticated form of investment but in view of their safety and the high returns often available, the Commission considers that they should be added to the list of authorised trustee investments.² Because of the large minimum sums involved³ this avenue of investment will not be open to all trustees. However, their inclusion will provide additional opportunities for trustees who have sufficient funds available.

9.3 A number of consequential issues arise if this general recommendation is accepted -

- (a) Should investment in bank indorsed as well as bank accepted bills be authorised?
- (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?

These questions are considered below.

2. BOTH TYPES OF BANK BILL TO BE AUTHORISED

9.4 A bill which is the subject of general acceptance by a bank is one which a bank has agreed to honour when it matures and the holder is not required to follow any special

¹ See paras 3.17 to 3.20 above for an explanation of bank bills and their function.

² This was also the view of all those who commented on the matter except the Law Society and the Institute of Legal Executives.

³ The Commission has been informed that in the Eastern States of Australia bills are usually of a denomination of not less than \$50,000 but that in Western Australia bank bills are drawn for as little as \$20,000 because of the requirements of the local market.

procedure to render the bank liable.⁴ Accordingly, there is no reason why such bills should not be authorised trustee investments and the Commission recommends accordingly. The position with a bank indorsed bill is different. A bank indorsed bill is one which a bank has agreed to pay should the acceptor default and under the *Commonwealth Bills of Exchange Act* the holder must first present the bill to the acceptor for payment on the day it falls due.⁵ If he does not do so, the bank is discharged from liability.⁶ If the acceptor dishonours the bill by non-payment the holder must give notice thereof to the bank within a reasonable time.⁷ However, in spite of these strict requirements, the Commission recommends that bank indorsed⁸ bills should also be authorised.⁹ This was also the view of the majority of commentators. The requirements that must be complied with in the case of bank indorsed bills do not detract from their ultimate safety. A trustee should simply take care to ensure that the requirements are complied with.¹⁰

9.5 The Council of Authorised Money Market Dealers suggested that a trustee should be required to purchase bank bills through one of its members. It said that such a requirement would ensure that trustees acquired bills which were genuine (that is, not forged) and regularly drawn and that full collection facilities at maturity were available to them. Although many trustees will as a matter of caution purchase bills through an authorised dealer the Commission considers that it is unnecessary that the Act should impose this as a statutory

⁴ *Bills of Exchange Act 1909-1973* (Cth), s 57(1). Acceptance may be general or qualified: id, s 24. The Commission's recommendation as regards bank accepted bills is intended to apply only to those whose acceptance is general. The Commission understands that bills whose acceptance is qualified are not in fact used in the market: see footnote 1 to para 3.19 above. However, the provision should exclude them in case the practice changes.

⁵ Id, s 50(1). The holder must also present the bill at the proper place as specified in the bill and on a business day: id, s 50(2). If the day on which the bill falls due is a non-business day it must be presented on the business day next following: id, s 98(2).

⁶ Unless the holder has a valid excuse for delay: id, s 51. The acceptor, however, remains liable.

⁷ Id, ss 53 and 54. S 54 lays down rules for what constitutes a reasonable time.

⁸ The Commission's recommendation as regards bank indorsed bills is intended to apply only to those which are not restrictively indorsed, for the same reason as applies in the case of bank accepted bills: footnote 1 above.

⁹ For the position in other jurisdictions see para 4.21 above. It is of note that the *Building Societies Act 1976-1982* (WA) empowers building societies to invest their liquid funds in both bank accepted and bank indorsed bills: ss 40(3) and 47.

The *Public Moneys Investment Amendment Act 1981* (WA) only permits the investment of public moneys in bank accepted bills. The then Treasurer gave as the reason for restricting investment to these bills the relative ease of recourse against the bank: Western Australian Parliamentary Debates (1981-1982) Vol 233, 1486.

¹⁰ It must be emphasised that these requirements only relate to the **bank's** liability. If for some reason the trustee does not comply with the requirements, so that the bank is discharged from liability, the trustee could still claim against the acceptor: see footnote 6 above. However, whether the claim would be met would depend on the acceptor's solvency.

obligation. A trustee may prefer to make other arrangements which are adequate in the circumstances¹¹ or he may be sufficiently experienced to deal with the whole matter himself.

3. MAXIMUM PERMISSIBLE TIME TO MATURITY

9.6 The working paper invited comment on the suggestion of the Stock Exchange that the maximum permissible time to maturity should be 366 days, as this was the maximum time for which bank bills were normally drawn.

9.7 The response of the commentators varied. Suggestions ranged from 180 days to five years and three were in favour of not prescribing any maximum period at all. Most commentators, however, favoured 200 days as the maximum period.

9.8 The Commission considers that there is a good case for imposing a maximum period to maturity at the time of acquisition by the trustee and recommends that it should be 200 days. Most bank bills traded in the market are of less than 200 days duration. Accordingly, specifying a maximum period of 200 days would not unduly limit a trustee's access to the market when he wished to purchase a bank bill, and would ensure that he had a ready market if he wished to sell it before maturity. Both the Victorian and South Australian enactments specify 200 days.¹²

4. APPORTIONMENT

9.9 In the working paper¹³ the Commission drew attention to the argument that, because the purchase of a bill is the purchase of a security at a discount, it is comparable to the purchase of a redeemable security the subject of section 18 of the *Trustees Act*,¹⁴ and consequently that the difference between the face value of the bill and the price paid for it should be treated as income and not capital. All those who commented on the issue considered that the difference was in the nature of income and it should be treated by the

¹¹ He may, for example, be able to make satisfactory arrangements with a dealer in the short term money market who is not an authorised dealer.

¹² *Trustee Act 1958-1983* (Vic), s 4(1)(j); *Trustee Act 1936-1983* (SA), s 5(1)(ca).

¹³ Para 8.8.

¹⁴ S 18 of the *Trustees Act* lays down rules for apportionment in the case of redeemable securities but seems not to apply to bills of exchange, since their presentation for payment would not be described as "redemption".

trustee as such. The Commission agrees and accordingly recommends that an appropriate provision be included in the *Trustees Act* to achieve this result.¹⁵

5. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

9.10 The Commission recommends that -

- (a) Both bank accepted and bank indorsed bills of exchange should be authorised trustee investments provided that with bank accepted bills the acceptance is general and with bank indorsed bills the bills are not restrictively indorsed.

(paragraphs 9.1 to 9.5)

- (b) The maximum permissible time to maturity of such bills should be 200 days from the date of acquisition by the trustee.

(paragraphs 9.6 to 9.8)

- (c) An appropriate provision should be included in the *Trustees Act* to ensure that the difference between the amount paid for a bank bill and the amount realised on the bill is treated as income and not capital.

(paragraph 9.9)

¹⁵ The legislation should also provide for the case where the trustee sells the bill before maturity by deeming the difference between the purchase price and the sale price to be income.

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

1. DISCUSSION

10.1 The apportionment provisions of the *Property Law Act 1969-1979* are outlined above.¹

10.2 In their application to trust estates the provisions seem sound as a matter of principle. The testator's death represents the starting point for both the life tenant and the remainderman. The capital of the estate which will ultimately go to the remainderman is composed of the testator's net assets at the date of his death. The life tenant is only entitled to the income on that sum. Hence when a dividend or other periodical payment falls due 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. Similarly, when the life tenant dies that part of the income of the estate which has accrued before the life tenant's death ought to go to her estate, rather than to the remainderman. The provisions can be prevented from operating by express stipulation so that, if the testator so wishes, he can provide for the whole of the income of his estate to be paid to the person who is the income beneficiary at the time when it becomes payable.

10.3 However, the Trustee Companies submitted that the provisions cause administrative delays and additional costs and that, where the life tenant is the surviving spouse of the testator, may result in inconvenience or even hardship.² This was also the view of the English Law Reform Committee in relation to the equivalent English provisions. The Committee said that the provisions rarely reflected the testator's intention and were commonly excluded in wills.³

10.4 The commentators on this issue were divided. Those in favour of amending the provisions so that they would **not** apply unless the settlor or testator expressly stipulated were the Trustee Companies (thus confirming the view expressed in their preliminary submissions), Australian United Corporation Limited and a commentator who wished to remain anonymous.

¹ Paras 3.24 to 3.27. The text of the provisions are reproduced in Appendix III below.

² See the hypothetical example in para 3.27 above.

³ As a consequence, the Committee recommended that the *Apportionment Act 1870* (Eng) should be amended in its application to wills and settlements by providing that the income should belong exclusively to the person entitled to the income of the trust on the date when that income becomes due, subject to any contrary provision in the will or settlement : English Report, para 3.40.

Those in favour of retaining the present position (namely, that the provisions apply unless the settlor or testator stipulates otherwise) were the Law Society, the Public Trustee and the Institute of Legal Executives. In elaboration of its view, the Public Trustee indicated that he was not aware of any instances where hardship had been caused to the life tenant by the application of the apportionment provisions, nor did he consider that they caused any undue delay or expense in the administration of trust estates.⁴

10.5 Because of the divergence of views of those with practical experience in the field the Commission has found it difficult to reach a conclusion on the matter. As stated above, the Commission considers that the apportionment provisions are sound in principle. Any change should only be contemplated if there is clear evidence that their application causes significant hardship and that equivalent hardship would not arise as a consequence of the change. In the absence of such evidence, the Commission accordingly recommends that no change should be made.

2. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

10.6 The Commission recommends that no change should be made to the apportionment provisions of the *Property Law Act 1969-1979* Part XV (sections 130-134).

(paragraphs 10.1 to 10.5)

⁴ The Public Trustee pointed out that share dividends are exceptional in that they are usually annual payments: para 3.27 above. Most other periodical payments in the nature of income are made at much shorter intervals, for example rents are usually payable weekly, fortnightly or monthly. In such cases there would be little loss of income to the life tenant, even supposing that the testator had not made special arrangements to provide her with immediate access to money pending receipt of income from the life tenancy.

CHAPTER 11 - OTHER MATTERS

1. GENERAL

11.1 In this chapter the Commission deals with a number of matters which could not readily be dealt with earlier in this report.

2. RECOMMENDATIONS TO APPLY TO EXISTING TRUSTS

11.2 It is the intention of the Commission that the changes to a trustee's powers of investment recommended in this report should apply to existing trusts as well as to future trusts. The powers of investment presently set out in the *Trustees Act 1962* were expressed to apply to both existing and future trusts,¹ and the Commission can see no reason why this should not also be the case in relation to any provisions implementing the Commission's recommendations. Implementation of some of the changes proposed by the Commission² would operate so as to make some presently authorised forms of investments unauthorised. However, as mentioned above,³ a trustee holding any such investments does not necessarily have to dispose of them. Section 20 of the *Trustees Act* provides that a trustee shall not be liable for breach of trust by reason only of his continuing to hold any investment that has ceased to be authorised. Accordingly, he may continue to hold them if in the circumstances it is prudent to do so.

3. FORMS OF INVESTMENT NOT THE SUBJECT OF A RECOMMENDATION IN THIS REPORT

(a) Government and semi-government securities

(i) *Government securities*

11.3 In paragraph 2.29 above, the Commission recommended that a committee should be set up whose function would be to review the statutory list of authorised trustee investments to ensure the list was up-to-date.⁴ The attention of the committee should be directed to

¹ S 5(1).

² Chapter 8.

³ Para 8.9.

⁴ As incidental to this review, the committee could also consider whether the word "securities" where it appears in s 6 of the *Trustees Act* is sufficiently wide to cover all government or semi-government

government securities. For largely historical reasons, government securities of the United Kingdom, New Zealand and Fiji are presently included in the list. Investment in such securities may expose a trustee to risk in terms of unexpected alterations in exchange rates or in the rules governing the transfer of money to or from the country concerned. The inclusion of Fiji and New Zealand but not, for example, the securities of other Commonwealth countries, also illustrates the incongruous and dated nature of this form of trustee investment.

(ii) *Securities of State instrumentalities*

11.4 The only Western Australian State instrumentality whose securities are specifically authorised as a trustee investment is the Western Australian Fire Brigades Board and only then if the securities are "charged upon the property and revenue" of the Board. In all other cases the security must be Government guaranteed in order to qualify as an authorised trustee investment. The question of the appropriate criteria to be applied to the securities of State instrumentalities is also a matter which could be considered by the trust investments review committee. This would have to be done in the light of the new arrangements introduced by the *Borrowing for Authorities Act 1981-1982*, which creates a centralised mechanism to service the borrowing needs of most State instrumentalities.

(b) **Unit trusts**

11.5 Section 16(1)(n) authorises a trustee to 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 in existence at the time of investment an approved deed under any law of the State relating to Companies". Proper advice must be obtained before purchase.

11.6 The Commission did not discuss the question of unit trusts in the working paper because the question had not been raised in the preliminary submissions.⁵ However, in the working paper the Commission invited comment on any other matter dealing with trustees' powers of investment. The aim was to ascertain whether there were any additional matters which could be dealt with in the course of any further review. A number of comments were

offerings in which it would be appropriate for trustees to invest. That section defines the word as **including** stock, funds and shares, but there may be doubt whether, for example, a promissory note would be included. S 2 of the *Public Moneys Investment Act 1961-1981* (WA), which contains a comprehensive definition may be of assistance, as may also s 4 of the *Trustee Act 1898-1981* (Tas).

received in response indicating disquiet about the width of section 16(1)(n) in the light of developments in the unit trust field since the *Trustees Act* was enacted in 1962. For example, the Commissioner for Corporate Affairs said:

"Recent developments in the unit trust area have demonstrated the absence of security in relation to many schemes which are the subject of approved deeds. There has been a resurgence of interest in public unit trusts in recent years in Australia and public unit trusts are now a significant area of business and investment."

11.7 The Commissioner pointed out that some unit trusts on the market included speculative schemes such as horse racing and film production syndicates. Other commentators drew attention to the fact that section 16(1)(n) makes no distinction between schemes listed on a stock exchange and others not so listed, nor does it require that a scheme have any minimum paid up capital or dividend payment record to qualify as a trust investment. The Stock Exchange suggested that the provision be revised by confining it to investment in cash management trusts which had been approved by the State Treasurer.

11.8 While the principle of authorising trustee investment in a unit trust scheme is reasonable, since it enables trustees with small sums available to diversify their investments, the present width of section 16(1)(n) of the *Trustees Act* justifies the commentators' concern.⁶ Although a trustee may not invest trust funds in a unit trust without first obtaining proper advice, the Commission has already drawn attention⁷ to the practical difficulties in the way of a trustee being certain that the advice he is given is adequate in relation to a field so diverse as unit trusts. However, the formulation of appropriate amendments to section 16(1)(n) would require further investigation. Accordingly, the Commission recommends that the proposed trust investments review committee should undertake a study of the area at an early date.⁸

⁶ The National Companies and Securities Commission recently announced that it is undertaking a major study of the property trust industry in order to determine which steps are necessary to enhance the protection of investors. The Commission said that although it is "aware that many such trusts are well managed, responsibly promoted and soundly invested, it also recognises widespread public and professional misgivings concerning the manner in which certain property trusts have been launched and promoted and the quality of advice given to prospective investors": National Companies and Securities Commission, *Fourth Annual Report 1 July 1982 to 30 June 1983*, 17.

⁷ Para 2.23 above.

⁸ The proposed committee would no doubt have regard to the outcome of the study being undertaken by the National Companies and Securities Commission (see footnote 2 to para 11.8 above) as well as to other relevant studies or policy directions of that Commission: National Companies and Securities Commission, *Fourth Annual Report 1 July 1982 to 30 June 1983*, 14-16.

(c) Credit unions

11.9 One commentator⁹ suggested to the Commission that deposits with credit unions approved by the Treasurer should be an authorised trustee investment.¹⁰ The submission contemplated a similar approval process to that presently existing in regard to building societies.¹¹

11.10 The credit union field has been the subject of rapid growth in Western Australia in recent years.¹² As at 30 June 1983 there were thirty-four credit unions in existence whose deposits totalled approximately \$308 million. Some credit unions have added to the original concept of providing relatively small unsecured loans to their members the provision of large sums lent on mortgage. In common with certain other financial institutions, some have established services such as real estate management, travel agencies, mortgage broking, insurance and limited legal services. Credit unions are thus evolving and the ultimate role they will play in the area of financial investment is not clear.¹³

11.11 In the Commission's view it is desirable to wait until that ultimate role becomes clearer before considering whether to grant trustee status to such bodies. Whether at that time credit unions would offer special advantages to trustees while at the same time ensuring sufficient protection to trust funds¹⁴ is a matter which should be considered by the proposed trust investments review committee. Clearly, as with building societies, not all credit unions would in any case be suitable for authorisation, as the commentator recognised. The commentator suggested approval by the State Treasurer. However, the Commission indicated above that it had not considered the appropriateness of this mechanism, or the criteria adopted by the Treasurer, in the case of building societies and recommended that these issues be

⁹ The commentator wished to remain anonymous.

¹⁰ Investment in credit unions was not considered in the working paper for the same reason as unit trusts: para 11.6 above.

¹¹ Para 7.6 above.

¹² For example: the United Credit Union Limited which had deposits of \$38,640 in 1973 had deposits of \$26,943,910 in 1982 (United Credit Union Limited, *10th Annual Report*); the Police Credit Society of WA Ltd had deposits of \$3,557,116 in 1976 and \$18,322,052 in 1982 (Police Credit Society of WA Ltd, *1981-1982 Annual Report*, 7) while the WA Teachers Credit Society Limited had deposits of \$406,000 in 1972 and \$69,136,000 in 1983 (WA Teachers' Credit Society Limited, *12th Annual Report 1982-1983*, 13).

¹³ Deposits in credit unions are not authorised trustee investments in any Australian jurisdiction or in England or New Zealand.

¹⁴ The Campbell Report criticised the general statutory provisions for regulating credit unions on the ground that they provided insufficient protection for the public, particularly in view of credit unions' expanding activities: Campbell Report, paras 19.179-19.190.

referred to the trust investments review committee.¹⁵ Similar questions would arise for consideration in the case of credit unions should it be decided in principle to extend authorisation to them.

(d) Other forms of investment

11.12 A number of commentators drew attention to other forms of investment which they suggested could be considered for authorised trustee status.¹⁶ Some of these are relatively new or are of increasing commercial significance. It would be appropriate for the trust investments review committee to consider them in due course.

4. ADVERTISING FOR FUNDS

11.13 It is apparent that the grant of authorised trustee status to a form of security is a factor which favours such securities in the attraction of investment money. Their standing as authorised trustee investments is frequently referred to by financial institutions in their advertising in a way which appears intended to be directed to investors generally. Some members of the community may be misled by the use of the phrase "authorised trustee investment" into thinking that the investment is in some way government guaranteed or is a safe one in all circumstances. Although it would seem undesirable to impose statutory restrictions in the absence of proven abuse, the Commission would prefer to see such investments advertised as being "authorised trustee investments if otherwise the investment is reasonable and proper in the circumstances". This would not only alert trustees to the fact that these are not automatically suitable for the trust and that they must have regard to other matters as well, but would also warn investors generally.¹⁷

5. TRUST FUNDS INVESTMENT ACT 1924-1926

11.14 Section 2 of the *Trust Funds Investment Act 1924-1926* provides as follows:

¹⁵ Para 7.7.

¹⁶ For example, letters of credit confirmed, guaranteed, accepted or indorsed by a bank, or the securities of certain large unlisted corporations. These suggestions are on file with the Commission.

¹⁷ The Commissioner for Corporate Affairs informed the Commission that his office will not authorise the issue of a prospectus or other literature relating to an issue of securities falling within s 16(1)(k)-(n) containing reference to the special status of the securities unless the reference is expressed to be subject to the applicable provisions of s 16(5)-(8), since such a reference would be considered misleading under s 103(2)(e) of the *Companies (Western Australia) Code*.

- "(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."

11.15 In the working paper the Commission said that it appeared that the provisions of section 2(1) were no longer of any significance, and could be repealed. Road Districts are now municipalities¹⁸ and section 16(1)(c) of the *Trustees Act* authorises trustees to invest "in debentures or other securities charged on the funds or property of any municipality in the State". Section 2(2) is also obsolete for the same reason.¹⁹ All those who commented on the issue agreed with the Commission. Since section 2 is the only substantive provision in the *Trust Funds Investment Act* the whole of that Act can be repealed. The Commission recommends accordingly.

6. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

11.16 The Commission recommends that -

- (a) The changes to a trustee's powers of investment recommended in this report should apply to existing trusts as well as to future trusts.
(paragraph 11.2)
- (b) The following matters²⁰ be referred to the proposed trust investments review committee -
- (i) Whether it is still appropriate to authorise trustee investment in the securities of overseas countries and, if so, upon what basis those countries should be chosen.

(paragraph 11.3)

¹⁸ *Local Government Act 1960-1983* (WA), s 9.

¹⁹ The subsection is doubly obsolete in that life assurance companies are now governed not by the *Life Assurance Companies Act 1889-1944* (WA), but by the *Life Insurance Act 1945-1981* (Cth).

²⁰ See also para 7.7 above for the Commission's recommendation that the basis for selection of building societies as authorised trustee investments should be reviewed.

- (ii) Whether the present criteria for investment in the securities of Western Australian State instrumentalities are appropriate, and if not, what the criteria should be.

(paragraph 11.4)
 - (iii) What amendments should be made to section 16(1)(n) of the *Trustees Act* (which authorises trustee investment in unit trusts) to ensure reasonable safety for trust funds so invested. This study should be undertaken at an early date.

(paragraphs 11.5 to 11.8)
 - (iv) Whether, once the ultimate role of credit unions in the financial system has become clearer, deposits with selected credit unions should be made authorised trustee investments and, if so, what should be the basis of selection.

(paragraphs 11.9 to 11.11)
 - (v) Whether any other forms of investment should be authorised.

(paragraph 11.12)
- (c) The *Trust Funds Investment Act 1924-1926* should be repealed.
- (paragraphs 11.14 and 11.15)

CHAPTER 12 - SUMMARY OF RECOMMENDATIONS

CHAPTER 2 - APPROACH OF THE COMMISSION

The Commission recommends that -

- (a) A list of authorised investments continue to be included in the *Trustees Act* in preference to adoption of the "prudent man rule".

(paragraphs 2.7 to 2.17)

- (b) A provision be added at the beginning of Part III of the *Trustees Act* drawing the attention of trustees to the need, in making **any** investment to have regard to the general equitable duties imposed on them as trustees. The provision should also draw attention to the need for trustees to review the investments they have made in the light of their general duties.

(paragraphs 2.18 and 2.19)

- (c) The matters to which the adviser should have regard in offering his advice in those cases where the trustee must obtain it should be made consistent with the statutory reference to a trustee's duties which the Commission has recommended be included in the *Trustees Act* (see recommendation (b) above).

(paragraph 2.25)

- (d) A paragraph should be added at the end of the list of investments specifically authorised by the *Trustees Act* empowering a trustee to invest in any other investment or class of investment authorised by the Supreme Court in the case of that trust. It should be provided that application to the Court may be made by the trustee or any beneficiary, and that the Court in making its determination shall have regard to the experience and skill of the trustee, the circumstances of the trust and any other matter it considers relevant, and may grant the application subject to such conditions as it thinks fit.

(paragraphs 2.26 and 2.27)

- (e) A trust investments review committee be established to review periodically the list of authorised investments in the *Trustees Act*, as follows -

- (i) the committee should be appointed by and report to the Attorney General;
 - (ii) it should comprise about five persons who together would constitute a body expert both in investments and the law of trusts;
 - (iii) the members should be appointed on the basis of their knowledge and experience and not as industry representatives or on industry nomination;
 - (iv) the committee should be convened, and chaired, by a person with extensive knowledge and experience in the law of trusts;
 - (v) it should operate on an informal basis (consequently it would not require staff or involve establishment costs);
 - (vi) it should convene at three-yearly intervals or more often if necessary.
(paragraphs 2.28 and 2.29)¹
- (f) Amendments to the list of authorised investments should continue to be made by Act of Parliament.

(paragraph 2.31)

CHAPTER 3 - THE LAW IN WESTERN AUSTRALIA

The Commission recommends that -

- (a) For the purposes of section 17 of the *Trustees Act*, the term "dwelling house" be defined to include a strata title lot used for residential purposes;
(paragraph 3.14, footnote 18)
- (b) Sections 17(2)(d) (purchase of a dwelling house for a beneficiary) and 22(1)(c) (lending trust money on the security of a mortgage) be amended to make it clear that to obtain the benefit afforded by the provisions, the trustee must act in accordance with the valuer's advice in relation to the purchase or loan, as the case may be.

(paragraph 3.14, footnote 19)

¹ See also paras 11.3, 11.4, 11.8, 11.11 and 11.12 above.

CHAPTER 5 - FIRST LEGAL MORTGAGES

The Commission recommends that -

- (a) The present maximum proportion of the value of the property which a trustee can lend on the security of a mortgage on that property and obtain the protection afforded by section 22 of the *Trustees Act* should remain at two-thirds of the value of the property unless -
 - (i) the loan is insured by an authorised insurer;
 - (ii) the amount of the loan does not exceed ninety percent of the value of the property as stated by a licensed valuer; and
 - (iii) the loan was made in accordance with the advice of that valuer.

If (i), (ii) and (iii) apply, a trustee should not be chargeable with breach of trust by reason only of the proportion the amount of the loan bears to the value of the property.

(paragraphs 5.2 to 5.10)

- (b) Authorisation as an insurer for the purposes of (a)(i) above should be extended to approved commercial insurers as well as the Housing Loans Insurance Corporation.

(paragraphs 5.11 and 5.12)

- (c) To obtain approval, an insurer should be required to satisfy the State Treasurer of its capacity properly to carry on the business in Western Australia of insuring against losses arising in respect of mortgage loans. The insurer should also be required to undertake to remain in business in Western Australia for the period for which the loans are insured and to submit an annual report on its financial affairs.

(paragraph 5.12)

- (d) The extended protection to be given to trustees as regards insured mortgage loans should not be confined to loans on residential property.

(paragraph 5.13)

- (e) The power given by section 16(1)(b) of the *Trustees Act* to lend on mortgage should continue to be confined to land in Western Australia.
(paragraphs 5.15 to 5.17)
- (f) The trustee, unless satisfied on reasonable grounds that his security would not otherwise be diminished, should be obliged to require the mortgagor to insure any buildings on the mortgaged land to their replacement value against damage by fire, storm and tempest, lightning, explosion, earthquake, damage by vehicles and aircraft, and malicious damage.
(paragraphs 5.18 to 5.20)

CHAPTER 6 - LAND, INCLUDING A DWELLING HOUSE FOR THE USE OF A BENEFICIARY

The Commission recommends that -

- (a) Trustees should be authorised to invest in land.
(paragraphs 6.2 and 6.3)
- (b) The power to invest in land should be confined to the purchase of a fee simple interest in land in Western Australia.
(paragraphs 6.5 to 6.7 and 6.29 to 6.31)
- (c) No statutory limitation should be imposed on the type of land which can be purchased and nor should the land be required to be income-producing.
(paragraphs 6.8 to 6.13, footnote 14 to para 6.10)
- (d) The legislation should provide that a trustee is not 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 of purchase if he obtains beforehand -
 - (i) a report by a licensed valuer who he believes on reasonable grounds is experienced in valuing the type of land concerned in the locality in which it is situated; and

- (ii) the price the trustee pays for the land does not exceed by more than five percent the value of the land, as stated in the valuer's report.

(paragraphs 6.14, 6.15 and 6.21 to 6.23)

- (e) The valuer's report referred to in (d) above should be in writing and contain a statement as to -

- (i) the value of the land;
- (ii) the actual or potential income from the land;
- (iii) the outgoings associated with owning it.

(paragraph 6.16)

- (f) A trustee should also, as a precondition of purchasing land, obtain and consider proper advice as to whether the purchase is appropriate having regard to the need for diversification and the circumstances of the trust generally.

(paragraph 6.20)

- (g) No restriction should be imposed on the proportion of the trust estate which a trustee may invest in land.

(paragraphs 6.24 to 6.27)

- (h) The power to invest in land should be available to all trustees.

(paragraph 6.28)

- (i) Section 17 of the *Trustees Act* should be amended to authorise trustees to purchase a dwelling house for the use of a beneficiary anywhere within the Commonwealth of Australia. To gain the protection afforded by section 17(2) of the *Trustees Act* the trustee should act on the advice of an independent valuer licensed in the relevant jurisdiction or, if there is no licensed valuer available in that jurisdiction, then on the advice of a Fellow or Associate of the Australian Institute of Valuers (Inc) carrying on business as a valuer in that jurisdiction.

(paragraphs 6.32 and 6.33)

- (j) The maximum sum a trustee can expend on improvement or development pursuant to section 30(1)(c) of the *Trustees Act* should be increased to \$20,000, provided that if the trustee obtains proper advice he should be able to spend up to \$50,000. If he wishes to spend more than \$50,000 he should apply to the Supreme Court for authorisation to do so as at present.

(paragraphs 6.34 to 6.36)

- (k) The *Trustees Act* should be amended 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 price fixed at the time of granting the option, provided the price and option fee was considered reasonable by an independent licensed valuer.

(paragraphs 6.37 to 6.41)

CHAPTER 7 - DEPOSITS IN BANKS AND BUILDING SOCIETIES

The Commission recommends that -

- (a) Section 16(1)(d) of the *Trustees Act* should be amended so as expressly to authorise a trustee's acquisition of a bank certificate of deposit whether in a negotiable, convertible, transferable or other form and whether purchased direct from a bank or a third party.

(paragraphs 7.1 and 7.2)

- (b) The *Trustees Act* should be amended to authorise trustee investment in interest-bearing deposits in any bank authorised under Commonwealth or State legislation to carry on banking business.

(paragraphs 7.3 and 7.4)

- (c) Call deposits in certified building societies should be an authorised trustee investment.

(paragraph 7.5)

- (d) The proposed trust investments review committee be asked to consider the adequacy of the present provisions for certifying a building society as one in which a trustee may invest.

(paragraph 7.7)

CHAPTER 8 - COMPANY SECURITIES

The Commission recommends that -

- (a) The minimum paid up share capital of a company in which a trustee may invest should be increased to five million dollars.

(paragraphs 8.4 to 8.9)

- (b) The dividend qualifying period of a company in which a trustee may invest should be reduced to five years.

(paragraphs 8.10 to 8.12)

- (c) The requirement that debentures must be quoted on a stock exchange to be an authorised trustee investment should be repealed, but the requirement that they should be public offerings should continue.

(paragraphs 8.14 and 8.15)

- (d) Except as provided in (e) below, a trustee should no longer be able to lend to a company (or to purchase a company debenture or note from a third party) unless -

- (i) the loan is secured in accordance with the requirements specified for "mortgage debentures" or "debentures" in section 97 of the *Companies (Western Australia) Code* or its equivalent elsewhere in Australia; and

(paragraph 8.16)

- (ii) there is a maximum time limit of five years to maturity from the date of acquisition of the debenture.

(paragraphs 8.17 to 8.19)

- (e) Loans to companies other than those complying with (d)(i) above, that is unsecured notes or unsecured deposit notes, should be a public offering and either be at call or have a maximum maturity date of six months, unless it is an investment in a convertible note of a maximum duration of five years from the date of acquisition.
(paragraphs 8.24 to 8.27)
- (f) The debentures of wholly owned Australian subsidiaries of banks should be specifically authorised trustee investments provided they are public offerings complying with (d) above.²
(paragraphs 8.20 to 8.22)
- (g) The *Trustees Act* should be amended to authorised trustees to purchase the rights to shares and convertible notes in those cases where the trustee is authorised to purchase the shares or convertible notes themselves, provided that he first obtains proper advice as to the purchase.
(paragraphs 8.28 to 8.31)
- (h) In all other respects the existing requirements for trustee investment in company securities should be maintained.
(paragraph 8.3)

CHAPTER 9 - BANK ACCEPTED OR INDORSED BILLS

The Commission recommends that -

- (a) Both bank accepted and bank indorsed bills of exchange should be authorised trustee investments provided that with bank accepted bills the acceptance is general and with bank indorsed bills the bills are not restrictively indorsed.
(paragraphs 9.1 to 9.5)
- (b) The maximum permissible time to maturity of such bills should be 200 days from the date of acquisition by the trustee.
(paragraphs 9.6 to 9.8)

² At present, such debentures are not authorised trustee investments because the shares of the subsidiary are not listed on a stock exchange.

- (c) An appropriate provision should be included in the *Trustees Act* to ensure that the difference between the amount paid for a bank bill and the amount realised on the bill is treated as income and not capital.

(paragraph 9.9)

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

The Commission recommends that no change should be made to the apportionment provisions of the *Property Law Act 1969-1979* Part XV (sections 130-134).

(paragraphs 10.1 to 10.5)

CHAPTER 11 - OTHER MATTERS

The Commission recommends that -

- (a) The changes to a trustee's powers of investment recommended in this report should apply to existing trusts as well as to future trusts.

(paragraph 11.2)

- (b) The following matters³ be referred to the proposed trust investments review committee -

- (i) Whether it is still appropriate to authorise trustee investment in the securities of overseas countries and, if so, upon what basis those countries should be chosen.

(paragraph 11.3)

- (ii) Whether the present criteria for investment in the securities of Western Australian State instrumentalities are appropriate, and if not, what the criteria should be.

(paragraph 11.4)

³ See also para 7.7 above for the Commission's recommendation that the basis for selection of building societies as authorised trustee investments should be reviewed.

- (iii) What amendments should be made to section 16(1)(n) of *the Trustees Act* (which authorises trustee investment in unit trusts) to ensure reasonable safety for trust funds so invested. This study should be undertaken at an early date.

(paragraphs 11.5 to 11.8)

- (iv) Whether, once the ultimate role of credit unions in the financial system has become clearer, deposits with selected credit unions should be made authorised trustee investments and, if so, what should be the basis of selection.

(paragraphs 11.9 to 11.11)

- (v) Whether any other forms of investment should be authorised.

(paragraph 11.12)

- (c) The *Trust Funds Investment Act 1924-1926* should be repealed.

(paragraphs 11.14 and 11.15)

H H Jackson
Chairman

C W Ogilvie
Member

L Proksch
Member

J A Thomson
Member

Daryl R Williams
Member

10 January 1984

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 any one 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 carry on 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 (l) 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), (l) 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), (l), (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 firstmentioned 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 subsection (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
LIST OF THOSE WHO COMMENTED ON THE WORKING PAPER¹

Australian Finance Conference
Australian United Corporation Limited
BT Australia Limited
Chase - NBA Finance Limited
Commissioner for Corporate Affairs
Council of Authorised Money Market Dealers
Institute of Finance Brokers of Western Australia Limited
Institute of Legal Executives (Western Australia) (Incorporated)
Law Society of Western Australia Inc (The Commercial Law Committee)
W A Lee
Martin Corporation Limited
Mortgage Guarantee Insurance Corporation of Australia Limited
P Mouatt
W R Munro
Perpetual Trustees WA Ltd
Public Trustee
Real Estate Institute of Western Australia Incorporated
I J V Sanderson
Stock Exchange of Perth Limited
Under Treasurer
Western Australian Permanent Building Societies Association (Inc)
West Australian Trustees Limited

The Westralian Farmers Co-operative Limited made a submission to the Commission although not in the form of a comment on the working paper.

¹ Two commentators requested anonymity and have therefore not been included in this list.

APPENDIX III

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.

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J.	(a) Debentures of qualified companies. ⁹ (b) Must the debentures be quoted on a stock exchange? (c) Debentures of wholly owned subsidiaries of banks. ¹²	Yes Yes No	Yes-but must be adequately secured No Yes	No N/A No	No N/A No	No N/A No	Yes ¹⁰ No Yes	No N/A No	No N/A No	Yes Yes No	Yes ¹¹ Yes No	Yes Yes Yes
K.	(a) Deposits or notes in qualified companies. (b) Must the deposit or notes be listed on a stock exchange? (c) Rights to convertible notes in respect of existing shareholding (d) Purchase of rights to convertible notes on a stock exchange.	Yes No Yes No	Yes-but time limit of six months (five years for convertible notes) No Yes Yes	No N/A Yes No	No N/A Yes No	No N/A Yes No	Yes-and deposits in life insurance corporation as well. No Yes No	No N/A No No	No N/A Yes No	Yes-and in companies declared by the Minister. No Yes No	Yes-convertible notes only Yes-quoted convertible notes only Yes No	Yes Yes Yes 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 6 of the Companies (Western Australia) Code, or its equivalent.	Yes	Yes- but note recommendation for further review	No	No	No	No	No	No	No	No	Yes
M.	Common trust fund of either a statutory trustee corporation or the Public Trustee.	Yes	Yes	No	Yes	Yes	Yes-as specified	No	No	Yes	Yes	-
N.	Dwelling house for use of a beneficiary within the jurisdiction.	Yes	Yes- anywhere in Australia	Yes- if Public Trustee or Statutory Trustee Company, (within NSW & ACT) Other trustee with consent of Court	Yes	Yes	Yes- No Limit expressed as to location	Yes	No- but trustee may apply to Court if beneficiary an infant	Yes- No Limit expressed as to location	Yes	No
O.	Land (a) Fee simple (b) Other interests in land (c) In own jurisdiction only.	No No N/A	Yes No Yes	No No N/A	Yes Yes	Yes No Yes	No No N/A	Yes No Yes	No No N/A	No No N/A	Yes-but only adjoining land No Yes	No No N/A
Other Matters:-												
P.	(a) General statutory power to grant option to purchase. ¹³ (b) Power to grant option to purchase as term of lease.	No Yes	Yes Yes	No No	No Yes	No No	No No	No No	No No	No No	No Yes	Yes Yes

Q. Apportionment provisions similar to the Property Law Act 1969-1979 (WA) Part XV (sections 130 to 134).	Yes									
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* The investments referred to in this table are those which authorised by the *Trustee Act 1962-1978* or are otherwise the subject of recommendations in this report. The equivalent enactments in other jurisdictions are: *Trustee Act 1925-1983* (NSW), *Trusts Act 1973-1981* (Qld), *Trustee Act 1958-1983* (Vic), *Trustee Act 1936-1983* (SA), *Trustee Act 1898-1981* (Tas), *Trustee (Insured Housing Loans) Act 1970-1977* (Tas), *Trustee Act 1925-1983* (ACT), *Trustee Act 1893-1981* (NT), *Trustee Act 1956-1978* (NZ), *Trustee Investments Act 1961-1982* (Eng) and *Trustee Act 1925-1978*. This table is not a complete list of investments authorised by the trustees legislation elsewhere, nor does it include investments which are authorised by special legislation either in Western Australia or elsewhere: see Jacobs 360 for some examples.

- 1 Each jurisdiction permits investment in a wide range of government securities both of the jurisdiction concerned and of other governments.
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 Damage by fire, storm and tempest, lightning, explosion, earthquake, damage by vehicles and aircraft, and malicious damage, to the replacement value of the building unless the trustee is satisfied on reasonable grounds that his security would not be diminished if the building was not so insured.
4 “Loss or damage by fire and by storm and tempest to the full insurable value thereof”.
5 Interest-bearing deposits in any bank authorised under Commonwealth or State Legislation to carry on banking business.
6 See the reservations expressed in the text.
7 See the reservations expressed in the text.
8 But note para 4.21 footnote 4.
9 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.
10 Also the debentures of unqualified companies if guaranteed by a qualified company.
11 Also the debentures of qualified dairy finance companies.
12 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 9 above.
13 The equitable power to grant an option would seem to be available in all jurisdictions: see para 3.22 and 3.23.