

TRUSTEE ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part II: Investment

Section 7: Existing trusts

33. **Section 7** provides for the application of Part II of the Act to trusts in existence when Part II comes into force (see section 42 as to commencement). The general rule is that Part II applies to all trusts irrespective of the date of their creation (section 7(1)). This rule is however subject to certain exceptions. First, Part II does not apply to pension trusts, authorised unit trusts or funds established under schemes made under sections 24 or 25 of the Charities Act 1993 (see sections 36-38). Second, the effect of the rule that the new general power of investment is subject to any restriction or exclusion imposed by the trust instrument (section 6(1)(b)) is not to apply to any trust instrument made before 3 August 1961 (section 7(2)). This will ensure that old restrictions overcome by the 1961 Act do not revive to restrict the benefits of the new general power of investment. Such restrictions pre-date a general statutory power. Fourth, section 7(3)(a) provides that where a trust instrument gives the powers of investment equivalent to the default powers for the time being authorised by law, the trustees should have the general power of investment. This provision ensures that an intention of a settlor to provide ample powers of investment is not frustrated by this liberalisation of the general law. It continues the policy underlying section 3 of the Trustee Investments Act 1961 which provided that any power of investment to invest property in any investment for the time being authorised by law for the investment of trust property, conferred before the passing of the 1961 Act, was to confer the same power to invest as sections 1 and 2 of that Act. Section 7(3)(b) makes similar provision for trust instruments made after the 1961 Act was passed.
34. It may be helpful to give an example of how sections 6 and 7 will operate.
35. Take, for example, an express power of investment in a post 2 August 1961 trust instrument authorising trustees to invest “*only in government bonds*”. This power would be taken to exclude the general power of investment (section 6(1)(b)). On the other hand, an express power in another instrument of the same date to invest “in shares quoted on the London Stock Exchange, but not in shares of X plc” would take effect as the general power of investment, subject to the restriction on investing in X plc (section 6(1)). Had the trust instruments pre-dated 3 August 1961, the general power of investment would have applied free of either limitation (section 7(2)) as would the new statutory powers conferred under the 1961 Act when it came into force (Trustee Investments Act 1961 section 1(3)).
36. Had the trust instrument merely stated that the trustees were to have such powers of investment as may for the time being be authorised by law (or words to that effect), the Act would confer the general power of investment (section 7(3)).