

TRUSTEE ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part II: Investment

Section 3: General powers of investment

20. **Section 3(1)** will implement the Law Commission's recommendation in relation to investment powers by giving trustees, subject to the safeguards and limitations in sections 3-7 of the Act, the same power to invest trust assets as if they owned the assets outright rather than holding them on trust. This new power will enable trustees to hold investments jointly or in common with other persons thereby reversing the present rule.
21. The new power is however not entirely general. It does not extend to investments in land other than by way of loans secured on land (subsections (3) – (5)). The effect of this limitation is reduced by section 8 which confers a power to acquire land for any purpose including as an investment. Separating the powers of investment in relation to land and other assets in this way has facilitated the making of consequential amendments to other legislation (see Schedule 2 to the Act). The new power is not entirely unfettered. First, trustees will remain subject to their fundamental duties (for example, the duty to act in the best interests of the present and future beneficiaries and to avoid any conflict between their duties as trustees and their personal interests). Second, the new duty of care created in Part I of the Act will apply (Schedule 1 paragraph 1(a)). At present, investment under the Trustee Investments Act 1961 is subject to the common law duty of care. Third, sections 4 and 5 impose specific duties to have regard to the need for diversification and suitability of investments and to obtain and consider proper advice where appropriate. These duties will apply to trustees in the exercise of a power of investment. Under the present law there is a general duty to have regard to the need for diversification so far as appropriate to the circumstances of the trust and to the suitability to the trust of the proposed investment and, where exercising certain statutory powers to invest, to take advice before making the investment (Trustee Investments Act 1961 section 6).
22. The term “asset” is defined in section 39(1) as including any right or interest. “Investment” is not defined in the Act. The general power of investment permits trustees to invest assets in a way which is expected to produce an income or capital return. “Land” is also not defined in the Act but is defined in Schedule 1 to the Interpretation Act 1978 as including buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.