

TRUSTEE ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

PART VI: Miscellaneous and Supplementary

Section 34: Power to insure

116. **Section 34** creates a new power to insure. Under the present law there is probably a common law power (and sometimes even a duty) to insure trust property, but this is not entirely certain. In addition, there are different statutory powers to insure under the Trustee Act 1925 section 19 and the Trusts of Land and Appointment of Trustees Act 1996 section 6(1). The power under section 19 is limited to three-fourths of the full value of the property and does not apply to bare trustees. The new power will replace these disparate, unsatisfactory and, in places, uncertain provisions with a clear general default statutory power for trustees to insure trust property as if they were absolute owners. The new provision is based upon the provisions which now apply to trustees of land by virtue of section 6(1) of the 1996 Act.
117. **Section 34(1)** does this by inserting a new power to insure into the Trustee Act 1925 in substitution for the existing section 19. Subsection (1) of the new section 19 confers a power upon all trustees to insure any trust property (whether land or personal property) against such risks and in such sums as they see fit. Trustees will be able to pay the insurance premiums out of the income or capital funds of the trust (see new section 19(5)).
118. Trustees will be subject to the new statutory duty of care under section 1 when exercising the power to insure under the new section 19 or any corresponding power conferred by the trust instrument (see Schedule 1, paragraph 4). The duty of care will therefore apply, for example, to the selection of an insurer and to the terms on which insurance cover is taken out.
119. The new power to insure will apply to all trustees including bare trustees irrespective of when the trust was created (section 34(3)) but will only be a default power (as is the case in relation to the existing section 19 of the Trustee Act 1925 by virtue of Trustee Act 1925 section 69(2)).
120. The exercise of the power by bare trustees (defined for these purposes in new section 19(3)) will however be subject to the qualification in the new section 19(2). This provides that bare trustees must comply with any direction from the sole beneficiary or all the beneficiaries (as the case may be) that any trust property is not to be insured or is only to be insured on certain conditions. The rationale for this qualification is that where the beneficiaries are together absolutely entitled to the trust property, they have power under the general law of trusts to bring the trust to an end (*Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282). To the extent that any such directions are given, the trustees may not delegate their power to insure. This is so that the beneficiaries can ensure compliance with the directions they have given (see new section 19(4)). The concept of a “delegable function” referred to in new section 19(4) is defined in section 11(2) of the Act.

121. [Section 34\(2\)](#) makes a minor consequential drafting amendment to section 20(1) of the Trustee Act 1925. Section 20(1) provides that insurance monies received by trustees against loss or damage of trust property are capital monies.

Section 35: Personal representatives

122. [Section 35](#) applies the Act to personal representatives. The effect of section 35(1) is that in relation to the matters contained within the Act personal representatives have (subject to section 35(2) - (4)) the same powers and duties in relation to the administration of an estate of a deceased person as trustees have in relation to a trust. This is consistent with the policy of the Trustee Act 1925 (see section 68(1)(17)).
123. [Section 35\(2\)](#) provides the necessary textual adjustments to achieve this end. Section 8(1)(b) requires special treatment (section 35(2)(b) and (c)) because it confers power to acquire land for occupation by a beneficiary. The general provision (section 35(2)(b)) equating beneficiaries with persons interested in the estate of the deceased would therefore be too wide for the purposes of occupation of trust property because it would include creditors. Section 35(2)(c) therefore gives that expression a more restricted meaning in relation to section 8(1)(b).
124. The effect of section 35(3) is that remuneration paid to a personal representative will in future count as an administration expense for the purposes: (a) of section 34(3) of the Administration of Estates Act 1925 (see notes to section 28(3) above); and (b) of, in the case of insolvent estates, any provision giving reasonable administration expenses priority over preferential debts. The categories of preferential debts listed in Schedule 6 to the Insolvency Act 1986 are (in ascending numerical order of priority): debts due to the Inland Revenue; to customs and excise; social security contributions; contributions to occupational pension schemes; remuneration of employees; and levies on coal and steel production. The remuneration of personal representatives will therefore have priority over legacies and other debts of the deceased. Section 35(4) prevents subsection (3) from having an effect upon priorities in the administration of estates where the death occurred before the clause comes into force (see section 42).

Section 36: Pension schemes

125. [Section 36](#) governs the application of the Act to occupational pension schemes established as trusts under the law of England and Wales (section 36(1)). An occupational pension scheme for these purposes is a scheme which has, or is capable of having, effect in relation to a description or category of employment so as to provide benefits payable on termination of service, death or retirement or in respect of earners with qualifying service in an employment of any such description or category (Pension Schemes Act 1993 section 1).
126. Trustees of occupational pension schemes are in a special position. The investment powers of the trustees of such schemes and related powers of delegation are conferred by section 34 of the Pensions Act 1995. Section 34(2) confers on pension trustees a power to delegate their discretion to make any decision about investments to a fund manager who satisfies certain requirements and prohibits the delegation of such matters in any other way except under section 25 of the Trustee Act 1925 (delegation by individual trustees). By virtue of section 47 of the Pensions Act 1995, occupational pension trustees are required, where the assets of the scheme include investments, to appoint a fund manager and can appoint nominees and custodians ([Occupational Pension Scheme \(Scheme Administration\) Regulations 1996 \(SI 1996/1715 r 2\(c\)\)](#)). Consequently, Parts I, II and III of the Act do not apply to such occupational pension trustees when carrying out their investment functions; nor does Part IV in so far as it confers power to appoint nominees and custodians or, in relation to investment functions, an agent (section 36(3)(5) and (8)). Conversely, the new general duty of care may apply to the trustees of occupational pension trusts in relation to matters other than investment, agency for investment purposes and

the appointment of a nominee or custodian (section 36(2)) and such trustees may delegate non-investment functions under Part IV (section 36(5)). However, for the protection of pension scheme beneficiaries, pension trustees are expressly prohibited from delegating any function to the scheme employer or to a person who is connected with, or an associate of, the scheme employer (section 36(6)). “Employer” is defined by virtue of section 36(7)(a) as the employer of persons in the description or category of employment to which the scheme in question relates and, if regulations so provide, persons who have been the employer in relation to the scheme (Pensions Act 1995 sections 124(1) and 125(3)). Persons are connected with a company if they are a director or shadow director or an associate of such a person or the company (Insolvency Act 1986 section 249). Whether or not a person is an associate is determined by the application of section 435 of the Insolvency Act 1986. This section is lengthy but spouses and close relatives are associates, as are business partners and their respective spouses and employers and employees.

Section 37: Authorised unit trusts

127. **Section 37(1)** provides that the new statutory powers of investment, acquisition of land and to appoint agents, nominees and custodians in Parts II – IV of the Act do not apply to trustees of authorised unit trusts. An authorised unit trust is a unit trust scheme declared by order of the Secretary of State to be such for the purposes of the Financial Services Act 1986 (Financial Services Act 1986 section 207(1)). A unit trust scheme is a collective investment scheme under which the property in question is held on trust for the participants (Financial Services Act 1986 section 75(8)). A collective investment scheme is broadly speaking an arrangement with respect to any property which is intended to enable the persons taking part to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income (Financial Services Act 1986 section 75(1)). The Secretary of State will only issue an order declaring a unit trust to be an authorised unit trust if he is satisfied that the scheme and, in particular, the trust deed complies with the requirements of regulations made as to – amongst other matters – the powers and duties of the manager and the trustee of the scheme (Financial Services Act 1986 sections 78 and 81). Authorised unit trusts therefore have no need of the new powers conferred by Parts II – IV of the Act. An authorisation order under section 78 of the Financial Services Act 1986 Act can be revoked under section 79 of that Act.

Section 38: Common investment schemes for charities etc

128. **Section 38** provides that trustees managing common investment and common deposit schemes under the Charities Act 1993 do not have the powers conferred by Parts II-IV of the Act with the exception of trustees managing pooling schemes made under section 24 of that Act. Common investment and common deposit funds enable different charities to pool resources for investment purposes. The funds may only be established by order of the court or the Charity Commissioners under sections 24 and 25 of the Charities Act 1993 respectively. Such schemes may make specific detailed provision for all matters connected with the fund. The powers conferred by Parts II-IV are therefore unnecessary, with the exception noted above.

Section 39: Interpretation

129. **Section 39** sets out several of the definitions used in the Act.

Section 40: Minor and consequential amendments etc

130. **Section 40** gives effect to Schedules 2, 3 and 4 to the Act. Schedule 2 to the Act contains consequential amendments to a number of enactments. The need for such amendments arises, in most cases, by virtue of the introduction of the general power of investment in Part II of the Act and the power to acquire land in Part III. Schedule 3 contains transitional and saving provisions. Schedule 4 lists the repeals to be effected by the Act.

Section 41: Power to amend other Acts

131. **Section 41** empowers a Minister of the Crown to make further amendments of Acts of Parliament in consequence of or in connection with Part II or III of the Act (powers of investment and acquisition of land respectively). The power is exercisable by statutory instrument subject to the negative resolution procedure. However, where it is proposed to exercise the power in relation to a local, personal or private Act, the making of any such instrument must be preceded by consultation with any person who appears to the Minister to be affected by any proposed amendment. It is likely that this power will be exercised, in particular, in respect of local and private legislation containing provisions which operate by reference to the Trustee Investments Act 1961. The phrase “Minister of the Crown” means the holder of an office in Her Majesty’s Government in the United Kingdom, and includes the Treasury, the Board of Trade and the Defence Council (Ministers of the Crown Act 1975 section 8(1)). The power under section 41 will come into force when the Act is passed (section 42(1)) and may be exercised in relation to Acts which extend beyond England and Wales (section 41(1)).

Section 42: Commencement and extent

132. **Section 42** provides that with the exception of itself and sections 41 and 43 (which come into force when the Act is passed) the provisions of the Act will come into force on such day or days as the Lord Chancellor may by order appoint (section 42(1) and (2)). Such commencement orders may include transitional provisions and savings (section 42(3)).
133. **Section 42(4)** limits the extent of the Act to England and Wales only. This is subject to two qualifications. First, as mentioned, an order may be made under section 41(1) amending an Act extending beyond England and Wales. Second, the extent of consequential amendments and repeals (other than to the Charities Act 1993 and the Trustee Investments Act 1961) made in Schedules 2 and 4 to the Act will be determined by the extent of the provision amended or repealed (section 42(5)).

Schedule 1 – Application of duty of care

134. The First Schedule specifies the circumstances in which the new general duty of care will apply. They have been noted and discussed against the relevant provisions of the Act but in brief a trustee acting under a power conferred by the Act or the trust instrument will be subject to the duty in section 1 in the following circumstances:
- when exercising a power of investment or of reviewing investments (paragraph 1);
 - when acquiring or managing land (paragraph 2);
 - when appointing or reviewing the appointment of an agent, nominee or custodian (paragraph 3);
 - in the compounding of liabilities (paragraph 4);
 - when insuring trust property (paragraph 5) and
 - when dealing with reversionary interests, valuations and audits under section 22(1) or (3) of the Trustee Act 1925 (paragraph 6).
135. **Paragraph 7** makes clear that the duty of care will not apply where it is clear from a trust instrument that it should not.

Schedule 2 – Minor and consequential amendments

136. The majority of the amendments in Schedule 2 simply extend the application of the new general power of investment under section 3 to regimes where the powers of investment were as wide as the equivalent powers of trustees were allowed to be under the present law in the absence of express provision in the trust instrument (see for example paragraphs 3, 4 and 8). These notes refer to a few of the more significant.

*These notes refer to the Trustee Act 2000 (c.29)
which received Royal Assent on 23 November 2000*

137. [Paragraph 1](#) - Trustee Investments Act 1961 - the provisions of the Trustee Investments Act 1961 mentioned in paragraph 1(1), which are replaced by the new power of investment in Part II of the Act, are repealed by the Act, except in so far as they are applied by or under any other enactment. Consequently, where (notwithstanding the provisions in Parts II and III of Schedule 2) an enactment continues to operate by reference to the Trustee Investments Act 1961, its effect is preserved. For this purpose it will still be possible (under section 12 of the 1961 Act) for additions to be made to the list of investments specified in Schedule 1 to that Act.
138. In brief the provisions mentioned relate to the following matters: paragraph 1(1) - section 1 (new power of investment of trustees); 2 (restrictions on wide range investments); 5 (certain valuations to be conclusive for purposes of division of trust fund); 6 (duty of trustees in choosing investments); 12 (power to confer additional powers of investment); 13 (power to modify provisions as to division of trust fund) and 15 (saving for court powers);
139. [Paragraph 1\(2\)](#) – section 3 (relationship between Act and other powers of investment); Schedules 2 and 3 (supplementary provision);
140. [Paragraph 1\(3\)](#) – section 8 (special cases); 9 (supplementary); Schedule 4 paragraph 1(1) and section 16(1) to the extent mentioned (construction of references to section 1 of the Trustee Act 1925 which was replaced by section 1 of the 1961 Act).
141. [Paragraph 2](#) - Charities Act 1993 – sections 70 and 71 of the 1993 Act were enacted to enable the Secretary of State, by secondary legislation, to expand the investment opportunities of charity trustees. In view of the new wider powers of investment which will be available to charity trustees under Part II these provisions are no longer needed. The amendments of section 86(2) remove references to sections 70 and 71. Sections 70 and 71 are to be repealed by Schedule 4 to the Act.
142. [Paragraphs 7 - 17](#) make consequential amendments to the Settled Land Act 1925. These fall into a number of broad groups. The amendments in the first group (paragraphs 7 - 9) either grant to trustees of the settlement (in relation to the investment of capital money) the general power of investment in section 3, or make provision to reflect this widening of investment power.
143. The second group of amendments (in paragraph 10) operate on section 75 of the 1925 Act. They amend the section so as to make the investment (or other application) of capital money under that Act a matter exclusively for the trustees of the settlement (subject to a requirement to consult and act in accordance with the wishes of the tenant for life so far as practicable) or the court. These amendments permit the trustees to delegate their functions in accordance with Part IV of the Act, but this is again subject to restrictions designed to safeguard the life tenant's right to be consulted in relation to the investment or application of capital money.
144. [Paragraph 11](#) inserts a new section 75A into the Settled Land Act 1925. The new provision is closely based on section 10(2) of the Trustee Act 1925 (which is repealed by the Act), and permits life tenants or statutory owners (with the consent of the trustees of the settlement), when selling land, to act as mortgagee for up to two thirds of the value of the property being sold.
145. The amendments in the next group (paragraphs 12 - 14) repeal those sections of the Settled Land Act 1925 which concern matters which will in future be governed by other provisions in the Act (such as the remuneration of trustees of the settlement).
146. [Paragraph 16](#) concerns the role of an assignee for value of a life tenant's estate or interest in the investment of capital money, and the final group of amendments (paragraphs 15 and 17) implement a number of changes to the powers both of trustees of the settlement and life tenants, reflecting some of the changes made to the powers of trustees by the Act.

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147. Paragraphs 18, 21, 23 and 24 amend the Trustee Act 1925 by removing provisions which are no longer necessary. Paragraph 19 clarifies that the power of trustees to give receipts extends to investments.

Schedule 3 – Transitional provisions and savings

148. Paragraph 1 provides that a banker or banking company holding bearer securities under section 7(1) of the Trustee Act 1925 (which is to be repealed by the Act) when Part IV of the Act comes into force will be deemed to be a custodian of those securities under section 18.
149. Paragraphs 2 and 3 provide that sections 8 and 9 of the Trustee Act 1925 (which are repealed by the Act) continue in effect in relation to matters occurring before the relevant repeal takes effect (as to which see section 42). Paragraph 6 provides that section 23(2) continues to apply to appointments made before the repeal of that section takes effect.

Schedule 4 – Repeals

150. Paragraph 1 lists the sections that are being repealed in the Trustee Investments Act 1961 and the Charities Act 1993.
151. Paragraph 2 lists repeals of section in other Acts.