

Queensland



# **TRUSTS (INVESTMENTS) AMENDMENT BILL 1999**



# Queensland



## TRUSTS (INVESTMENTS) AMENDMENT BILL 1999

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**1999**

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**A BILL**

**FOR**

**An Act to amend the *Trusts Act 1973* in relation to investment of trust funds, and for other purposes**

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**The Parliament of Queensland enacts—**

1

## **PART 1—PRELIMINARY**

2

### **Short title**

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Clause **1.** This Act may be cited as the *Trusts (Investments) Amendment Act 1999*.

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### **Commencement**

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Clause **2.** This Act commences on a day to be fixed by proclamation.

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## **PART 2—AMENDMENT OF TRUSTS ACT 1973**

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### **Act amended in pt 2**

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Clause **3.** This part amends the *Trusts Act 1973*.

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### **Amendment of s 5 (Definitions)**

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Clause **4.** Section 5, definition “**authorised investments**”—  
*omit, insert—*

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‘**“authorised investments”** means investments of trust funds that are—

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(a) authorised by the instrument creating the trust; or

15

(b) made by the trustee exercising a power of investment under part 3  
or under an order under section 94;<sup>1</sup> or

16

17

(c) authorised by another Act or the general law.’.

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<sup>1</sup> Part 3 (Investments), section 94 (Court’s jurisdiction to make other orders)

	<b>Replacement of pt 3 (Investments)</b>	1
Clause	<b>5. Part 3—</b>	2
	<i>omit, insert—</i>	3
	<b>‘PART 3—INVESTMENTS</b>	4
	<b>‘Application of particular provisions</b>	5
	<b>‘20.</b> Sections 29 to 30C apply despite anything contained in the instrument creating the trust.	6 7
	<b>‘Power of trustee to invest</b>	8
	<b>‘21.</b> A trustee may, unless expressly forbidden by the instrument creating the trust—	9 10
	(a) invest trust funds in any form of investment; and	11
	(b) at any time, vary an investment or realise an investment of trust funds and reinvest an amount resulting from the realisation in any form of investment.	12 13 14
	<b>‘Duties of trustee in relation to power of investment</b>	15
	<b>‘22.(1)</b> A trustee must, in exercising a power of investment—	16
	(a) if the trustee’s profession, business or employment is, or includes, acting as a trustee or investing money for other persons—exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or	17 18 19 20 21
	(b) if the trustee’s profession, business or employment is not, or does not include, acting as a trustee or investing money for other persons—exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of other persons.	22 23 24 25
	<b>‘(2)</b> A trustee must, in exercising a power of investment, comply with a provision of the instrument creating the trust that is binding on the trustee and requires the obtaining of a consent or approval or compliance with a direction for trust investments.	26 27 28 29

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‘(3) A trustee must, at least once in each year, review the performance, individually and as a whole, of trust investments. 1  
2

**‘Law and equity preserved 3**

‘23.(1) A rule or principle of law or equity imposing a duty on a trustee exercising a power of investment continues to apply except so far as it is inconsistent with this or another Act or the instrument creating the trust. 4  
5  
6

‘(2) Without limiting the rules or principles mentioned in subsection (1), they include a rule or principle imposing— 7  
8

(a) a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust; and 9  
10

(b) a duty to invest trust funds in investments that are not speculative or hazardous; and 11  
12

(c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries; and 13  
14

(d) a duty to obtain advice. 15

‘(3) A rule or principle of law or equity relating to a provision in an instrument creating a trust that purports to exempt, limit the liability of, or indemnify a trustee in relation to a breach of trust, continues to apply. 16  
17  
18

‘(4) If a trustee is under a duty to obtain advice, the reasonable cost of obtaining the advice is payable out of trust funds. 19  
20

**‘Matters to which trustee must have regard in exercising power of investment 21  
22**

‘24.(1) Without limiting the matters a trustee may take into account when exercising a power of investment, a trustee must, so far as they are appropriate to the circumstances of the trust, have regard to the following matters— 23  
24  
25  
26

(a) the purposes of the trust and the needs and circumstances of the beneficiaries; 27  
28

(b) the desirability of diversifying trust investments; 29

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(c) the nature of and risk associated with existing trust investments and other trust property;	1 2
(d) the need to maintain the real value of the capital or income of the trust;	3 4
(e) the risk of capital or income loss or depreciation;	5
(f) the potential for capital appreciation;	6
(g) the likely income return and the timing of income return;	7
(h) the length of the term of the proposed investment;	8
(i) the probable duration of the trust;	9
(j) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment;	10 11
(k) the total value of the trust estate;	12
(l) the effect of the proposed investment for the tax liability of the trust;	13 14
(m) the likelihood of inflation affecting the value of the proposed investment or other trust property;	15 16
(n) the cost (including commissions, fees, charges and duties payable) of making the proposed investment;	17 18
(o) the results of a review of existing trust investments.	19
<b>‘(2) A trustee—</b>	<b>20</b>
(a) may obtain, and if obtained must consider, independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice; and	21 22 23 24 25
(b) may pay out of trust funds the reasonable costs of obtaining the advice.	26 27
 <b>‘Powers of trustee in relation to securities</b>	 <b>28</b>
<b>‘25.(1)</b> If securities of a corporation are subject to a trust, the trustee may agree to a scheme or arrangement—	29 30

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- (a) for or arising out of the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the corporation; or 1  
2
- (b) for the sale of all or part of the property and undertaking of the corporation to another corporation; or 3  
4
- (c) for the acquisition of securities of the corporation, or of control of the corporation, by another corporation; or 5  
6
- (d) for the amalgamation of the corporation with another corporation; or 7  
8
- (e) for the release, modification or variation of rights, privileges or liabilities attached to the securities, or any of them; 9  
10
- in the same way as if the trustee were beneficially entitled to the securities. 11
- ‘(2) The trustee may accept instead of, or in exchange for, the securities subject to the trust, securities of any denomination or description of another corporation that is party to the scheme or arrangement. 12  
13  
14
- ‘(3) If a conditional or preferential right to subscribe for securities in a corporation is offered to a trustee for a holding in that corporation or another corporation, the trustee may, for all or any of the securities— 15  
16  
17
- (a) exercise the right and apply capital money subject to the trust in payment of the consideration; or 18  
19
- (b) assign to any person, including a beneficiary under the trust, the benefit of the right, or the title to the right, for the best consideration that can be reasonably obtained; or 20  
21  
22
- (c) renounce the right. 23
- ‘(4) A trustee accepting or subscribing for securities under this section is, for any provision of this part, exercising a power of investment. 24  
25
- ‘(5) A trustee may retain securities accepted or subscribed for under this section for any period for which the trustee could properly have retained the original securities. 26  
27  
28
- ‘(6) The consideration for an assignment made under subsection (3)(b) must be held as capital of the trust. 29  
30
- ‘(7) This section applies to securities whether acquired before or after the commencement of this section. 31  
32

**‘Investment in securities under RITS**

1

‘**26.(1)** A chose in action arising under RITS that entitles its holder to a security of a particular description (the “**underlying security**”) is, for this Act and the instrument creating a trust, taken to be the same in all respects as the underlying security.

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‘**(2)** The holding or acquisition by a trustee of a chose in action mentioned in subsection (1) is taken to be an investment by the trustee in the underlying security.

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‘**(3)** It does not matter that the right conferred by the chose in action is a right in relation to securities of a particular description and not in relation to particular securities.

9

10

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‘**(4)** In this section—

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“**RITS**” means the Reserve Bank of Australia’s Information and Transfer System, as operating from time to time.

13

14

**‘Power of trustee as to calls on shares**

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‘**27.** A trustee may—

16

- (a) apply capital money subject to a trust in payment of calls on shares subject to the same trust; and
- (b) if the trustee is a trustee corporation, exercise the power conferred by paragraph (a) despite the shares on which the calls are made being shares in the trustee corporation.

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**‘Power to purchase dwelling house as residence for beneficiary**

22

‘**28.(1)** A trustee may—

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- (a) purchase a dwelling house for a beneficiary to use as a residence; or
- (b) enter into an agreement or arrangement to secure for a beneficiary a right to use a dwelling house as a residence.

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‘(2) Despite the terms of the instrument creating the trust, a trustee may, if to do so would not unfairly prejudice the interests of other beneficiaries, retain as part of the trust property a dwelling house for a beneficiary to use as a residence.

‘(3) A dwelling house purchased, retained or otherwise secured for use by the beneficiary as a residence may be made available to the beneficiary for that purpose on the conditions consistent with the trust and the extent of the beneficiary’s interest that the trustee considers appropriate.

‘(4) The trustee may retain a dwelling house or an interest or rights in a dwelling house acquired under this section after the use of the dwelling house by the beneficiary has ended.

‘(5) In this section—  
**“dwelling house”** includes—

- (a) a building or part of a building designed, or converted or capable of being converted, for use as a residence; and
- (b) amenities or facilities for use in association with the use of a dwelling house.

**‘Power of trustee to retain investments**

‘29. A trustee is not liable for breach of trust only because the trustee continues to hold an investment that has stopped being an investment—

- (a) authorised by the instrument creating the trust; or
- (b) properly made by the trustee exercising a power of investment; or
- (c) made under this part as previously in force from time to time; or
- (d) authorised by another Act or the general law.

**‘Loans and investments by trustees not breaches of trust in particular circumstances**

‘30.(1) If a trustee lends an amount on the security of property, the trustee is not in breach of trust only on the ground of the comparison of the amount of the loan with the value of the property at the time when the loan was made—

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- (a) if it appears to the court that— 1
- (i) in making the loan, the trustee was acting on a report about 2  
the value of the property made by a person whom the trustee 3  
reasonably believed to be competent to give the report and 4  
whom the trustee instructed and employed independently of 5  
any owner of the property; and 6
- (ii) the amount of the loan was not more than two-thirds of the 7  
value of the property as stated in the report; and 8
- (iii) the loan was made in reliance on the report; or 9
- (b) if the trustee is insured by an entity prescribed under a regulation 10  
carrying on the business of insurance against all loss that may 11  
arise because of the default of the borrower. 12
- ‘(2) If a trustee lends an amount on the security of leasehold property, the 13  
trustee is not in breach of trust only because the trustee dispensed, either 14  
completely or in part, with the production or investigation of the lessee’s 15  
title when making the loan. 16
- ‘(3) This section applies to transfers of existing securities as well as to 17  
new securities and to investments whether made before or after the 18  
commencement of this section. 19
- ‘Limitation of liability of trustee for loss on improper investments 20**
- ‘30A.(1) If a trustee improperly lends trust money on a security that 21  
would have been a proper investment if the amount lent had been less than 22  
the actual amount lent— 23
- (a) the security is to be taken to be a proper investment in relation to 24  
the lesser amount; and 25
- (b) the trustee is only liable to make good the difference between the 26  
amount advanced and the smaller amount, with interest. 27
- ‘(2) This section applies to investments whether made before or after the 28  
commencement of this section. 29

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**‘Court may take into account investment strategy etc. in action for breach of trust**

**‘30B.** In a proceeding against a trustee for a breach of trust in relation to a duty under this part relating to the trustee’s power of investment, the court may, when considering the question of the trustee’s liability, take into account the following matters—

- (a) the nature and purpose of the trust;
- (b) whether the trustee had regard to the matters set out in section 24<sup>2</sup> so far as they are appropriate to the circumstances of the trust;
- (c) whether the trust investments have been made under an investment strategy formulated in accordance with the duty of a trustee under this part;
- (d) the extent the trustee acted on the independent and impartial advice of a person competent, or apparently competent, to give the advice.

**‘Power of court to set off gains and losses arising from investment**

**‘30C.(1)** The court may, when considering an action for breach of trust arising out of or in relation to an investment by a trustee where a loss has been or is expected to be sustained by the trust, set off all or part of the loss resulting from the investment against all or part of the gain resulting from any other investment whether in breach of trust or not.

**‘(2)** The power of set off conferred by subsection (1) is in addition to any other power or entitlement to set off all or part of any loss against any property.’.

**Insertion of new pt 10**

Clause **6.** After part 9—  
*insert—*

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<sup>2</sup> Section 24 (Matters to which trustee must have regard in exercising power of investment)

**‘PART 10—TRANSITIONAL PROVISION**

1

**‘Transitional provision for Trusts (Investments) Amendment  
Act 1999**

2

3

‘**115.(1)** A provision in an Act or document, whether or not the document creates a trust, that empowers or requires a person to invest an amount in the investments authorised by this Act as in force immediately before the commencement of this section, is to be read as if it empowered or required the person to invest the amount according to the provisions of this part as to the investment of trust funds.

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‘**(2)** In an Act or document, and if otherwise appropriate, the following references are taken to be references to an authorised investment under this Act as in force after the commencement of this section—

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11

12

(a) a reference to an authorised investment under the repealed Acts, section 4;

13

14

(b) a reference to an authorised investment under this Act as in force immediately before the commencement of this section.’.

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16

**PART 3—CONSEQUENTIAL AMENDMENTS**

17

**Amended legislation—schedule**

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Clause 7. The schedule amends the legislation mentioned in it.

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<b>SCHEDULE</b>	1
<b>CONSEQUENTIAL AMENDMENTS</b>	2
section 7	3
<b>COURT FUNDS ACT 1973</b>	4
<b>1. Section 11(2), from ‘in any investment’—</b>	5
<i>omit, insert—</i>	6
‘other than under the <i>Trusts Act 1973</i> , part 3.’	7
<b>FUNERAL BENEFIT BUSINESS ACT 1982</b>	8
<b>1. Section 31(2), from ‘pursuant’—</b>	9
<i>omit, insert—</i>	10
‘under the <i>Trusts Act 1973</i> , part 3.’	11
<b>2. Section 40(1)(a) and (b)—</b>	12
<i>omit, insert—</i>	13
(a) under the <i>Trusts Act 1973</i> , part 3; or	14
(b) in an investment approved by the Governor in Council; or’.	15
<b>3. Section 65(1), definition “the account”, from ‘, or a building’—</b>	16
<i>omit.</i>	17

## SCHEDULE (continued)

**QUEENSLAND INVESTMENT CORPORATION ACT** 1  
**1991** 2

- 1. Section 41—** 3  
*omit.* 4

**QUEENSLAND TREASURY CORPORATION ACT** 5  
**1988** 6

- 1. Section 28—** 7  
*omit.* 8

**STATE DEVELOPMENT AND PUBLIC WORKS** 9  
**ORGANISATION ACT 1971** 10

- 1. Section 99(1)—** 11  
*omit.* 12

- 2. Section 99(2) and (3)—** 13  
*renumber* as section 99(1) and (2). 14

**STATE HOUSING ACT 1945** 15

- 1. Heading before s 17(4A)—** 16  
*omit.* 17

## SCHEDULE (continued)

<b>2. Section 17(4A)—</b>	1
<i>omit.</i>	2
<b>STATUTORY BODIES FINANCIAL</b>	3
<b>ARRANGEMENTS ACT 1982</b>	4
<b>1. Section 46—</b>	5
<i>omit, insert—</i>	6
‘ <b>Category 3 investment power</b>	7
‘ <b>46.(1)</b> Category 3 investment power includes category 2 investment	8
power and the power to invest in all or any of the following, regardless of	9
the period of the investment—	10
(a) the first legal or first statutory mortgage of an estate in fee simple	11
in land in any State;	12
(b) the purchase of—	13
(i) land in fee simple in any State; or	14
(ii) leasehold land in the State held under a lease that is for a	15
term of 40 years or more and that is unexpired at the time of	16
the purchase; or	17
(iii) subject to the <i>Land Act 1994</i> , a freeholding lease of land held	18
from the State under that Act;	19
(c) debentures or other securities charged on the funds or property of	20
a local government;	21
(d) an investment arrangement prescribed under a regulation for this	22
paragraph.	23
‘(2) In this section—	24
‘ <b>“freeholding lease”</b> means—	25

## SCHEDULE (continued)

- (a) a pre-Wolfe freeholding lease, or post-Wolfe freeholding lease,  
that was an agricultural farm under the repealed *Land Act 1962*; or 1  
2
- (b) a grazing homestead freeholding lease. 3
- “grazing homestead freeholding lease” see *Land Act 1994*, schedule 6. 4
- “post-Wolfe freeholding lease” see *Land Act 1994*, schedule 6. 5
- “pre-Wolfe freeholding lease” see *Land Act 1994*, schedule 6.’. 6
- 2. Section 65—** 7
- omit.* 8

**TRUSTEE COMPANIES ACT 1968** 9

- 1. Section 36A(1), from ‘is restricted’—** 10
- omit, insert—* 11
- ‘is in accordance with the *Trusts Act 1973*, part 3.’. 12
- 2. Section 36A(2) and (3)—** 13
- omit.* 14

**TRUSTS ACT 1973** 15

- 1. Section 33(1)(i)(iii) and (iv)—** 16
- omit.* 17

## SCHEDULE (continued)

- |  |   |
|--|---|
| <b>2. Section 37(6), ‘21 or 27’—</b>                 | 1 |
| <i>omit, insert—</i>                                 | 2 |
| ‘30’.  | 3 |
| <br>   |   |
| <b>3. Section 49, from ‘Subject’ to ‘a trustee’—</b> | 4 |
| <i>omit, insert—</i>                                 | 5 |
| ‘A trustee’.   | 6 |

<b>VALUATION OF LAND ACT 1944</b>	7
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- |                                |    |
|--------------------------------|----|
| <b>1. Section 78, ‘27(1)’—</b> | 8  |
| <i>omit, insert—</i>           | 9  |
| ‘30(1)’.                       | 10 |