

# Trusts Bill 2024

## Explanatory Notes

### Short title

The short title of the Bill is the Trusts Bill 2024.

### Policy objectives and the reasons for them

The *Trusts Act 1973* (Act) governs many aspects of Queensland's trusts law. It does not codify the law of trusts but instead supplements the law in this area. In particular, the Act facilitates the efficient administration of trusts by conferring powers on trustees which might otherwise be lacking under the trust instrument, and by ensuring that the court has appropriately wide powers to supervise the administration of trusts.

The objective of the Trusts Bill 2024 (Bill) is to replace the Act with new, modernised and simplified trusts legislation, and introduce new or substantially changed provisions which streamline the legislation to meet modern needs and address existing gaps in the Act. The Bill is drafted broadly in accordance with the recommendations of the Queensland Law Reform Commission (QLRC) in its review of the Act.

From January 2012 to December 2013, the QLRC conducted a full review of the Act which included publication of a Discussion Paper, an Interim Report with recommendations and a Final Report with a draft Bill (QLRC's review). The QLRC's review: examined whether the Act provided an adequate, effective and comprehensive framework for the regulation of trusts (including charitable trusts) in Queensland; identified opportunities for the Act to be modernised, simplified, clarified or updated; ascertained whether any other relevant State legislation pertaining to the law of trusts should be amended for consistency with, or as a consequence of, any recommended amendments to the Act; and recommended streamlining the law with respect to deciding disputes in relation to the terms of the administration of trusts, including the appropriate court or tribunal which is to have jurisdiction over less complex matters and disputes involving lower monetary values.

The QLRC's review involved a comprehensive and independent review of the Act, considered equivalent provisions in other jurisdictions, and undertook substantial consultation with a wide range of stakeholders who were generally supportive of the QLRC's recommendations.

The Bill generally adopts the QLRC's review recommendations and modernises and simplifies trust legislation for Queensland. The objectives of the Bill are to:

- repeal provisions of the Act that are now obsolete or no longer appropriate in modern trusts legislation, or that confer powers that are no longer needed in light of the new provisions of the Bill;

- streamline the legislation, meet modern needs and address existing gaps in the Act including: to state trustees' management powers and minimum or core duties; grant new powers to trustees to delegate; modernise the capital amount which may be applied for maintenance, education or advancement of a beneficiary by a trustee; simplify the administration of trusts by granting a power of appointment to the administrator or attorney of the last continuing trustee with impaired capacity; grant power to the Attorney-General to consider and determine certain *cy pres*<sup>1</sup> applications; and confer additional statutory powers on courts to address existing gaps; and
- streamline the law with respect to deciding disputes in relation to the administration of trusts, especially for matters involving lower monetary values, including *cy pres* schemes.

## Achievement of policy objectives

The Bill achieves the policy objectives by:

- repealing provisions that are obsolete, are no longer appropriate in modern trusts legislation, or that confer powers that are no longer needed in light of the new provisions in the Bill;
- redrafting the provisions in modernised language;
- modernising a trustees' powers and duties, by:
  - conferring on trustees all the powers of an absolute owner of the trust property, subject to the trustees' duties;
  - stating trustees' minimum or 'core' duties that apply generally in administering a trust including: a general duty of care; a duty to act honestly and in good faith; and a duty to keep trust accounts and make them available to beneficiaries upon request;
  - conferring a new power for a trustee to authorise another person to exercise the trustee's investment powers;
  - limiting a trustee's power to delegate the administration or exercise of the trusts, powers, authorities and discretions vested in the trustee to 12 months' duration;
- clarifying gaps including: that the appropriation power does not affect any power of appropriation conferred under the trust instrument and that the settlor may specify greater or additional powers in the trust instrument to those specified in the Bill;
- modernising the provisions to reflect modern community standards including: increasing the capital that may be applied by a trustee for the maintenance, education or advancement of a beneficiary; allowing the District Court, within its jurisdictional monetary limit, to exercise the same powers that are conferred on the Supreme Court; and enabling trustees of certain charitable trusts to apply to the Attorney-General for the approval of *cy pres* schemes, in lieu of making an application to the court;

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<sup>1</sup> *Cy pres* in plain English means: "as nearly as possible". *Cy pres* applications refer to situations where the purpose of a charitable trust is incapable of being carried out (for example, because it is in favour of a charity that no longer exists) and the trust property is to be applied to another charity which has a charitable purpose as near as possible to the original charitable purpose.

- conferring additional statutory powers on the court for the efficient and effective administration of the trust including the power: to review and reduce the amount of a trustee’s excessive remuneration; to disqualify a person from being appointed as a trustee; and to remove and replace office holders who have been appointed under the trust instrument;
- streamlining the administration of a trust by granting a new power, without recourse to the court, for a person who is the administrator or attorney (for all financial matters) of a last continuing trustee who has impaired capacity for administering the trust to appoint a replacement trustee or trustees; and for the last continuing trustee who is a bankrupt, or taking advantage of the laws of bankruptcy as a debtor, to appoint a replacement trustee or trustees;
- reflecting modern trust instruments by allowing appointment of a trustee not only by the appointor of the trust, but also by any other mechanisms under the trust instrument, to be exercised in a reasonable period, before other mechanisms for appointment of a new trustee under the Bill apply; and
- providing safeguards for beneficiaries of a trust by preventing the following persons from being appointed as a trustee of a trust: a child, a bankrupt or a person who is taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction, a “Chapter 5 body corporate”, as defined under section 9 of the *Corporations Act 2001* (Cth), or a trustee who has been disqualified from being a trustee by a court under the Bill.

The positions in the Act which are altered by the Bill are set out below. Unless otherwise stated, these changes are consistent with the QLRC’s review recommendations.

#### Trustee and Statutory Trustee

The definition of *trustee* in the Act (section 5) includes a “statutory trustee”. A statutory trustee is a person with capacity:-

- who is entitled to possession, or the rents and profits, from land where there is no trustee of that land (*a deemed trustee*); and
- who is, or would be, a life tenant of settled land under the *Settled Land Act 1886* (a settled land trustee).

The Bill removes a settled land trustee from the definition of a trustee as this is outdated and no longer required.

However, the Bill, at clause 7, deviates from the QLRC’s review, by including a deemed trustee as a “statutory trustee” within the definition of trustee (see clause 7(2)). Part 14 has the same effect as sections 7 and 31 of the Act in defining and limiting the powers of statutory trustees. While it is not known whether the provisions relating to deemed trustees have practical application, they are longstanding and, in an abundance of caution, are retained with stakeholders’ support.

#### Capacity and Impaired Capacity

The Act made various references to a person having ‘mental capacity’ or ‘incapacity’ without defining these terms.

Modernised definitions of *capacity* and *impaired capacity*, adopted from the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* are included at clause 10 of the Bill.

#### Restrictions on who may be appointed as trustee

The Act does not place any restrictions on who may be appointed as a trustee. Section 12 of the Act, however, allows an infant trustee to be removed and replaced.

The Bill (clause 13) prevents a person being appointed as a trustee if they are a child; a “Chapter 5 body corporate” as defined under section 9 of the *Corporations Act 2001* (Cth); a person who is bankrupt, or is taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction; or a person who is disqualified from being appointed as a trustee by a court order made under clause 173 of the Bill.

Clause 13 differs from the QLRC’s review findings because clause 13:

- prevents trustees who had been disqualified by court order from being appointed as a trustee;
- does not permit the appointment of a child as trustee conditional on them attaining majority; and
- is more certain in relation to bankrupt trustees because it prevents them from being appointed as trustee. The broader definition of insolvent persons recommended by the QLRC would include a person who was unable to pay their debts as and when they fell due. Clause 13 more narrowly defines a ‘bankrupt’ trustee as individuals who are undischarged bankrupts or those who are taking advantage of the laws of bankruptcy as a debtor, or, in the case of corporations, are a ‘Chapter 5 body corporate’ under section 9 of the *Corporations Act 2001*.

#### Limit on number of trustees

The Act limits the trustees of a trust to four, unless the trust is a charitable trust or the Minister by a certificate approves a greater number of trustees for the trust under section 11.

The Bill (clause 14) limits the number of trustees to four; which is the same as section 11 of the Act. This limitation applies to trusts other than charitable trusts (which have no limit on the number of trustees) and trusts used for self-managed superannuation funds under the *Superannuation Industry (Supervision) Act 1993* (Cth). The exclusion of self-managed superannuation funds introduced by the Bill deviates from the QLRC’s review recommendations. The Bill (clause 15) allows the court, rather than the Minister (as provided for in the Act), to approve more than four trustees being appointed for a trust in accordance with the QLRC’s review recommendations. Clause 14(4), in accordance with the QLRC’s review recommendations, also provides that a custodian trustee is not to be counted as a trustee for the limit on the number of trustees.

### Replacement of trustees

Section 12 of the Act allows a person with the power of appointment under a trust to replace a trustee of the trust with a new trustee, if the trustee is dead, incapable or unfit to act, refuses to act, is a child, remains out of Queensland for more than a year without having properly delegated the execution of the trust, seeks to be discharged from all or any of the trusts or powers reposed in or conferred on the trustee, or being a corporation, has ceased to carry on business, is under official management, is in liquidation or has been dissolved.

The Bill (clause 20) modernises this provision by elaborating on the circumstances in which the trustee may be replaced to include where:

- the trustee becomes bankrupt, or starts to take advantage of the laws of bankruptcy as a debtor, under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction. The QLRC’s review recommendation (which was not followed) used bankruptcy as the test, which included the “inability to pay debts as and when they fell due”;
- the trustee is disqualified from managing corporations under the Part 2D.6 of the *Corporations Act 2001* (Cth) and does not have permission to manage all corporations or the permission is subject to exceptions or conditions; under section 206GAB or 206G of the *Corporations Act 2001* (Cth);
- the trustee is a corporation that: has stopped carrying on business; is a Chapter 5 body corporate within the meaning of section 9 of the *Corporations Act 2001* (Cth); or has been deregistered or has otherwise ceased to exist.

Clause 20 also removes the ability for a trustee to be replaced if they remain out of Queensland for more than a year without having properly delegated the execution of the trust as this is no longer a suitable ground for removal. It also no longer includes removal of a child as a child is no longer permitted to be appointed as a trustee under clause 13 of the Bill. However, clauses 232 and 238 contain the power to replace (under clause 20) or remove (under clause 29) a child who had been appointed as trustee prior to commencement of the Bill.

### Replacement of last continuing trustee who is dead

Section 12(1) of the Act allows the personal representative of the last continuing trustee who is dead to appoint a replacement trustee or trustees where there is no appointor under the trust instrument, or no appointor who is willing and able to act, to appoint a new trustee.

Clause 21 of the Bill provides a similar right to the personal representative of the last continuing trustee who is dead to appoint a replacement trustee or trustees where there is no appointor under the trust instrument, or no appointor who is willing and able to act. However, clause 21 further limits this right to where any other mechanism to appoint a trustee under the trust instrument has not been utilised within a reasonable period of the last continuing trustee’s death. This deviates from the QLRC’s review recommendations to reflect the complexity of trust instruments in modern society and

ensure that any mechanism for appointing a replacement trustee under the trust instrument may take effect.

*Replacement of last continuing trustee with impaired capacity*

The Act does not provide any ability to replace a trustee where the last continuing trustee has impaired capacity for administering the trust, and there is no one, or no one willing and able, to exercise the power of appointment to appoint a new trustee. In this case, it would be necessary to apply to the court for orders to appoint a new trustee.

Under clause 22 of the Bill, the administrator or attorney for the last continuing trustee who has impaired capacity for administering the trust, who is authorised to exercise power for all financial matters for the trustee, may exercise the power of appointment to appoint a new trustee including appointing themselves. This power only arises where there is no appointor under the trust instrument, or no appointor able and willing to exercise the power of appointment to appoint a new trustee, and any other mechanism under the trust instrument which enables a new trustee to be appointed has not been exercised within a reasonable time period after the last continuing trustee with impaired capacity became the last continuing trustee, or became a person with impaired capacity.

To give effect to the QLRC's review recommendations the power of appointment in this clause has been clarified so that the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* do not apply to appointments made under this clause and these appointments are not made in their capacity as an attorney or administrator. In deviation from the QLRC's recommendation the power in this clause:

- is subject to a contrary intention expressed in the trust instrument or the order or instrument by which the administrator or attorney is appointed; and
- is limited to attorneys or administrators who are appointed for all financial matters.

*Replacement of last continuing trustee who is bankrupt etc.*

Where the last continuing trustee is bankrupt or is taking advantage of the laws of bankruptcy as a debtor, and there is no appointor of the trust or other mechanism under the trust instrument to replace the bankrupt trustee, the Act does not provide a recourse to replace the bankrupt trustee and it is necessary to apply to the court.

Clause 23 of the Bill allows the last continuing trustee who is bankrupt, or is taking advantage of the laws of bankruptcy as a debtor, under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction to appoint a replacement trustee. However, this power can only be used where there is no appointor under the trust instrument, or no appointor able and willing to exercise the power of appointment to replace the trustee, or any other mechanism under the trust instrument to replace the trustee has not been exercised within a reasonable period of the trustee becoming bankrupt, or becoming the last continuing trustee.

Whilst clause 23 was not proposed by the QLRC's review recommendations, it is consistent with existing provisions (and provisions in the Bill) enabling replacement of trustees and provides an efficient and cost-effective mechanism for appointing a replacement trustee without recourse to court.

### Notice of removal of delegating trustee to trustee's delegate

Clause 31 of the Bill is a new clause which requires the trustee's delegate to be notified when the trustee is removed, discharged or replaced. This is a variation from the QLRC's review recommendations and is a procedural notice provision which aligns with the new provisions regarding the trustee's power to delegate. More information about the trustee's power to delegate is set out below.

### Vesting of trust property and devolution of trusts – on last continuing trustee having impaired capacity for particular matters

Under both the Act and the QLRC's review recommendations, there is no provision dealing with the property of the trust where the last continuing trustee has impaired capacity to administer the trust. This means that the trust property remains with the last continuing trustee who has impaired capacity to administer the trust, effectively placing the trust property in a legal 'limbo' where the party who controls the trust property has no ability to deal with it.

Part 3, division 8 of the Bill devolves the trust property to the public trustee until a new trustee is appointed to the trust where a court or tribunal makes a determination that a trustee has impaired capacity for all financial matters, or for administering the trust, or on the person who is the last continuing trustee having an administrator appointed for all financial matters. This new provision applies the same policy as sections 15 and 16 of the Act (that are adopted in part 3, division 7 of the Bill) which devolves the trust property to the public trustee in a similar way when the last continuing trustee dies.

### Limitation of powers of public trustee where trust property devolves on death or incapacity of the last continuing trustee

Under section 16 of the Act, the power of the public trustee to administer the trust property which devolves on the death of the last continuing trustee does not deprive the public trustee of any power which the public trustee may exercise under section 62 of the *Public Trustee Act 1978*.

Clauses 39(3) and 46(3) of the Bill do not deprive the public trustee of any power which it may exercise under either section 61 or 62 of the *Public Trustee Act 1978* where the trust property devolves to the public trustee on the death or incapacity of the last continuing trustee. This deviates from the QLRC's recommendations in respect of the reference to section 61. Sections 61 and 62 of the *Public Trustee Act 1978* relate to the circumstances in which public trustee may release a mortgage or encumbrance or execute a transfer.

### Custodian Trustees

Under section 19 of the Act, subject to the provisions of the trust instrument, on the appointment of the custodian trustee to the trust:

- the trust property vests in the custodian trustee solely;
- the custodian trustee's sole function is to get in and hold the trust property, invest its funds, and dispose of the trust assets (and execute any documents or

- perform any acts required to do this) as the managing trustee (by a majority where more than one) direct;
- the custodian trustee has no power to appoint a new trustee (other than by application to court);
  - the management of the trust property and exercise of all powers and discretions exercisable by the trustee under the trust remain with the managing trustee as if there was no custodian trustee;
  - the custodian trustee is not liable for any act or default by the managing trustee, or for any act or default by the custodian trustee under a direction by the managing trustee;
  - the custodian trustee must bring or defend any proceedings or actions involving trust property as the managing trustee directs. The custodian trustee is not liable for the costs of those proceedings except for costs that are payable out of trust property;
  - the custodian trustee has a right to apply to the court for directions or orders as the court thinks appropriate where the custodian trustee is of the view that any direction of the managing trustee conflicts with law or may expose the custodian trustee to liability or is otherwise objectionable.

The QLRC's review recommended that these provisions be subject to a contrary intention in the trust instrument.

The Bill in part 4 deviates from the QLRC's review recommendations by making these equivalent provisions (being clauses 53, 54, 55, 56, 57 and 59) subject to an express contrary intention in the trust instrument so that the custodian trustee's rights, obligations and liabilities are clear. The Bill clarifies where the custodian trustee is not liable under clauses 56, 57 and 59 and where the managing trustee is personally liable under those (same) clauses. Clause 62, which is a new provision, also makes it clear that the managing trustee and custodian trustee continue to have the usual right of indemnity from the trust property that applies to trustees in relation to liabilities incurred in the proper administration of the trust.

### Trustees' duties

The Act does not provide any general statutory duty of care on the exercise of a trustee's powers. In accordance with the QLRC's review recommendations, the Bill in part 5 adopts minimum statutory obligations rather than detailed or prescriptive requirements, which largely reflect and, in certain respects, clarify the general common law in relation to those duties.

Part 5, division 2 of the Bill provides for a general duty to exercise care, diligence and skill in administering the trust. That duty is higher for those trustees engaged in a profession, business or employment which manages the affairs of other persons and for non-professional trustees who hold themselves out as having special knowledge or experience in administering trusts or administering trusts of a particular type. All other trustees must exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons.



Part 5, division 3 of the Bill provides for a general duty on the trustee in administering a trust to act honestly and in good faith and, for a charitable trusts, to further the purposes of the trust, and for any other trust, for the benefit of the beneficiaries of the trust.

Part 5, division 4 of the Bill provides that trustees have a duty to keep accurate records and accounts, to keep those accounts and records for at least three years after the termination of the trust, and to make accounts available for beneficiaries to inspect and copy. These provisions do not limit any other general law rights beneficiaries may have to obtain other information from the trustee or to apply to the court for an order that the trustee provide other information. A *beneficiary* is also broadly defined to include a person in whose favour a power to distribute the trust property may be exercised which would include beneficiaries and potential beneficiaries in line with the QLRC's review recommendations.

#### Investment – power to provide residence for beneficiary

Section 28 of the Act allows a trustee to purchase a dwelling house for a beneficiary to use as a residence or enter into an agreement or arrangement to secure a right for a beneficiary to use the dwelling house as a residence.

Clause 80 of the Bill uses the modern term 'residence' rather than a 'dwelling' and also clarifies that the trustee's power to purchase a 'residence' includes a power to construct a residence. Further, this clause of the Bill is to apply despite any contrary provision in the trust instrument. The restriction from section 28(2) of the Act, that requires the decision to retain a residence not to unfairly prejudice the interests of the other beneficiaries, has not been retained because the restrictions in clause 80(3) of the Bill adequately protect the trust which require the trustee to only exercise the power consistent with the extent of the beneficiary's interest under the trust.

Clause 80 of the Bill generally adopts the QLRC's review recommendations with one further clarification at subclause (5), which confirms that the ability to retain a residence after the beneficiary has stopped living in the residence does not limit the operation of the *Retirement Villages Act 1999* or any other Act.

#### Investment – power to delegate

Under the Act, there is no power to delegate the trustee's investment powers to another person.

Clause 81 of the Bill, subject to an express contrary intention in the trust instrument, authorises the trustee to delegate the trustee's investment power to another person on such terms (including relating to remuneration) as the trustee considers appropriate. Notwithstanding the delegation of the investment power to another person, subject to an express contrary intention in the trust deed, the trustee remains liable for the acts or omissions of this other person under the trustee's duties or other requirements under the trustee's duties (part 4) and investment (part 5) parts of the Bill pursuant to clauses 81(3) and 82 of the Bill.

#### Court consideration of investment strategy in proceeding for breach of trust

Section 30B of the Act sets out the factors the court may take into account in considering a trustee's liability for an alleged breach of trust in relation to the trustee's investment power.

Clause 85 of the Bill generally mirrors this provision except it includes a new factor to be taken into account – the amount of the trust funds invested in the exercise of the investment power. This is also a deviation from the QLRC's review recommendations.

*General powers of trustees in relation to trust property*

Part 4 of the Act, and, in particular, section 32 of the Act, sets out general powers the trustee has in respect of trust property. These powers are restrictive and amount to less than the powers of an absolute owner of property.

Clause 87(1) and (3) of the Bill give the trustee all of the powers of an absolute owner of the property in relation to the trust property, subject to an express statement excluding or modifying that power in the trust instrument. Clause 87(2) and (3) of the Bill gives the trustee certain specific powers in relation to the trust property which are unable to be excluded or modified by the trust instrument including, for instance, the power to sell, lease, insure or mortgage trust property.

This clause of the Bill generally adopts the QLRC's review recommendations except it has been clarified that the power to insure the trust property includes the power to insure the trust property against loss or damage as well as for any risk or liability relating to the trust property. Further, the power to lease has been clarified to include any power to renew, extend or vary a lease.

*Trustee's duty to sell trust property*

In accordance with the QLRC's review recommendations, the wide power given to trustees under clause 88 of the Bill permitting the trustee to postpone sale of trust assets indefinitely (which follows section 32(1)(c) and (4) of the Act) is now qualified for personal representatives by new section 49B of the *Succession Act 1981* (which is found in clause 338 of the Bill). New section 49B places time limitations on a personal representative's power to carry on a business forming part of a deceased person's estate pending disposal of any estate assets used in the business, unless otherwise approved by order of the court.

*Trustee's power to expend amounts in relation to trust property*

Whilst clause 90 of the Bill broadly adopts section 33(1)(a) to (f) of the Act by giving the trustee power to expend amounts in relation to trust property, it adopts modifications as recommended by the QLRC's review including removing the limit of \$10,000 on the amount the trustee is permitted to expend on the improvement or development of trust property without court approval.

*Trustee's power to apportion expenditure between income and capital and recoup particular expenditure*

Section 33(1)(g) of the Act, subject to any other provision of the Act or a direction of the court, gives the trustee the power to apportion payment or expenditure between capital and income and allows the trustee to recoup the capital from subsequent income where such payment or expenditure has been made out of capital.

The Bill (at clause 91) generally follows this section but also allows the trustee to recoup the income from capital where such payment or expenditure has been made out of income and also makes the trustees' power under this clause subject to an express contrary intention in the trust instrument, in accordance with the QLRC's review recommendation.

#### *Trustee's power to appropriate*

Section 33(1)(l) of the Act permits the trustee to appropriate any part of the trust property to satisfy, wholly or in part, a legacy payable out of the trust property or a share of the trust property (whether contingent or absolute) to which a person is entitled, subject to notice being given to all other beneficiaries who have an interest in the appropriation then having a right to apply to the court to vary the appropriation within one month of the notice.

Part 7, division 3 of the Bill varies this provision, generally in accordance with the QLRC's review recommendations, by providing that:

- the appropriation may only be made with the consent of the person entitled. If the person entitled is under a legal incapacity then the person's guardian (if the entitled person is a minor) or administrator or attorney (if the entitled person is an adult who lacks capacity), who is authorised to exercise power for financial matters relating to the proposed appropriation, may consent (see clauses 95(2) and 96(1)(c) as clarified by clause 96(4));
- the notice required to be given to interested persons is for two months (see clause 94(2) of the Bill) instead of the one month notice period in the Act; and
- clause 95(6) of the Bill, clarifies that this does not limit or otherwise affect any power of appropriation conferred under the trust instrument.

In a deviation from the Act and also the QLRC's review recommendation, clause 94(1)(b) and (3) of the Bill also allows an interested person to shorten or waive the two-month notice period by giving notice to the trustee. Clause 93(4) and (5) of the Bill clarifies to whom notice must be given to where the interested person is a minor (their guardian) or an adult with impaired capacity (their attorney or administrator) and reflect the framework of the *Powers of Attorney Act 1998* and *Guardianship and Administration Act 2000*.

#### *Trustee's Delegation*

Section 56 of the Act provides that a trustee who is, or may be about to be, out of Queensland, or by reason of physical infirmity, temporarily incapable of performing all duties as a trustee may, by power of attorney executed by a deed, delegate any of the trusts, powers, authorities, and discretions vested in the trustee to a person resident in Queensland. A co-trustee, unless they are a trustee corporation, may not receive a delegation under section 56. The delegating trustee will remain liable for their

delegate's actions and defaults. The delegation is only to operate whilst the trustee is out of the jurisdiction or temporarily incapable of performing all duties due to physical infirmity.

Part 7, division 4 of the Bill differs from section 56 by:-

- limiting the proposed delegates to those who are not excluded from being trustees of a trust under clause 13 of the Bill;
- requiring the delegation to be effected by way of an instrument signed by both the trustee and the delegate instead of the power of attorney under the Act;
- altering the duration of the delegation by providing that the delegation:
  - commences on an event or date stated in the instrument of delegation (or otherwise the date of the delegation instrument);
  - expires on the earlier of: an event or date stated in the instrument of delegation; the beginning of the day that is 12 months after the day the delegation commences; when the delegation is revoked; or the day the trustee who has delegated their powers is replaced, removed or discharged from the trust, or dies;
- clarifying when revocation of the delegation will occur and specifying that this includes when:
  - the trustee gives an instrument to the delegate signed by the trustee revoking the delegation;
  - the trustee or delegate becomes a person with impaired capacity for administering the trust;
  - the delegate becomes a bankrupt or starts to take advantage of the laws of bankruptcy under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction;
  - the delegate becomes disqualified from being appointed as a trustee by an order made by the court under clause 173 of the Bill. This ground was not recommended by the QLRC but is an appropriate extension that ensures that if the delegate has been determined by a court as not being fit to act as trustee, that person cannot be delegated a trustee's powers;
  - if a company stops carrying on business or becomes a 'Chapter 5 body corporate' within the meaning of section 9 of the *Corporations Act 2001* (Cth) or is deregistered or otherwise ceases to exist; and
- requiring the trustee to give written notice of the delegation to any co-trustee and any appointor who is not also the delegating trustee, and where there is no co-trustee, or an appointor who is not the delegating trustee, the notice must be given to each beneficiary of the trust to the extent it is practicable to do so.

The Bill also does not adopt the recommendations of the QLRC's review to extend the trustee's power to delegate to include a situation where a trustee is, or may be about to become, temporarily mentally (as opposed to physically) incapable of performing trustee's duties.

#### *Trustee's appointment of an agent*

Sections 54(1) and 43 of the Act give a trustee a general power to appoint an agent and to confer a power for a trustee, in writing, to authorise a person, including another trustee, to give receipts.

Clause 112 of the Bill, adopting the recommendation of the QLRC's review, varies this by not requiring the authorisation to be in writing, and whilst permitting a trustee to appoint a co-trustee as an agent, prevents the trustee appointing a beneficiary of the trust as an agent, even if the beneficiary is a co-trustee.

#### Delivery of Chattels

Section 74 of the Act permits the trustee to deliver chattels to a child or their guardian where the child is beneficially entitled to the chattels and a receipt of the child or guardian is a complete discharge to the trustee for the chattels delivered.

Clause 119 of the Bill adopts the effect of this section but, in accordance with the QLRC's review recommendations, clarifies that the value of the chattels delivered under this clause is not to be taken into account in relation to the amount of capital able to be applied for maintenance of the child under clause 133 of the Bill.

#### Application of insurance money

Section 48 of the Act requires that money received by a trustee under an insurance policy for trust property must be treated as capital money for the purposes of the trust.

Clause 120 of the Bill, adopting the QLRC's review recommendation, requires the amount received to be treated as income to the extent it is consistent with the purpose for which the insurance policy was taken out and otherwise to be treated as capital.

#### Deposit of documents for safe custody

Section 49 of the Act allows the trustee to deposit any document held by the trustee in relation to the trust or trust property with any financial institution or corporation whose business includes the undertaking of safe custody documents, with the cost of such deposit to be payable out of income, or if no income is available, out of the capital, of the trust property.

Clause 121 of the Bill, in accordance with the QLRC's review recommendations, extends to an entity whose business includes undertaking the safe custody of documents to a law practice under the *Legal Profession Act 2009*.

#### Valuation of trust property

Section 51 of the Act allows the trustee to ascertain the value of any trust property or other property personally, subject to where the trustee is not personally qualified then the trustee must consult a properly qualified person about the value of the property. This fixing of the value is binding on all persons beneficially interested under the trust subject to the trustee acting "in good faith".

Under clause 122 of the Bill, rather than the binding nature of the valuation being subject only to the trustee acting 'in good faith', instead the trustee must act in accordance with their duties under part 5, divisions 2 and 3 of the Bill. This requires the trustee to exercise care, diligence and skill in administering the trust; and to act

honestly and in good faith in the interests of the beneficiaries of the trust (or to further the purposes of the trust if a charitable trust). This builds on the QLRC's review recommendations which were to require the trustee to value trust property in accordance with their duty to exercise care, diligence and skill in administering the trust.

#### *Inquiries about beneficiaries*

Sections 33(1)(j) and 115 of the Act allow the trustee to make enquiries about a beneficiary of the trust with the cost of such enquiries to be payable out of that beneficiary's share of the trust, subject to a contrary intention in the trust instrument.

Clause 125 of the Bill deviates from the Act and QLRC's review recommendations by making this right to pay the costs out of the beneficiary's share of the trust subject to an express contrary intention in the trust instrument.

#### *Exercise of trustee's power when particular beneficiaries are absolutely entitled*

Section 31(2) of the Act provides that the trustee has all the powers conferred under part 4 of the Act, except where those powers are expressly revoked by all beneficiaries who are absolutely entitled to the trust property and are not under a disability by written notice to the trustee.

Clause 126 of the Bill changes the position adopted by the Act and deviates from the QLRC's recommendations by:

- limiting the application of the new clause to trusts, other than trusts created by court order; and
- permitting the attorney or administrator of an adult beneficiary who lacks capacity, to join with all other adult beneficiaries with capacity to revoke a power that the trustee has under part 7. This approach adopts the common law position.

The clause in the Bill is also more closely aligned with the broader provision under the Act as this clause is not limited to termination of the trust as was contemplated in the recommendations of the QLRC's review.

#### *Maintenance, education and advancement of income for minor beneficiary*

Section 61(1) of the Act allows the trustee to apply income from trust property in which a minor beneficiary has an absolute or contingent interest for the maintenance of that beneficiary. This income includes intermediate income of the trust to which that beneficiary has a contingent interest under subsection (4).

Clause 129 of the Bill, in adopting the QLRC's review recommendations, clarifies the trustee's power to also apply or accumulate intermediate income of the trust which is not otherwise expressly or specifically disposed of under subclause (5). This ensures consistency with section 33H of the *Succession Act 1981*. This clause also clarifies the trustee's power to apply income for maintenance applies not only where the beneficiary's interest in the trust property is absolute or contingent but where it is a vested, contingent, future or absolute interest or is liable to be divested.

### Unexpended income for minor beneficiary

Section 61(2) and (7) of the Act requires, subject to a contrary intention in the trust instrument, that the trustee accumulate and invest in authorised investments, the residue of unexpended income, which the beneficiary is absolutely or contingently entitled to, during a beneficiary's minority, with such accumulations to be paid to them when they attain majority or marry.

Clause 130 of the Bill, in accordance with the QLRC's review recommendations, removes outdated parts of the provision including: the requirement for payment of the accumulation to be made to a minor beneficiary on marriage before the age of majority because this is no longer appropriate in reflecting modern societal values; any reference to 'entailed interests' as these have been abolished; and any reference to settlement made on them during their infancy under statutory powers as these statutory powers (relating to settlements on infants on marriage) are no longer part of Queensland's law.

### Application of trust capital for beneficiary's maintenance

Section 62 of the Act allows a trustee to pay or apply capital for the maintenance, education or advancement (including past maintenance or education) of a beneficiary from any part of the capital to which the beneficiary is entitled provided that the amount advanced is limited to the greater of \$2,000 or half of the capital, unless the court consents to a greater amount being paid or applied.

Clauses 133 and 135 adopt this provision but increase the amount of capital which may be paid or applied from \$2,000 to \$100,000. The amount of capital will also be adjusted annually on 30 June from the first anniversary of the commencement of this clause based on the annual increase in the Consumer Price Index (All groups – Brisbane) published by the Australian Bureau of Statistics.

### Trustee not liable for losses for application or payment of trust income or capital

Section 63(4) of the Act provides that a trustee is protected from liability for any loss that is incurred in respect of income or capital that is paid or applied to a beneficiary.

Clause 139 of the Bill, in accordance with the QLRC's review recommendations, limits that protection to where the loss arises because of a failure to impose any or adequate conditions, failure to take security or adequate security, failure to take action to protect the security, through the release or abandonment of the security without payment, or for any other matter in relation to any condition imposed, or waiver of any condition.

### Giving notice of intention to distribute

Section 67 of the Act allows the trustee to obtain protection by publishing a notice requiring any person having a claim to, or against, the trust property, whether as creditor or beneficiary or otherwise, to send particulars of the person's claim within the stated time after which the trustee may distribute the trust property having regard only to the claims, whether formal or not, that the trustee has had notice of and is not liable for any person's claim whom the trustee had no notice at the time of distribution. Subsection

67(4)(b) of the Act does not relieve the trustee of an obligation to make searches or obtain certificates of search similar to those which an intending purchaser would be advised to make or obtain.

Clause 140 of the Bill follows this section but, in accordance with the QLRC's review recommendations, removes the effect of section 67(4)(b) so that a trustee does not have to undertake searches similar to an intending purchaser and also alters the notice period from six weeks to two months. It also modernises and updates the requirements, with minor deviations from the QLRC's review recommendations for the advertisement of the notice so that it aligns with current methods of publication for probate or administration notices or otherwise as the court directs. Clause 141 clarifies that it is unnecessary whether the notice of the claim is a formal notice of claim given in response to the published notice or an informal notice of the claim not in response to the published notice.

#### *Barring of claims*

Section 68 of the Act allows the trustee to require a person who has or may have a claim to or against the trust property or against the trustee personally to pursue their claim, failing which the claim is barred. The trustee serves notice on the person advising that the trustee wishes to reject their claim and requiring them to issue proceedings within six months of the notice to enforce the claim, failing which the trustee may apply to the court to seek orders barring the claim, enabling the trust property to be dealt with without regard to the claim.

Clauses 143 to 145 of the Bill adopt the same position as the Act, but deviate from the Act to allow the trustee to serve notice on a person where the trustee does not accept a claim rather than requiring the trustee to reject the claim in accordance with the QLRC's review recommendations (which is more appropriate where the trustee has insufficient information to assess the claim). The Bill also deviates from the Act in accordance with the QLRC's review recommendation to clarify that in clause 145 the court may bar the claim for all purposes (not just as against the trustee but also against any beneficiary of the trust property).

#### *Beneficiary's right to contest trustee's right to indemnity*

Section 68(6) allows a beneficiary who is not made a party to an application by a trustee to bar a claim pursuant to section 68 to contest the trustee's claim for an indemnity out of the trust property.

Clause 146 of the Bill restates this provision and clarifies that this right to contest the trustee's indemnity is not just limited to the beneficiaries who are not made a party to the application by the trustee but also those who are not made a respondent to the application by the court. This is a deviation from the QLRC's review recommendations.

#### *Enforcement of remedies for wrongful distribution*

Section 113 of the Act requires that a person who has suffered loss due to a wrongful distribution of trust property must, unless otherwise permitted by the court, first exhaust all remedies which may be available against the trustee before enforcing any remedies



against a recipient of a wrongful distribution. However, where the recipient has received the distribution in good faith and has so altered their position in reliance on the propriety of the distribution, the court may make such orders as it considers just in all of the circumstances where it would be inequitable to enforce the remedy as against the recipient.

Clause 148 of the Bill, in accordance with the QLRC's review recommendations, provides that a person is not required to exhaust all remedies against the trustee before enforcing any remedies against a recipient of a wrong distribution.

Clause 150 of the Bill, again in accordance with the QLRC's review recommendations, provides that the "good faith and alteration of position" defence from the Act restated in clause 149 of the Bill does not limit any other defence that the recipient may have available to them under the Bill, at law or in equity.

#### *Implied indemnity of trustees*

Section 71 of the Act provides, a trustee is not liable for any acts or omissions of any other trustee, nor those of any financial institution, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, or any other loss, unless the insufficiency, deficiency or loss occurs through the trustee's own default.

Clause 153 of the Bill, deviates from the QLRC's review recommendation, by clarifying that this limitation on the trustee's liability only for their own actions or omissions applies subject to the following clauses of the Bill: clause 57 (where the managing trustees are liable for the actions of the custodian trustee in accordance with the managing trustee's direction), clause 59 (where the managing trustees are liable for the custodian trustee's cost in bringing or defending proceedings brought or defended under the direction of the managing trustees), clause 82 (where the trustee is liable for the acts or omissions of a person authorised to exercise any of the trustee's investment powers) and clause 103 (where the trustee remains liable for the acts or omissions of the trustee's delegate).

#### *Protection against liability for rents, etc. under lease*

Section 66 of the Act provides a trustee with protection from personal liability and the power to distribute trust property after it has set aside any amount sufficient to answer any future claim which may be made in relation to any fixed or ascertained sum for a rent, covenant or agreement payable under any lease or in consideration of a rentcharge, or indemnity given for any rent, covenant or agreement under a lease.

Clause 155 of the Bill, in accordance with the QLRC's review recommendations, modernises this clause and removes any reference to 'rentcharge' which has been abolished and also makes use of the definition of "lease" in the *Acts Interpretation Act 1954* rather than defining lease.

#### *Evidence about vacancy in a trust or removal of trustee*

Section 13 of the Act provides that a statement in an instrument appointing a new trustee is conclusive evidence as to how a vacancy in the office of trustee occurred in favour of a subsequent purchaser in good faith and the registrar or other person registering or certifying title.

Clause 156 of the Bill, in accordance with the QLRC's review recommendations, extends this protection given to subsequent purchasers and registrars to a debtor acting in good faith making payment to a new or continuing trustee of the trust.

#### Protection for persons registering dealings with trust property

Section 34(3) of the Act provides that where a trustee agrees with another party to sell trust property and other property, neither the registrar of titles nor any other person registering or certifying title is affected by notice, or concerned to inquire whether there has been a contravention of any apportionment of the purchase money.

Section 38(3) of the Act provides that neither a subsequent purchaser, nor the registrar or other person registering or certifying title, needs to inquire whether a surrender of an onerous leasehold or freehold property was authorised by the section.

Clause 157 of the Bill, in accordance with the QLRC's review recommendations, modernises and updates these provisions. The protection for a subsequent purchaser contained in section 38(3) is not expressly restated because clause 158 of the Bill (which restates section 46 of the Act) makes it unnecessary to do so.

#### Receipts given by trustees

Section 43 of the Act empowers a trustee, or any other person authorised by the trustee, to give a receipt to any person for any payment of an amount, or transfer or delivery of property, to the trustee and such receipt is a discharge for the amount or property and the person paying or transferring the amount or property is not required to see to its application and is not answerable for any loss or misapplication of the amount or property.

Clause 159 of the Bill has been modernised to reflect the new power of a trustee to appoint an agent under clause 112 of the Bill. This agent is specifically empowered under this clause 159 to provide a receipt rather than "any person authorised by the trustee in writing" as provided for under the Act.

#### Remuneration of trustees

Section 101 of the Act:-

- except where the trust instrument directs otherwise, allows a trustee who is engaged in profession or business and who is given no benefit or remuneration under the trust instrument, to charge all usual professional or business charges in connection with their work in connection with the trust including any acts which the trustee could have done personally;
- where the circumstances justify it, allows as the court to order remuneration for a person's services as trustee as the court may think fit, and, in the case of a trustee engaged in profession or business, the court may take into account any

charges that have been paid out of the trust property for the usual professional or business charges in determining the appropriate remuneration.

Clauses 163 to 165 of the Bill adopt this provision of the Act. Clause 166 then gives the court the power, on its own initiative or an application by an interested person, to review and reduce excessive amounts for commission and professional charges charged by a trustee, other than a licensed trustee company under section 9 of the *Corporations Act 2001* (Cth), or the public trustee where the amount charged or proposed to be charged are fees and charges under section 17 of the *Public Trustee Act 1978*. This new provision generally adopts the QLRC's review recommendations except that it excludes certain trustees who are subject to other court review or legislative review processes being the public trustee and licensed trustee companies.

#### Persons who may apply for orders in relation to a trust

Section 99 of the Act sets out who may make an application to court for orders; which is generally adopted in clauses 168 and 170 of the Bill, although these provisions set out the extended powers of the court to make certain orders which are addressed further below.

#### Appointment and removal of trustees

Section 80 of the Act empowers the court to appoint a new trustee or trustees, in substitution for or in addition to any existing trustee or trustees or where there is no existing trustee, if it is expedient to do so and it is inexpedient, difficult or impracticable to do so without the assistance of the court. The court's power extends to making any necessary consequential vesting order or conveyance to the new trustee or trustees. The court may, without limiting its power, make an order appointing a new trustee in substitution for a trustee who desires to be discharged, who is convicted of a crime or misdemeanour, is bankrupt, or is a corporation that is under official management or in liquidation or has been dissolved, or where it appears for the court that it is undesirable for that trustee to be a trustee.

Clause 171 of the Bill:

- restates the court's power to replace a trustee, and appoint a new trustee but also clarifies that the court may also remove a trustee without appointing a new trustee. The court's power to remove a trustee or trustees is also clarified to make it clear that at least one trustee must remain after the court has removed the trustee or trustees;
- extends the court's power to appoint and/or remove a trustee to where it is impossible to do so without an order of the court; and
- clarifies that the court may make orders on application or on its own initiative.

These variations to the Act are deviations from the QLRC's review recommendations by clarifying the provisions.

#### Disqualification of trustees

The Act does not provide the court with the power to disqualify a person from being a trustee of another trust and remove them as trustee of any trust.

Clause 173 of the Bill contains a new power for the court, where a court has removed a person as trustee of a trustee under clause 171(2)(c) of the Bill, to disqualify that person from being the trustee of any other trust, and remove them as trustee of any other trust if the court determines the person has committed one or more breaches of trust and the nature and seriousness of the breach(es) make the person unfit to act as a trustee. This new power was recommended by the QLRC's review.

#### *Appointment and removal of particular office holders*

The Act does not provide the court with any power to appoint or remove an office holder of the trust other than a trustee of the trust.

Clause 174 of the Bill is a new provision which allows the court, on application or on its own initiative, to order that a relevant office holder be removed and/or a new office holder be appointed if:

- it is expedient for the court to do so; and
- it is inexpedient, difficult, impracticable or impossible to do so without an order of the court.

The reasons for removal or appointment are to be the same as the reasons for removal and appointment of a trustee under clause 171 of the Bill. An application for an order under this clause may be made by a trustee, a person who holds the office, a person who is beneficially interested in the trust property (whether or not they are under a legal incapacity) or a person who may receive a distribution from the trust. The relevant office holder must be a person appointed to an office created under the trust who may exercise a power in relation to the trust or the trust property and must act in a fiduciary capacity in exercising the power. Whilst this new provision generally adopts the QLRC's review recommendations, it has been clarified so that the court power to remove is extended to where it is impossible to remove the office holder without an order of the court; allows the court to appoint a new office holder, remove an office holder, or remove and appoint an office holder; clarifies that the court may make orders on application or on its own initiative; and clarifies that the provision only applies to an office holder who must act in a fiduciary capacity when exercising their power in relation to the trust or the trust property.

#### *Review of decisions and apprehended decisions*

Section 8 of the Act allows a person who has an interest (whether direct or indirect, vested or contingent) in the trust property, or a right of due administration of a trust and who is either aggrieved by any act, omission or decision (decision) of a trustee or other person in the exercise of any power conferred by the Act or by law or the trust instrument ; or has reasonable grounds to apprehend such decision by which the person will be aggrieved may apply to the court for review of the decision or to give directions in relation to the apprehended decision.

Clauses 191 to 195 generally adopt the effect of section 8 of the Act but, in accordance with the QLRC's review recommendations, clarify that:

- the office holder must be a person who has a power in relation to the trust property or trust that is conferred on them under the Bill or otherwise and that power must be exercised in a fiduciary capacity; and
- the grounds on which the court may review the decision or give directions about the apprehended decision would include whether the decision or proposed decision would be an appropriate exercise of the relevant power, or, without limiting that ground, whether the relevant power of the trustee or other office holder was or would be exercised:
  - in bad faith;
  - without real or genuine consideration; or
  - contrary to the purposes of the trust.

#### *Conferral of additional management or administrative powers*

Section 94(1) of the Act allows the court to confer additional management or administrative powers on the trustee of a trust where the court is of the opinion that a proposed disposition or transaction is expedient in the management or administration of the trust property or in the best interests of those persons, or a majority of those persons, beneficially interested under the trust, and it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the court, or there is an absence of power in the trust instrument or by law.

Clauses 183 to 186 of the Bill generally adopt the effect of section 94(1) but clarify, in accordance with the QLRC's review recommendations, that the court also has the power to grant additional management or administrative powers to the trustee of the trust even if the Bill grants the power subject to a contrary intention in the trust instrument and this power is excluded or modified by the trust instrument.

The definition of management power under clause 183 of the Bill is also varied from the one used in section 94 of the Act to remove the additional general leasing powers granted to a trustee under the Bill. As these powers granted to a trustee under the Bill are not able to be excluded or modified by the trust instrument, there is no need for the court to be given power to grant these powers (see clause 87(2) and (3)).

#### *Court may give directions about particular matters and protection to trustee acting under those directions*

Section 96 of the Act enables a trustee to apply, upon a written statement of facts, to the court for directions about the trust property, the management or administration of the trust property, or the exercise of any power or discretion vested in the trustee.

Clause 189 of the Bill generally adopts the effect of this section but removes the requirement for a written statement of facts to be provided in accordance with the QLRC's review recommendations.

Section 97 of the Act provides that trustees, whilst acting under a direction of the court (even if that direction is later varied, set aside, invalidated, overruled or declared to be of no effect), are taken to have discharged their duty as trustee in relation to their liability as trustee unless the trustee has been guilty of fraud or wilful concealment or

misrepresentation in obtaining the direction or in acquiescing to the court making the order giving the direction.

Clause 190 of the Bill clarifies that the trustee's protection in acting under court directions does not apply if the trustee, in obtaining the direction or, in agreeing (expressly or impliedly) with the court in making the order giving the direction: commits a fraud; wilfully conceals a material matter; or misrepresents a material matter.

*Court's power to make orders in relation to property or claims of a child*

Sections 86 and 87 of the Act allow the court, where it considers it necessary or desirable in the interests of an infant, or an infant and some other person, on application of a guardian or next friend of the infant, to make an order appointing the guardian or some other fit and proper person, which will bind the infant, as if they had capacity to, and had entered into the agreement, dealing or proceeding themselves, to:-

- enter into any agreement for or on behalf of the infant;
- dispose or otherwise deal with property, or to exercise such of the powers as are conferred by or under this Act on a trustee;
- vest the right to transfer or call for a transfer of stock, receive the dividends or income or, or to sue for or recover a thing in action upon such terms as the court thinks fit.

Clause 182 of the Bill modernises and updates the effect of this clause by replacing the guardian or next friend reference with 'litigation guardian' to reflect current court practice in the *Uniform Civil Procedure Rules 1999*.

*Cy pres applications – the circumstances in which purposes of a charitable trust may be changed*

Section 105 of the Act sets out the circumstances in which purposes of a charitable trust may be changed which, amongst many other grounds, includes:-

- where the original purposes, in whole or in part cannot be carried out according to the directions given and to the spirit of the trust; and
- where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the trust, be made applicable to common purposes;
- where the original purposes were laid down by reference to a class of persons or an area which has for any reason since ceased to be suitable, regard being had to the spirit of the trust, or to be practical in administering the trust.
- where the original purposes, in whole or in part, have, since they were laid down ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regarding being had to the spirit of the trust.

Clause 205 of the Bill, in deviating from the QLRC's review recommendations, extends these grounds to include not just the "spirit of the trust", but also the social and economic conditions prevailing at the time of the proposed change to the purposes of the trust.

*Approval of cy pres schemes by the Attorney-General*

Under section 106 of the Act, only the Supreme Court may approve a scheme to change the purposes of a charitable trust to allow the trust property to be applied *cy pres* if the required circumstances under section 105 of the Act exist.

This is mirrored in part 12, division 3, subdivision 2 of the Bill. However, in accordance with the QLRC's review recommendations, the Bill enables the Attorney-General to approve a scheme to allow trust property to be applied *cy pres* where:-

- a trustee makes an application to the Attorney-General;
- the purposes of the trust have not previously been changed by the Court; and
- the value of the trust property does not exceed the District Court's monetary limit.

The trustee's application must be in the approved form, comply with any requirement prescribed by regulation and be accompanied by the prescribed fee. The Attorney-General may require the trustee to provide any other information, opinions or advice the Attorney-General considers appropriate.

The Attorney-General must give written notice to the trustee requiring the trustee to give public notice of the application in the way required by the Attorney-General. The public notice must invite persons and charities interested in the proper administration of the trust to make written submissions to the Attorney-General within a stated period of at least 28 days after the notice is published and state how submissions may be made to the Attorney-General. The Attorney-General must consider any written submissions made by a person or charity interested in the proper administration of the charitable trust within the submission period in making their decision.

The Attorney-General may approve a variation to the scheme proposed by the trustee, but only after consulting with the trustee and the trustee consenting to the proposed variation. This is a deviation from the QLRC's review recommendations.

The Attorney-General may refuse to approve a scheme if the Attorney-General considers the application should be dealt with by the court because of the contentious nature of the application, because a special question of law or fact arises or for another reason. If the scheme is refused, the Attorney-General must give the trustee written notice of the decision including the reasons for the decisions.

The Attorney-General must give public notice of the decision in relation to the scheme and, where the scheme is approved, give notice of the appeal rights to the Supreme Court within 28 days after the notice.

A person aggrieved by the decision to approve a scheme may appeal the decision to the Supreme Court. Where the scheme is refused by the Attorney-General, the trustee may apply to the court for approval of the scheme.

A public register of all schemes approved by the Attorney-General must be kept and available for inspection. The Bill, in a deviation from the QLRC's review

recommendations, allows this register to be kept electronically or physically, rather than requiring that a physical register to be available for inspection during business hours.

*Duty of trustee in relation to application of property cy pres*

Section 105(4) of the Act places a duty on the trustee of a charitable trust, where the case permits and requires the property or some part of it to be applied *cy pres*, to secure its effective use for charity by taking steps to enable it to be so applied.

Clause 217 of the Bill, in accordance with the QLRC's review recommendations, further clarifies the trustee's duty by requiring the trustee to make an appropriate application under the relevant division of the Bill or to otherwise have the property applied *cy pres*.

*Gifts of particular trustees for philanthropic purposes*

Part 9 of the Act gives trustees of 'prescribed trusts' the power to provide money, property or benefits to a deductible gift recipient under the *Income Tax Assessment Act 1997* (Cth) whether or not that power is conferred under the trust instrument, without compromising the tax-exempt status of the donor. This power enables gifts to be made to government-linked entities that are not 'charities' at common law. Under Commonwealth law, this required the trustee to either have the power under the trust instrument or, where there was no power under the trust instrument, to 'opt-in' by making the necessary declaration in the approved form for the 'prescribed trusts'.

Subsequent changes to the Commonwealth law no longer require trustees to make a declaration to 'opt-in' to make distributions in favour of the 'prescribed trusts' with the legislation providing the necessary power for the trustees to automatically deem those as 'prescribed trusts'.

The changes to part 9 of the Act that appear in part 13 of the Bill were not contemplated by the QLRC's review but are necessary because of Commonwealth legislation that came into effect in 2013 which deemed certain ancillary funds to be charitable. The changes in part 13 of the Bill are modelled on recent amendments to the *Charitable Trusts Act 2022* (WA). As the nature of this change is curative, this part applies to all exercises of this power that were made without the relevant declaration to 'opt-in' during the period defined by clause 307 (which has retrospective effect).

*Amendment to Succession Act 1981 – Protection for personal representatives for call made after transfer of shares*

Section 75 of the Act provides that a personal representative of a deceased person who was registered as the holder of shares not fully paid up in any incorporated company may distribute (and register) the assets of the estate without reserving any portion of the estate for the payment on calls made after registration with the company or liquidator able to follow the assets of the deceased person into the hands of any person they have been transferred or distributed to.

As this section applies only to personal representatives and not more widely to trustees, the Bill, adopting the QLRC's review recommendations, inserts, in clause 334, new



section 53A in the *Succession Act 1981* which is a modern restatement of the current section of the Act.

*Amendment to Succession Act 1981 – Abolition of rule in Allhusen v Whittell*

Section 78 of the Act alters the equitable rule of apportionment in *Allhusen v Whittell* to achieve fairness between beneficiaries with successive interests by not allowing the personal representative of a deceased person to apply any part of the income of the settled property to pay any capital expenses including the debts and liabilities that have accrued at the date of death of the deceased person; the funeral, testamentary and administrative expenses; and any legacies bequeathed by the will so that these are paid out of capital which maximises the income for any income beneficiary or life tenant. However, this section does not apply to any commission payable to the personal representative which is payable in relation to the income of the settled property or any other testamentary and administrative expenses that would be wholly payable out of income as these may still be payable out of the income of the settled property. Further, if income is produced pending application of any assets in or towards payments of the debts, liabilities, funeral, testamentary and administration expenses, the income is deemed to be income of the residuary estate of the deceased rather than of the income beneficiary or life tenant.

As this section applies only to personal representatives and not more widely to trustees, the Bill, adopting the QLRC's review recommendations, inserts, in clause 340 new section 61AA in the *Succession Act 1981* which is a modern restatement of the current section of the Act.

As a new section 61AA of the *Succession Act 1981*, also in part replaces section 114 of the Act, which provides that fees, commission, remuneration and other charges payable to a personal representative in respect of the administration of the estate are deemed to be testamentary expenses section 114 is therefore no longer necessary and is not included in the Bill.

*Definitions – schedule 1 of the Bill*

*Court*

Under the dictionary in the Act, 'court' is limited to the Supreme Court or a judge of that court.

In accordance with the QLRC's review recommendations, the definition of 'court' has been broadened to extend to the District Court in relation to a matter under the Bill for which the District Court has jurisdiction under the *District Court of Queensland Act 1967*. The Bill also amends the *District Court of Queensland Act 1967* to provide that the District Court has jurisdiction:

- for an application under the Bill relating to the trust or trust property, where the value of all of the trust property does not exceed the District Court's monetary limit; and
- for another application under the Bill, where the value of the property to which the application relates does not exceed the District Court's monetary limit.

### *Guardian*

The Act makes references to a guardian of an infant but did not define the term. The QLRC's review recommended the insertion of a new definition of guardian which included the parent of a person.

The Bill defines guardian to mean the parent of the child or another person who has the legal parental responsibility for making decisions about the long-term care, wellbeing and development of the child. This differentiates between people who have the legal responsibility for day-to-day care arrangements for the child and those who may have the legal responsibility for long-term management and legal decisions for the children, where these are undertaken by separate persons.

### **Outdated or unnecessary provisions**

#### *Settled Land Act 1886 Provisions*

The provisions in the Act dealing with trustees under the *Settled Land Act 1886* have been omitted (sections 5 - definition of 'trustee' in subclause (c), and 6(1)(a) are no longer necessary).

#### *Replacement of a trustee*

Section 12(1)(b) of the Act allows a trustee to be removed if they remain out of State for more than 1 year without having properly delegated the execution of the trust. This is outdated and no longer required.

#### *Devolution of mortgage estates on death*

Section 17 of the Act provides for any interest in property vested in a person by way of mortgage to devolve and vest in the public trustee until a grant of probate or letters of administration of the estate of the deceased person is granted. Given that section 45 of the *Succession Act 1981* provides that both real and personal property of a deceased person vests in the deceased person's executor (or, if there is no executor, or no executor willing and able to act, the public trustee), this provision is no longer necessary.

#### *Power of trustee to retain investments*

Section 29 of the Act which provides that a trustee is not liable for breach of trust only because the trustee continues to hold certain investments, has been removed as it is unnecessary because of the wide powers of trustees to invest and the duties which govern trustees.

#### *Protection of financial institutions*

Section 55 of the Act provides protection to financial institutions who act on the authorisation of one or more of the trustees to draw cheques on, and make withdrawals from, any account in the name of the trustees and endorse cheques payable to the trustees. This is no longer necessary given the general power of trustees to appoint an agent in the Bill.

### Exoneration of trustees in respect of certain powers of attorney

Section 70 of the Act gives trustees some relief in circumstances where they act or pay money in good faith in reliance on a power of attorney. Given the protections provided by section 99 of the *Powers of Attorney Act 1998* to third parties who deal with attorneys without knowing that the power of attorney was invalid, this provision is no longer required.

### Succession duty and estate duty

The new section 61AA inserted into the *Succession Act 1981* by the Bill (which is based on section 78(5) of the Act), has no reference to succession duty and estate duty, which have been abolished.

### Requirements upon certain transfers to local government

Section 117 of the Act provides for requirements upon certain transfers to local government. This provision is no longer necessary as it offers no practical benefit and appropriate safeguards are provided more generally in relation to registration of interests in trusts, in particular, under part 6, division 6 of the *Land Title Act 1994*.

### Service provisions

Provisions in the Act dealing with service, for example, sections 68(7) and (8), have been removed where unnecessary as these are adequately dealt with under the *Uniform Civil Procedure Rules 1999* pursuant to service of proceedings, and the general services provisions under the *Acts Interpretation Act 1954* and the *Electronic Transactions (Queensland) Act 2001*.

## **Alternative ways of achieving policy objectives**

The proposed Bill is essential to give effect to the policy objectives. There is no alternative way of achieving the policy objectives.

## **Estimated cost for government implementation**

Any additional costs associated with implementation of this Bill will be adequately met by existing budgetary provisions.

## **Consistency with fundamental legislative principles**

The Bill is generally consistent with fundamental legislative principles (FLP) in the *Legislative Standards Act 1992*. Aspects of the Bill that raise possible FLP issues, and justifications for any breaches, are addressed below.

## **Rights and Liberties of Individuals**

- Makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review

The power of the Attorney-General to determine an application on whether a *cy pres* scheme should be granted under part 12, division 3, subdivision 3 of the Bill is well defined being limited to *cy pres* schemes involving trust property that does not exceed the value of the District Court's jurisdictional monetary limit, and is subject to public notice of the application being given, giving the public a right to make submissions on the application within the submissions period, and the Attorney-General taking into account all written submissions made within the submissions period. Further, the Attorney-General's determination is subject to a right of appeal to the Supreme Court.

- Consistent with principles of natural justice

The Bill embodies the principles of natural justice including requiring notice to be given to relevant parties so that they are aware of any potential deprivation of their rights, interests or legitimate expectations so they are able to take steps to protect their interests. Relevant provisions in the Bill are set out below.

*Notice of vesting of trust property on appointment of new trustee or obtaining a grant of representation (clauses 40, 41 and 47 of the Bill)*

These provisions require any new trustee appointed (whether on appointment, or assumption of appointment on obtaining a grant of representation) to give notice to the public trustee so that the public trustee is aware of the divestment of the trust property from them and does not continue to act in relation to the trust. The Bill also protects the rights of parties with any actions against the public trustee in relation to the trust able to be taken against the new trustee appointed and with the public trustee to be entitled to be indemnified out of the trust property for the liability under clauses 43 and 48.

*Giving notice of and consent to appropriation (part 7, division 3 of the Bill)*

These provisions require the trustee to: obtain the consent of the beneficiary receiving the appropriation of trust property; and also to give notice to all other interested parties to give them the option to apply to the court within two months of the notice if they are not agreeable to the proposed appropriation. This prevents the trustee from making an appropriation of specific trust property to a particular beneficiary without their prior consent. This also prevents the trustee from making an appropriation if a court application is made within two months of the notice until any court application is resolved.

*Notice of trustee's delegation (section 104 of the Bill)*

This provision requires the trustee who delegates a matter to give notice of the delegation to each co-trustee, and any appointor of the trustee (who is not the trustee delegating) and, where there is no co-trustee or appointor who is not the trustee delegating, to each beneficiary of the trust (or their guardian, where a minor, or their administrator or attorney where they have impaired capacity) to the extent it is practicable to do so. This enables other parties to be aware of the delegation and, if

there are concerns regarding this delegation and its impact on the trust, to take steps to remove the trustee or apply to the court.

*Notice revoking trustee's powers when particular beneficiaries are absolutely entitled (clause 126 of the Bill)*

This provision allows the beneficiaries who are absolutely entitled to the trust property to revoke the trustee's powers under part 7 of the Bill on notice to the trustee which enables the beneficiaries to exert control over the trust property and protect their interests.

*Giving notice of intention to distribute (clause 140 of the Bill)*

This provision requires a trustee who intends to distribute trust property to give public notice about the proposed distribution. This notice gives people who may have a claim or interest in the trust property an opportunity to put the trustee on notice of their claim or interest in the trust property, prior to distribution.

*Barring of claims (clauses 143-145 of the Bill)*

This provision requires a trustee who intends to disregard a claim made against trust property to give notice to the claimant giving them an opportunity to start a proceeding and enforce the claim within six months after the day notice is given and to prosecute the proceeding with appropriate diligence. If the claimant fails to do this, the trustee may, at the expiry of this six-month period, apply to the court to bar the claim. The court, in hearing this claim, may require that any beneficiaries of the trust are given notice of the proceedings or added as a party to the proceedings to give them an opportunity to be heard.

*Power of Court to authorise variations of trust (clause 188 of the Bill)*

This provision allows the court to require notice of the application to vary the trust to be given to all persons as the court directs which could include persons who may have an interest in the trust who may be affected by the proposed trust variation. This would give the persons notified of the proceedings the option to be heard in the proceedings.

*Applications to court in relation to charitable trusts (part 12, division 2 of the Bill)*

This provision requires an applicant to give notice of their application regarding a charitable trust to the Attorney-General, the trustee of the trust, and any other person or charity as directed by the court to give those persons an opportunity to participate and be heard in the proceedings.

*Right of Attorney-General to determine an application on whether a cy pres scheme should be approved (part 12, division 3, subdivision 3 of the Bill)*

The Bill gives power to the Attorney-General to approve a *cy pres* scheme, subject to a trustee making the application and giving public notice of the application advising when and how submissions may be made. The Attorney-General is

required to take into account all written submissions made within the submissions period in making a determination thereby giving these parties a right to be heard. The decision of the Attorney-General may be appealed to the Supreme Court. This is consistent with the right to natural justice by giving all interested parties a right to be heard.

**Does not adversely affect rights and liberties, or impose obligations retrospectively**

The Bill applies the following rights and obligations retrospectively as set out below. The retrospective application is considered justified.

*Replacement of trustees (clauses 20 and 232)*

A trustee may be replaced as trustee of the trust if any of the circumstances mentioned in clause 20(1) of the Bill happen irrespective of whether these circumstances happen before or after the commencement. Having this clause apply irrespective of when the circumstances happen (whilst retrospectively impacting on the trustee's rights as they may be replaced as trustee) protects the rights of those interested in the trust property to ensure that the trust is able to be effectively administered for the benefit of the beneficiaries of the trust. The Bill also allows a child who was appointed a trustee prior to commencement to be replaced after commencement of the Act.

*Replacement of last continuing trustee who is dead (clause 21 and 233)*

The last continuing trustee of the trust who has died may be replaced and a new trustee appointed by their legal personal representative under this clause whether their death happened before or after the commencement. However, the operation of the new clause 21 is intended to replicate the effect of the previous section 12(1) and (4) of the Act by altering the operation of clause 21(5) so that, for trusts created before the commencement, the power of appointment applies irrespective of a contrary intention.

This is to facilitate the efficient administration of the trust and protects the status quo under existing trust deeds. New clause 21 also operates retrospectively to enable any mechanism under the trust instrument to appoint a new trustee to take effect within a reasonable period of the trustee's death before the personal representative is able to exercise the power of appointment. This further protects the rights of the settlor allowing the trust instrument providing for any appointment of a replacement trustee to take effect in preference to any appointment by a personal representative under clause 21.

*Appointment of additional trustees (clauses 24 and 235)*

Clause 24 of the Bill replaces section 12(5) of the Act and allows additional trustees to be appointed to the trust up to the maximum number of trustees (including as allowed by the Minister under the Act). Clause 24 applies to all trusts whether they were created before or after the commencement. However, the effect of section 12(5) of the Act is intended to be retained in that, for trusts created prior to the commencement, clause 24(4) applies to an appointor of the trust as if the provision were not expressed to be subject to a contrary intention in the trust. Therefore, whilst this provision operates retrospectively, it is intended to protect the existing operation of the Act's equivalent

provision to trusts created prior to the commencement. There is intended to be no real change in the rights of and obligations on the trustee under this clause in relation to trusts created prior to the commencement.

*Removal and discharge of trustees (clauses 29 and 238)*

A trustee may be removed and discharged as trustee of the trust under clause 29 of the Bill if any of the circumstances mentioned in clause 20(1)(c) to (h) of the Bill happen irrespective of whether these circumstances happen before or after the commencement. As this clause applies irrespective of when the circumstances happen, and the grounds on which the trustee may be removed under clause 20 differ to those under the Act, this retrospectively impacts on the trustee's rights as they may be removed as trustee. However, this protects the rights of those interested in the trust property to ensure that the trust is able to be effectively administered for the benefit of those with an interest in the trust property. The Bill also saves the effect of section 12 of the Bill in relation to removal of a child as trustee.

*Exercise of trust powers by surviving trustees (clauses 36 and 241)*

Clause 36 of the Bill has a similar effect to section 16 of the Act in allowing the surviving trustee(s) to exercise the power or perform the trust on the death of any other joint trustee of the trust. Even though clause 241 applies after commencement, irrespective of when the death of the joint trustee of the trust occurred, there is no intention to effect any practical alteration of the rights and obligations of the trustees.

*Custodian trustee provisions (part 4 and part 17, division 4)*

The custodian trustee provisions of the Bill apply to all custodian trustees whether they were appointed prior to or after the commencement. However, the effect of the provisions of the Act applying to custodian trustees is effectively saved for trusts created before the commencement so that the references in clauses 53(5), 54(4), 55(3), 56(3), 57(3) and 59(3) of the Bill to an "express contrary intention" in the trust instrument become references to the "provisions of the trust instrument". Therefore, whilst these provisions have retrospective application, the application of these provisions is not intended to alter the position under the Act for trusts created prior to the commencement.

*Investment advice (clauses 76 and 250)*

Clause 76 requires a trustee to consider advice and allows the trustee to pay the reasonable costs of obtaining the advice out of the trust funds. This applies retrospectively including to any advice received by the trustee but not yet considered or paid for by the trustee before the commencement. However, the effect of this clause 76 reflects the position under section 24(2) of the Act. It is intended that there is no practical alteration of the rights and obligations of the trustees and other parties with an interest in the trust property.

*Purchase, retention or securing of a dwelling house (clauses 80 and 252)*

Clause 80 authorises a trustee to purchase, construct, retain or otherwise secure a residence for a beneficiary on such conditions as the trustee thinks fit. This clause applies retrospectively to any residence which had been purchased, retained or was otherwise secured as a residence for the beneficiary on such conditions as the trustee thought fit before commencement under section 28 of the Act.

Section 28(2) of the Act allows the trustee to disregard the terms of the trust instrument to “retain”, as part of the trust property, a residence for the beneficiary’s use only if it would not unfairly prejudice the interests of other beneficiaries. Clause 80(1) provides that the trust instrument cannot prevent the exercise of, or limit the trustee’s power to purchase, construct, retain, or otherwise secure a residence for a beneficiary (it is not limited to retention like the Act) and does not include the test of whether a beneficiary’s interest would be unfairly prejudiced.

Clause 80(3) adopts the safeguard found in section 28(3) of the Act so that the trustee may only exercise the power in clause 80(1), or impose conditions in relation to that residence, which are “consistent with the extent of the beneficiary’s interest under the trust”. Clause 80(3) protects other beneficiaries’ interests in the trust whilst also ensuring that the trustee has the power to provide a residence for a beneficiary through the trust where consistent with the extent of that beneficiary’s interest in the trust, notwithstanding any provisions to the contrary in the trust instrument.

#### *Liability for particular loans (clauses 83, 84 and 253)*

Clauses 83 and 84 of the Bill set out, in relation to loans made on the security of property: when a trustee is not in breach of trust for a particular loan; and, when a trustee’s liability for losses made on improper loans is limited. Clause 253 provides that clauses 83 and 84 apply to loans made by the trustee whether those loans were made before or after the commencement. Because these provisions are intended to have the same effect as sections 30(1) and 30A(1) of the Act, there is no intention to practically alter the rights and obligations of the trustees and those parties with an interest in the trust property.

#### *Proceedings against trustee for breach of trust on investment (clauses 85 and 254)*

Clause 85 of the Bill applies to any proceedings against a trustee for breach of trust on exercise of the investment power started after the commencement, irrespective of when the investment power was exercised and, therefore, operates retrospectively.

Clause 254 is intended to preserve the effect of the Act by deeming the relevant Act provisions to be referenced where appropriate in clause 85 of the Bill and, as section 30B of the Act does not enable the court to take into account the amount of the trust funds invested in the exercise of the investment power, this is not a relevant consideration for the court in relation to an investment power exercised before commencement. Therefore, this is not intended to practically alter the rights and obligations of parties to proceedings against the trustee.

#### *Set off of gains and losses in proceedings for breach of trust (clauses 86 and 255)*



Clause 86 of the Bill applies to any proceedings against a trustee for breach of trust arising from investments of trust property by the trustee. Clause 86 is effectively a restatement of section 30C of the Act, so there is no intended change to the rights and obligations of the parties to proceedings under this clause. Clause 255 states that section 30C applies to proceedings started before commencement, and clause 86 applies to proceedings started after commencement, therefore the (modernised) wording of clause 86 will apply retrospectively, however it is intended to have the same effect as section 30C.

*General powers in relation to existing trust property (clauses 87 and 257)*

The new general powers conferred on a trustee in relation to trust property under clause 87 of the Bill apply to all trust property held by the trustee immediately before the commencement, subject to the trustee's duties under the Bill and at law. This gives the trustee flexibility to administer the trust property as effectively as possible without unnecessary restrictions of the limited powers given under the Act.

*Power to apportion expenditure (clauses 91 and 258)*

Clause 91 of the Bill enables the trustee to apportion expenditure, including expenditure made under section 33(1)(a) to (f) of the Act before the commencement, as between capital and income as the trustee considers equitable, including paying such expenditure from capital and recouping it from income (which is also provided for under section 33(1)(g) of the Act) or paying it from income and recouping it from capital as the trustee considers equitable in all the circumstances (which is not expressly provided for under the Act). Clause 258 outlines when the new power contained in clause 91 (to pay expenditure from income and recoup from capital) can be applied to expenditure that was made prior to the commencement of the Bill.

*Trustee's delegation of matter by power of attorney (clause 263)*

Whilst this provision saves the effect of a power of attorney by a trustee temporarily delegating a matter under section 56 of the Act, it retrospectively automatically ends that power of attorney one year after the commencement, if the power of attorney has not otherwise been revoked or ended earlier. This provides certainty about the duration of the trustee's delegation and the rights and obligations of the trustee and the trustee's delegate.

*Application of insurance money (clauses 120 and 266)*

The Bill will apply to the application by the trustee of funds received from an insurance policy for the trust property where the funds are received after the commencement, irrespective of when the insurance policy was taken out. Whilst this applies retrospectively, as the Bill intends to adopt the effect of the provision under the Act, this is not intended to alter the rights and obligations of the trustee.

*Costs etc. of inquiries about beneficiaries (clauses 125 and 270)*

The Bill will apply retrospectively to allow a trustee to reimburse themselves for any costs, expenses or charges incurred in making inquiries to ascertain the existence or

whereabouts of beneficiaries of the trust regardless of whether the inquiries were made before or after the commencement. However, the application of the Bill will be altered so that for any trusts created before the commencement, this provision will be subject to a contrary intention in the trust instrument, rather than an express contrary intention which will apply to trusts created after the commencement. This is intended to retain the effect of the Act for existing trusts and is not intended to alter the rights and obligations of trustees and those interested in the trust property for trusts existing prior to commencement.

*Remedies for wrongful distribution of trust property (part 9, division 3 and clause 282)*

The Bill will apply retrospectively to allow a person who has suffered loss to enforce a remedy against the recipient of trust property by issuing proceedings against them after the commencement without first having to exhaust all remedies available to them against the trustee who wrongfully distributed trust property to the recipient. This applies irrespective of whether any court order had, prior to the commencement, required them to exhaust all remedies against the trustee who wrongfully distributed trust property before being allowed to pursue proceedings against the recipient of the trust property as such orders cease to have effect on the commencement. This will benefit both the person who has suffered loss and the trustee who wrongfully distributed trust property by potentially reducing the number of proceedings required (and the associated legal costs) to enable the person to pursue a remedy directly against the recipient of the trust property. The Act, however, will continue to apply in relation to all proceedings issued before the commencement.

*Expenses reasonably incurred before commencement in administering trust (clauses 154 and 283)*

Clause 154 of the Bill will apply retrospectively to enable a trustee to be reimbursed from the trust property for, or to pay, or discharge, from the trust property, expenses reasonably incurred in administering the trust. As this is intended to be a restatement of the general law, this is not intended to alter the rights and obligations of trustees and those interested in the trust property.

*Statement in existing instrument about vacancy in trust or removal of trust (clauses 156 and 284)*

Clause 156 of the Bill will apply retrospectively to protect certain persons acting in good faith who rely on a statement about the circumstances in which the vacancy of a trustee office, or removal of a trustee, arose. This is an extension of the Act as not only does it provide protection to purchasers and persons registering or recording a dealing with the trust property but the Bill also applies to debtors making payment to a new or continuing trustee of the trust. This protects the rights of debtors in their dealings with new or continuing trustees of the trust.

*Powers of court in relation to breaches of trust property committed before commencement (clauses 160, 161, 285 and 286)*

The Bill applies retrospectively to empower the court to relieve a trustee from personal liability for a breach of trust, or to order that a beneficiary indemnify a trustee for a

breach of trust committed at the instigation, request, or with the written consent of that beneficiary. However, the Bill's provisions are intended to adopt the effect of the Act, so this is not intended to alter the rights and obligations of the trustees and those interested in the trust property.

*Proceedings for remuneration of trustees for whom charges have been paid out under repealed Act (clauses 165 and 289)*

The Bill applies retrospectively to empower the court, in considering an application for remuneration by a trustee, to consider any professional charges paid out of the trust property to the trustee under the Act before the commencement as well as any professional charges paid out of the trust property to the trustee under the Bill. However, as the Bill's provisions are intended to adopt the effect of the Act, this is not intended to alter the rights and obligations of the trustees and those interested in the trust property.

*Powers etc. of trustees appointed by court under repealed Act, s 80 (clauses 172 and 292)*

The Bill applies retrospectively to give a person appointed as trustee by court order, whether before or after the commencement, all of the powers, authorities and discretions, and to act if they had been the original trustee under the trust instrument. However, as the Bill's provisions are intended to adopt the effect of the Act, this is not intended to alter the rights and obligations of the trustees, the persons interested in the trust property and those dealing with the trustees.

*Protection of trustees acting under existing directions under repealed Act, s 96 (clauses 190 and 301)*

The Bill applies retrospectively to give a trustee protection when acting under a direction of the court whether the direction was made under the Act, before or after the commencement, or whether it was made under the Bill. However, as the Bill's provisions are intended to adopt the effect of the Act, this is not intended to alter the rights and obligations of the trustee and the persons interested in the trust property.

*Payment into court - money or securities paid before commencement (clauses 199 and 305)*

The Bill applies retrospectively to the distribution of property that was paid into court whether before or after the commencement so that it is subject to a court order. However, as the Bill's provisions are intended to adopt the effect of the Act, this is not intended to alter the rights and obligations of the trustee and the persons interested in the trust property.

*Validation provision for exercise of former prescribed power (part 13 and clause 307)*

The Bill in certain circumstances validates the exercise or purported exercise of a prescribed power by the trustees of a prescribed trust before the commencement notwithstanding that the exercise may not have complied with the requirements of the Act. This adopts changes to the Commonwealth legislation from 2013 thereby allowing

the trustee to make distributions to certain eligible recipients which are permitted under the Commonwealth legislation without affecting the validity or status of the prescribed trusts as a charitable trust.

### **That legislation has sufficient regard to the institution of Parliament**

*Clause 326* amends the *Funeral Benefit Business Act 1982* to provide that the Bill, when enacted, applies to payments made under section 79(2) to (3) in the way and to the extent prescribed by regulation.

Section 79(2) and (3) of the *Funeral Benefit Business Act 1982* lists the parts of the *Trusts Act 1973* that apply to payments made by a contributor other than payments to the types of entities listed under subsection (1). Because of the uniqueness of funeral benefits businesses, the exclusions that apply to certain entities, and the nature of payments made by contributors, clause 324 of the Bill allows the provisions of the Bill that will apply to funeral benefits businesses to be specified in a regulation. It also provides for a transitional provision that retains the position under the Act until this regulation is made. This departure from the FLPs is considered justified as it provides appropriate flexibility to determine the appropriate provisions of the Bill to apply to funeral benefits businesses.

## **Consultation**

Key government and non-government stakeholders across a range of sectors that either have direct involvement with, or an interest in, trusts law in Queensland were consulted. Targeted stakeholder consultation was undertaken with peak bodies in the trust and legal industry. Public consultation was also undertaken on an exposure draft Bill. The results of this consultation were taken into account in settling the provisions of the Bill.

## **Consistency with legislation of other jurisdictions**

The Bill is specific to the State of Queensland and is not uniform with or complementary to legislation of the Commonwealth or another state.

Notwithstanding this, the QLRC, in preparing the QLRC's review, reviewed and considered comparable trusts law in other jurisdictions (including Australian and overseas jurisdictions) in making the final recommendations in the QLRC's review; which have been broadly adopted in the Bill.

# Notes on provisions

## Chapter 1

### Part 1 – Preliminary

#### Division 1 - Introduction

*Clause 1* states the short title of the Act as the *Trusts Act 2024*.

*Clause 2* provides that the Act commences on a day fixed by proclamation.

*Clause 3* provides that the Act applies: to a trust, whether created before or after, or partly before and partly after, the commencement of the Act, except to the extent this Act or another Act provides otherwise; despite a contrary intention in any trust instrument except to the extent the Act provides otherwise.

The Act does not prevent a settlor (subject to an express contrary intention in the trust instrument) from conferring on a trustee any powers additional to or greater than those conferred under the Act and these additional or greater powers will have effect and be exercisable in the same way and with the same consequences as a power conferred under the Act. The powers conferred on a trustee under the Act are in addition to any powers conferred on the trustee under another Act. *Trustee* is defined in this clause to include a person exercising the powers of a trustee under the Act.

*Clause 4* provides that the Act binds all persons, including the State, and where possible, the Commonwealth and the other States.

#### Division 2 - Interpretation

*Clause 5* refers to the dictionary in Schedule 1 which defines particular words used in the Act.

*Clause 6* defines *trust*.

*Clause 7* defines *trustee* and *statutory trustee*.

*Clause 8* defines *trust instrument*.

*Clause 9* defines *trust property*.

*Clause 10* defines when a person has *capacity* or *impaired capacity* for a matter.

*Clause 11* defines *charitable*.

*Clause 12* provides that a reference to a trustee lending or investing trust funds on the security of property includes a reference to a trustee lending or investing trust funds on a new security or on the transfer of an existing security.

## **Part 2 – Restrictions on appointment of trustees and related matters**

*Clause 13* provides who may not be appointed as a trustee of a trust.

*Clause 14* limits the maximum number of trustees, excluding custodian trustees, that may be appointed to a trust to four trustees. Charitable trusts and trusts that are, or are created for the purpose of becoming, a self managed superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cwlth), are excluded.

*Clause 15* allows the court, on application, to make an order approving the appointment of more than four trustees if satisfied that it is appropriate to do so in the particular circumstances of the case. If an order is made increasing the maximum number of trustees for a trust then the permitted number of trustees under clause 14 is also altered for that trust to the approved number of trustees.

*Clause 16* provides that where a local government is appointed as trustee of a trust it may act in the administration of the trust, for the purpose of and according to the trust even if the purpose is not a function of local government. Where the local government is not the original trustee of the trustee, this applies subject to a contrary intention in the trust instrument.

## **Part 3 – Appointment, discharge and removal of trustees and devolution of trusts**

### **Division 1 - Preliminary**

*Clause 17* provides that part 3 only applies to a personal representative of a deceased person's estate as trustee to the extent that the personal representative: has completed the administration of all or part of the estate; and holds the estate, or part of the estate, in the capacity of trustee only.

*Clause 18* defines when an appointor is, or appointors are, not able and willing to act as appointor of the trust for this part.

### **Division 2 – Appointment of trustees**

*Clause 19* provides that:

- division 2 applies, where there is an appointor of the trust, to the appointors, whether the appointment of a trustee is made in a circumstances under division 2 or under the trust instrument;
- where the appointor is authorised under division 2 to appoint a trustee in a circumstance which is also mentioned under the trust instrument, an appointment under this division is subject to the terms applying to that appointment under the trust instrument;
- where a will names a person as trustee of a trust and the person is dead, the provisions of the division that apply if a trustee is dead apply irrespective of

whether the person is named as sole trustee or otherwise and whether the death happened before or after the testator's death.

*Clause 20* provides when the trustee of a trust may be replaced and who may appoint the replacement trustee for the trust.

*Clause 21* provides for the circumstances in which the personal representative of the last continuing trustee of the trust who has died may appoint a replacement trustee for the trust.

*Clause 22* provides for the circumstances in which the administrator or attorney appointed for all financial matters for the last continuing trustee who has impaired capacity for administering the trust may appoint a replacement trustee for the trust. As this is a new provision, it will only apply to trusts created after commencement (see clause 234).

*Clause 23* provides for the circumstances in which a last continuing trustee who is bankrupt or taking advantage of the laws of bankruptcy under the *Bankruptcy Act 1966* (Cth) or similar laws of a foreign jurisdiction may appoint a replacement trustee for the trust. As this is a new provision it will only apply to trusts created after commencement (see clause 234).

*Clause 24* provides for when an additional trustee may be appointed to the trust and who may appoint any additional trustee to the trust.

*Clause 25* provides that where any part of the trust property is held on a trust distinct from the trust relating to any other part of the trust property, a separate set of trustees (or a trustee if only one trustee was originally appointed to the trust property) may be appointed for the separate trust property or as trustees of any other part of the trust property.

*Clause 26* provides that a person appointed as trustee has all of the powers, authorities and discretions of, and may in all matters act as, the original trustee of the trust both before and after the trust property is vested in the trustee.

### **Division 3 - Discharge and removal of trustees**

*Clause 27* defines the *minimum trustee requirements* for a trust for division 3.

*Clause 28* provides when a replaced trustee is discharged from a trust or a part of a trust when a new trustee is appointed to replace the replaced trustee to that trust or part of a trust and the minimum trustee requirements are met.

*Clause 29* provides when a trustee may be removed and discharged from the trust, and who may remove the trustee, without appointing a replacement trustee, provided that the minimum trustee requirements for the trust are met.

*Clause 30* provides that a trustee who wishes to be discharged from the trust or any part of the trust, may only be discharged where the minimum trustee requirements for the

trust are met on the trustee's discharge; and, subject to satisfaction of the terms of any instrument of discharge with the trustee's co-trustees and, if applicable, any appointor of the trust, agreeing to the discharge. Further, where any registration, notification or recording of the transfer of the trust property is required under another Act or the law of another State or the Commonwealth, the discharge will not take effect until this registration, notification or recording occurs.

#### **Division 4 - Notification of former delegate if trustee replaced, removed or discharged**

*Clause 31* provides that where a trustee: is replaced under division 2, removed under clause 29 or under the trust instrument without being replaced, or is discharged under clause 30; and has delegated a matter in relation to the trustee under clause 100; and the person who replaced or removed the trustee or agreed to the discharge of the trustee had notice that the trustee had delegated a matter in relation to the trust under clause 100, that person must give written notice to the person to whom the delegation was made that the trustee has been replaced, removed or discharged.

#### **Division 5 - Vesting of trust property on appointment, removal or discharge of trustees**

*Clause 32* provides that division 5 applies to a new trustee appointed under division 2 or under the trust instrument whether to replace a trustee or as an additional trustee, removed under clause 29 or discharged under clause 30. The division does not apply if a new trustee is appointed to replace the last continuing trustee of the trust who is dead or to replace the last continuing trustee of the trust who has impaired capacity where the trust property has vested in the public trustee under clause 45.

*Clause 33* defines *instrument of change*, *post-change trustee* and *pre-change trustee* for division 5.

*Clause 34* provides that the trust property divests from any trustee who is removed or discharged under the instrument of change, and vests in a new trustee on the appointment of that new trustee in the instrument of change without any conveyance, transfer or assignment, unless the transfer of the trust property only has effect if notified, registered or recorded under the requirement or another Act or of the law of another State or the Commonwealth. In this event, such divesting and vesting is subject to this notification, registration or recording and the instrument of change only vests the trust property in the post-change trustee (or jointly if more than one post-change trustee) the right to call for a transfer of the trust property.

*Clause 35* provides that: the pre-change and post-change trustee must do all things necessary to assist in the notification, registration and recording of the divesting and vesting of the trust property where required under clause 34; the instrument of change is a conveyance of the trust property from the pre-change trustee to the post change trustee (or if more than one, as joint tenants); the instrument of change does not breach a covenant or condition, or give rise to any forfeiture of any lease or agreement for lease or other property; where consent of a third party is needed to the conveyance, the vesting of the property is subject to that consent but the consent may be obtained after



execution of the instrument of change by the pre-change trustee and the post-change trustee(s).

## **Division 6 - Devolution of trusts on death of trustee**

*Clause 36* provides that, if a power or trust is imposed on two or more trustees jointly and one or more of these trustees dies, the surviving trustee or any surviving trustees jointly may exercise the power or perform the trust.

## **Division 7 - Vesting of trust property and devolution of trusts – death of last continuing trustee**

*Clause 37* provides that division 7 applies if the last continuing trustee of the trust dies.

*Clause 38* provides that on the death of the last continuing trustee, the trust property devolves to and vests in the public trustee, subject to the same provisions as trust property vests in a post-change trustee under division 5, and will remain vested in the public trustee until divested under clause 40 or 41. The public trustee does not need to notify, register or record the vesting of the trust property under clause 35 if the public trustee does not act in relation to the trust or only appoints a new trustee.

*Clause 39* provides that whilst the trust property is vested in the public trustee under clause 38 the public trustee has all the powers, authorities and discretions, and may in all matters act as, the original trustee of the trust property under the trust instrument. However, unless the court otherwise directs in special circumstances, the public trustee is not required to exercise any of these powers, authorities and discretions or act in the administration of the trust. This clause does not limit the powers of the public trustee under section 61 or 62 of the *Public Trustee Act 1978*.

*Clause 40* provides that, where a new trustee who is not the public trustee is appointed to replace the last continuing trustee and the new trustee gives the public trustee written notice of the appointment, the trust property divests from the public trustee and devolves to and vests in the new trustee in the same way and subject to the same provisions as trust property vests in a post-change trustee under division 5.

*Clause 41* provides that where a new trustee has not been appointed to replace the last continuing trustee and a grant of probate with the will or a grant of letters of administration of the estate of the last continuing trustee is made to a person other than the public trustee, and the holder of the grant gives the public trustee written notice of the grant and the holder's intention to assume the trust, the trust property divests from the public trustee and devolves to and vests in the holder of the grant in the same way and subject to the same provisions as trust property vests in a post-change trustee under division 5.

*Clause 42* provides that where the trust property vests in the grant holder under clause 41, the holder is taken to be appointed as a new trustee by an appointor of the trust and has all the powers, authorities and discretions of, and may in all matters act as, the original trustee of the trust under the trust instrument.

*Clause 43* provides that where the public trustee is liable for any action taken by it in relation to the trust, and is entitled to be indemnified out of the trust property for that liability, on divesting of the trust property from the public trustee under clause 40 or 41, the public trustee is no longer liable and any person who would have a remedy against the public trustee has the same remedy against the person in whom the trust property vests under clause 40 or 41.

## **Division 8 – Vesting of trust property and devolution of trusts – last continuing trustee with impaired capacity for particular matters**

*Clause 44* provides that division 8 applies where: an administrator is appointed for all financial matters for the last continuing trustee of a trust; or the Supreme Court of Queensland, the District Court of Queensland, the Queensland Civil and Administrative Tribunal or a corresponding interstate entity (as defined) decides that the last continuing trustee of the trust has impaired capacity for all financial matters or for administering the trust.

*Clause 45* provides that on the appointment of the administrator or the making of the decision, the trust property devolves to and vests in the public trustee in the same way and subject to the same provisions as trust property vests in a post-change trustee under division 5 and will remain vested in the public trustee until divested under clause 47. The public trustee does not need to notify, register or record the vesting of the trust property under clause 35 if the public trustee does not act in relation to the trust or only appoints a new trustee.

*Clause 46* provides that, whilst the trust property is vested in the public trustee under clause 45, the public trustee has all the powers, authorities and discretions, and may in all matters act as, the original trustee of the trust property under the trust instrument. However, unless the court otherwise directs in special circumstances, the public trustee is not required to exercise any of these powers, authorities and discretions or act in the administration of the trust. This clause does not limit the powers of the public trustee under section 61 or 62 of the *Public Trustee Act 1978*.

*Clause 47* provides that where a new trustee who is not the public trustee is appointed to replace the last continuing trustee and the new trustee gives written notice of the appointment to the public trustee, the trust property divests from the public trustee and devolves to and vests in the new trustee in the same way and subject to the same provisions as trust property vests in a post-change trustee under division 5.

*Clause 48* provides that where the public trustee is liable for any action taken by it in relation to the trust and is entitled to be indemnified out of the trust property for that liability, on divesting of the trust property from the public trustee under clause 47, the public trustee is no longer liable and any person who would have a remedy against the public trustee has the same remedy against the person in whom the trust property vests under clause 47.

## **Division 9 - Disclaimer of testamentary trusts and related matters**

*Clause 49* provides that where a person is appointed by will as both executor of the will and trustee, on renunciation of probate of the will, or failure to apply for probate of the will after being properly cited or summoned to apply, the renunciation or failure is taken to be a disclaimer by that person of the trust contained in the will.

*Clause 50* provides that if a person appointed by will as both executor of the will and trustee, is taken to have disclaimed the trust contained in the will under clause 49, or dies before probate of the will is granted to them, on letters of administration with the will being granted to another person (grantee), then the grantee is the trustee of the testamentary trust in place of the person.

## **Part 4 – Custodian trustees**

*Clause 51* defines *managing trustee* of the trust.

*Clause 52* provides that a corporation may be appointed as the custodian trustee and how that appointment may be made.

*Clause 53* provides that, subject to an express contrary intention in the trust instrument, the trust property vests solely in the custodian trustee on appointment of the custodian trustee. The instrument of appointment of the custodian trustee takes effect as a conveyance of the trust property from the managing trustees to the custodian trustee; and does not create a breach of covenant or condition, or give rise to the forfeiture of any lease or other property. It also provides for vesting and divesting subject to the completion of the notification, registration or recording requirements of another Act, or of the law of another State or the Commonwealth pursuant to clause 34 as amended by this clause.

*Clause 54* provides that, subject to an express contrary intention in the trust instrument, if trust property is vested in a custodian trustee under clause 53, the powers, authorities and discretions exercisable by trustees under the trust, including the management of the trust property, remains vested in the managing trustees and the custodian trustee does not have the power to appoint a new trustee.

*Clause 55* provides, subject to an express contrary intention in the trust instrument, the functions of a custodian trustee.

*Clause 56* provides that, subject to an express contrary intention in the trust instrument, a custodian trustee is not personally liable for an act or omission of the managing trustees, or for an act or omission of the custodian trustees under a direction of the managing trustees under clause 55.

*Clause 57* provides that, subject to an express contrary intention in the trust instrument, if a custodian trustee does an act, or makes an omission, under a direction of the managing trustees under clause 55, then the managing trustees are liable as if the act or omission was the managing trustees' own act or omission.

*Clause 58* provides that a custodian trustee may apply to the court for directions if the custodian trustee believes that a direction given by the managing trustees under clause 55 conflicts with the trust instrument or the law, exposes the custodian trustee to a liability or is otherwise objectionable. The court may make directions or orders (including costs orders) it considers appropriate, which will bind the custodian trustee and the managing trustees.

*Clause 59* provides that, subject to an express contrary intention in the trust instrument, proceedings in relation to trust property vested in the custodian trustee must be brought or defended in the custodian trustee's name as the managing trustees by instrument direct with the managing trustee, rather than the custodian trustee, to be liable for the costs of these proceedings where they are brought or defended in accordance with the managing trustee's direction.

*Clause 60* provides that a person dealing with the custodian trustee need not inquire about any directions given to the custodian trustee by the managing trustees and whether the managing trustees have agreed to the dealing. A person dealing with the custodian trustee is not affected by notice of the fact that the managing trustees have not agreed to the dealing.

*Clause 61* provides who can apply to the court to end a custodian trusteeship, what the court needs to be satisfied of before ending the trusteeship and the directions and orders that the court may make in ending the trusteeship.

*Clause 62* provides that this part of the Bill does not limit the right of the managing trustees of the trust, or of a custodian trustee of trust property, to be indemnified out of the trust property in relation to liabilities incurred in the proper administration of the trust.

## **Part 5 - Trustees' duties**

### **Division 1 - Preliminary**

*Clause 63* provides that part 5 does not limit any other duty to which a trustee is subject, whether under this Act or otherwise.

*Clause 64* defines *professional trustee* and *trustee* for this part.

### **Division 2 - General duty to exercise care, diligence and skill in administering trusts**

*Clause 65* provides that a professional trustee has a duty, when administering a trust, to exercise the care, diligence and skill that a prudent person engaged in the trustee's profession, business or employment would exercise in managing the affairs of other persons.

*Clause 66* provides that trustees who have, or hold themselves out as having, special knowledge or experience relevant to administering trusts or trusts of a particular type, but who are not professional trustees, have a duty when administering the trust to

exercise the care, diligence and skill that a prudent person having that special knowledge or experience would exercise in managing the affairs of other persons.

*Clause 67* provides that where clauses 65 and 66 do not apply, a trustee has a duty, in administering a trust, to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons.

### **Division 3 - Duty to act honestly and in good faith**

*Clause 68* provides that a trustee has a duty in administering the trust to act honestly and in good faith for the benefit of the beneficiaries, or, if the trust is a charitable trust, to further the purposes of the trust.

### **Division 4 - Duties relating to accounts and other records**

*Clause 69* provides that a trustee has a duty in administering the trust to keep separate and accurate accounts and records for each trust they administer and must keep those accounts and records for at least three years after the termination of the trust(s). This does not affect any other statutory or other legal obligations or common law duties which may require a trustee to retain accounts and records for a longer period.

*Clause 70* provides a trustee has a duty in administering a trust, on a reasonable request of a beneficiary of the trust, within a reasonable period of the request being made, to make accounts available for inspection by a beneficiary. The trustee must also provide, on reasonable request of a beneficiary of the trust, and subject to the reasonable costs being paid, copies of the accounts to the beneficiary. This does not limit any rights that the beneficiary has to obtain other information from the trustee or to apply to the court for an order that the trustee produce other information.

## **Part 6 — Investments**

### **Division 1 - Preliminary**

*Clause 71* defines *investment power* and *professional investor* for part 6.

### **Division 2 - Duty of particular trustees to exercise care, diligence and skill in exercising investment powers**

*Clause 72* provides that, subject to a contrary intention in the trust instrument, a trustee who is a professional investor has a duty to exercise the care, diligence and skill that a prudent person engaged in the trustee's profession, business or employment would exercise in managing the affairs of other persons.

*Clause 73* provides that, subject to a contrary intention in the trust instrument, a trustee who is not a professional investor but has, or holds themselves out as having, special knowledge or experience in investing money for other persons, has a duty in exercising an investment power, to exercise the care, diligence and skill that a prudent person

having that special knowledge or experience would exercise in managing the affairs of other persons.

### **Division 3 - Duties and powers in relation to investments**

*Clause 74* provides that, subject to compliance with the terms of the trust instrument which require consent or approval in relation to trust investments or compliance with a direction in relation to trust investments, a trustee has the power to invest trust funds, or vary investments or realise an investment and reinvest, in any investment other than in a form of investment that is expressly forbidden by the trust instrument.

*Clause 75* provides a list of matters that the trustee must take into account to the extent they are appropriate to the circumstances of the trust in exercising an investment power but does not limit the matters which the trustee may have regard to in exercising an investment power.

*Clause 76* provides when a trustee may obtain independent and impartial advice about the investment of trust funds or the management of trust investments, when the trustee must consider that advice and that the trustee may pay for the reasonable costs of that advice from the trust funds.

*Clause 77* requires the trustee to review the performance of trust investments, individually and as a whole, every 12 months.

*Clause 78* provides that a rule or principle of law or equity that imposes a duty on a trustee exercising an investment power continues to apply except to the extent that it is inconsistent with the Act, another Act or with the trust instrument. Any rule or principle which purports to exempt, limit the liability of, or indemnify a trustee in relation to a breach of trust continues to apply and where the trustee is under a duty to obtain advice, the reasonable costs of obtaining the advice are payable out of the trust funds.

*Clause 79* provides that any chose in action arising under the Reserve Bank Information and Transfer System operated by the Reserve Bank of Australia, is taken, under the Act and a trust instrument, to be an investment by the trustee in that underlying security notwithstanding that the right is in relation to securities of a particular description rather than in relation to particular securities.

*Clause 80* provides that, notwithstanding any restriction or limitation on the trustee's power under the trust instrument, a trustee may buy, construct or retain a residence for a beneficiary to live in or enter into an agreement or arrangement to secure a right to use a residence for the beneficiary to live in (including a residence contract under the *Retirement Villages Act 1999*) where such interest is consistent with the extent of the beneficiary's interest under the trust.

*Clause 81* provides that, subject to an express contrary intention in the trust instrument, the trustee may by instrument authorise another person to exercise any of the trustee's investment powers on terms the trustee considers appropriate, but the trustee remains subject to any duty or other requirement applying to the trustee under part 5 or 6 relating to the exercise of the trustee's investment powers.

## **Division 4 - Liability of trustees in relation to exercise of investment powers**

*Clause 82* provides that, subject to an express contrary intention in the trust instrument, where a trustee authorises another person under clause 81 to exercise any of the trustee's investment powers, the trustee remains liable for any acts or omissions of the other person in exercising the trustee's investments powers as if the acts or omissions were by the trustee.

*Clause 83* provides if a trustee lends trust funds on the security of property, in what circumstances the trustee is not in breach of trust.

*Clause 84* provides that if a trustee improperly lends trust funds on the security of property but the loan would have been a proper investment if a lesser amount had been lent, the trustee is only liable for the difference between the actual amount lent and the lesser amount that was a proper investment, with interest.

*Clause 85* lists matters that the court may take into account in a proceeding against a trustee for a breach of trust in relation to the exercise of an investment power.

*Clause 86* provides when the court may set off losses from any investment against the gains resulting from any other investment in a proceeding against a trustee for a breach of trust in relation to an investment.

## **Part 7 – General powers of trustees**

### **Division 1 - Powers in relation to trust property**

*Clause 87* sets out the general powers given to a trustee in relation to trust property and when these may be modified or excluded by the trust instrument.

*Clause 88* provides when the trustee has the power to postpone the sale, calling in and conversion of a particular trust property that the trustee has a duty to sell, other than in relation to trust property that is of a wasting, speculative or reversionary nature.

*Clause 89* provides that a trustee may in relation to the trust property, do anything, make any omission, and execute any instrument, necessary to carry into effect the powers and authorities given under this Act or the trust instrument.

### **Division 2 - Expenditure in relation to trust property**

*Clause 90* details the purposes for which the trustee may exercise a power to expend amounts from a trust, including from trust capital, in relation to trust property.

*Clause 91* provides that, subject to the Act, a direction of the court, and an express contrary intention in the trust instrument, the trustee has the power, in relation to trust property, to apportion expenditure made under clause 90 between capital and income

or otherwise among the persons entitled to the capital or income in the way the trustee considers equitable. Where the expenditure is made out of capital, the trustee may recoup that expenditure out of income, or vice versa, if to do so would be equitable in all the circumstances.

### **Division 3 - Appropriation**

*Clause 92* contains definitions of *entitled person*, *extension application*, *interested person* and *variation application* for division 3.

*Clause 93* provides how the trustee must give written notice to any person interested in a proposed appropriation (*an interested person*) of the proposed appropriation of trust property to a beneficiary to satisfy a legacy or share of the trust the beneficiary is entitled before the appropriation is made.

*Clause 94* provides that an interested person who is given notice of the proposed appropriation may: make an application to the court to vary the proposed appropriation within two months of receiving written notice from the trustee, or such other longer period as allowed by the court; waive their right to make a variation application; or shorten the notice period given by the trustee to make a variation application.

*Clause 95* provides when a trustee may appropriate any part of the trust property to satisfy all, or part of, a legacy or share of the trust property a beneficiary is entitled to.

*Clause 96* provides that only the guardian (or guardians jointly, if more than one) of a child who is interested in the proposed appropriation may, on behalf of the child, waive the child's right to make a variation application under clause 94, give notice to shorten the period to make a variation application under clause 94 or approve an appropriation under clause 95. If the child is an entitled person to the appropriation, the guardian (or guardians jointly, if more than one) may also consent to the appropriation under clause 95. This clause also provides that clauses 94 and 95 do not limit how or by whom an application to the court may be made on behalf of a person under a legal capacity or the powers of an administrator or attorney for a person with impaired capacity for a matter.

*Clause 97* provides, where the trust instrument provides for the payment of an annuity, the trustee has the power to set aside, and appropriate out of any trust property available for payment of the annuity, an amount that is enough, in the trustee's opinion, at the time of the appropriation, when invested, to provide out of the income of the investment the amount required to pay the annuity. The trustee may then distribute the residue and income of the trust property in accordance with the trust instrument. The annuitant's recourse is to the capital and income of the appropriated amount and the residue and income of the trust property are not liable for the annuity.

*Clause 98* provides that where a trustee proposes to distribute the residue and income of the trust property that includes land or a water allocation, after an appropriation to satisfy an annuity under clause 97, the trustee must give the relevant registrar written notice that the trust property may be distributed because of an appropriation made under clause 97 and the relevant registrar is not required to inquire further on whether the appropriated amount set aside is sufficient for payment of the annuity.



## **Division 4 – Delegation**

### **Subdivision 1 – Preliminary**

*Clause 99* defines *delegate* and *instrument of delegation* for division 4.

### **Subdivision 2 – Delegation by trustees**

*Clause 100* provides how and to whom, the trustee may delegate the administration or exercise of all or any trusts, powers, authorities and discretions vested in the trustee as trustee when the trustee is absent, or is about to be absent, from the State, or is, or may be about to become, because of physical infirmity, temporarily incapable of performing the duties of a trustee.

*Clause 101* provides when the delegation of the trustee’s power under clause 100 is in effect.

*Clause 102* provides that the trustee’s delegate under clause 100 has, within the scope of the delegation, the same trusts, powers, authorities, discretions, duties and liabilities in relation to the matter except the power of delegation under clause 100, subject to the limitations in the instrument of delegation about the circumstances in which the delegation operates. The delegate is subject to the court’s jurisdiction and power in the administration of the trust to oversee the delegate as if they were a trustee.

*Clause 103* provides that the trustee remains liable for the acts or omissions of their delegate in relation to the matters delegated under clause 100 as if the delegate’s actions were the trustee’s own acts and omissions.

*Clause 104* provides who the trustee must give written notice to on delegating a matter under clause 100.

### **Subdivision 3 - Revocation of delegation**

*Clause 105* provides that a trustee may revoke a delegation given under clause 100 by giving a signed instrument revoking the delegation to the delegate.

*Clause 106* provides a trustee’s delegation given under clause 100 is revoked if the trustee becomes a person with impaired capacity for administering the trust.

*Clause 107* provides when a delegation under clause 100 is revoked by a delegate.

### **Subdivision 4 - Protections for third parties**

*Clause 108* defines *delegate* for subdivision 4.

*Clause 109* provides that particular acts of a delegate in favour of a third party are valid and effective even if the delegation is not in operation at the time of the particular act,

provided the relevant third party did not have actual notice that the delegation was not in operation.

*Clause 110* provides that a statutory declaration made by the delegate in relation to the trust is conclusive evidence of the matter stated in favour of the party dealing with the delegate, if the declaration states that: the delegation of a matter under clause 100 has commenced and has not been revoked or otherwise ended, and the circumstances in which the delegation is to operate apply; or, in any transaction, the delegate is acting in the administration of the trust.

*Clause 111* provides that if, in any transaction, it appears from the delegation of a matter under clause 100, or from any evidence required for the purpose of delegation, that the delegate is acting in the administration of a trust, then the person who is dealing in good faith with that delegate is not affected by notice of the trust.

## **Division 5 - Appointment of agents**

*Clause 112* provides who the trustee may appoint as an agent in the administration of the trust and the things which the agent may be appointed to do in the administration of the trust.

*Clause 113* provides a trustee may pay an agent appointed under clause 112 and provides that the trustee is entitled to be paid any charge or expense reasonably and properly incurred because of the agent's appointment.

## **Division 6 - Application of income by trustee-mortgagee in possession**

*Clause 114* defines *mortgage debt*, *primary beneficiary* and *priority outgoing* for the division.

*Clause 115* applies where the trustee becomes a mortgagee in possession of land for a debt secured for persons in succession that is secured wholly or partly by a mortgage over that land which the trustee holds as mortgagee or co-mortgagee. The clause provides when the trustee must apply income received by the trustee derived from the land to meet priority outgoings for the land and how the trustee must apply the balance of the income.

*Clause 116* provides how the trustee must apportion any amount recovered in relation to the income that is applied under clause 115 where: all or part of the mortgage debt is recovered, the trustee has applied the income of the land received by the trustee to pay priority outgoings in relation to the land, and the income or part of the income applied would have been payable to the primary beneficiary as interest of the mortgage debt.

*Clause 117* gives the trustee power to pay a priority outgoing in relation to the land from the income derived from the land even if the priority outgoing arose before the trustee became a mortgagee in possession of the land. If the trustee exercises this power then the primary beneficiary who would have been entitled to the income of the land

which has been paid towards these priority outgoings, is entitled to recoup that income from the capital of the mortgage debt.

## **Division 7 - Delivery of chattels**

*Clause 118* allows the trustee to deliver chattels to a beneficiary entitled to a life interest or other limited interest in those chattels, after the beneficiary asks the trustee to deliver the chattels to the beneficiary and the beneficiary provides a signed inventory of the chattels to the trustee.

*Clause 119* provides that a trustee may deliver chattels to a child, or the guardian of a child, who is beneficially entitled to the chattels. A receipt from the child or the guardian is a complete discharge of the trustee for the chattels delivered. These delivered chattels do not form part of any calculation of the trust capital applied for the child's maintenance under clause 133.

## **Division 8 - Other provisions**

*Clause 120* provides how the trustee must treat and apply the proceeds of an insurance policy against the loss of or damage to trust property or any other risk or liability relating to trust property.

*Clause 121* provides that a trustee may deposit a document held by the trustee relating to the trust or the trust property with certain entities whose business includes undertaking the safe custody of documents. The cost of this deposit is payable out of income, or where there is insufficient income, the capital of the trust property.

*Clause 122* provides how a trustee may fix the value of trust property or any property the trustee is authorised to buy or acquire and when that valuation is binding on those beneficially interested in the trust property.

*Clause 123* provides that the trustee may have the accounts of the trust property examined or audited by an accountant and how the costs of this examination or audit are to be paid from trust property.

*Clause 124* permits a trustee to sue and be sued by themselves in another capacity, including the trustee's personal capacity, however the trustee must obtain directions from the court about the way in which the differing interests are to be represented.

*Clause 125* provides that the trustees may make inquiries by advertisement or otherwise about the existence or whereabouts of the beneficiaries of the trust and how the costs of these inquiries are payable out of the trust property.

*Clause 126* provides that, other than for a trust created by a court order, the trustee may exercise the powers conferred under part 7 in relation to the trust property even though the beneficiaries are absolutely entitled to the trust property and all beneficiaries are adults with capacity, or have an administrator or attorney appointed who may exercise power for financial matters relating to the beneficiary's interest in the trust property. The trustee may not exercise these powers if they are revoked by all beneficiaries of

the trust by written notice to the trustee from each beneficiary who is an adult who has capacity and from the administrator or attorney appointed for financial matters relating to a beneficiary's interest in the trust property for each beneficiary who does not have capacity.

*Clause 127* provides that where, as a result of the exercise of a power under the Act, land is converted to personal property or personal property is converted to land, that converted property must be held on a trust, subject to the limitations, conditions, powers or directions, corresponding as nearly as the law and circumstances permit, with those affecting the property before conversion.

## **Part 8 - Maintenance, education and advancement**

### **Division 1 - Preliminary**

*Clause 128* defines *relevant capital* for part 8.

### **Division 2 – Application of trust income**

*Clause 129* provides, where a trust has a beneficiary who is a child, when a trustee may exercise a power to pay all or part of the income of the trust property to the beneficiary's guardian or otherwise for or towards the beneficiary's maintenance, education or advancement (including past maintenance or education).

*Clause 130* provides when a trustee may accumulate and invest unexpended income of the trust property that has not been paid or applied towards a child beneficiary's maintenance, education or advancement and how that accumulated income may be distributed.

*Clause 131* provides when a trustee may exercise a power to pay or apply income to an adult beneficiary for or towards that beneficiary's maintenance, education or advancement (including past maintenance or education).

*Clause 132* provides when clauses 129 to 131 apply to a vested annuity.

### **Division 3 - Application of trust capital**

*Clause 133* provides when the trustee may pay or apply amounts from, or parts of, the capital of the trust property for or towards a beneficiary's maintenance, education or advancement (including past maintenance or education) and the maximum amount of capital that may be applied or paid unless the court, on application by the trustee, authorises a greater amount or part to be paid or applied.

*Clause 134* provides restrictions on the trustee's ability to pay or apply amounts from, or parts of, the capital of the trust property for a beneficiary's maintenance, education or advancement under clause 133.

*Clause 135* defines the prescribed amount under clause 133(4) of the application of trust capital to be \$100,000 indexed annually at the end of the financial year after commencement based on the all groups consumer price index for Brisbane published by the Australian Bureau of Statistics.

*Clause 136* provides that any capital paid or applied under division 3 must be brought into account as part of the share of the trust property to which the beneficiary is or becomes absolutely or indefeasibly entitled.

## **Division 4 - Imposition of conditions**

*Clause 137* provides that a trustee, in exercising a power to pay or apply an amount or a share out of trust income or capital for a beneficiary's maintenance, education or advancement (including past maintenance or advancement) under division 2 or 3 or the trust instrument, may impose conditions on the payment or application including repayment, interest or giving of security. The trustee may also waive, wholly or partially, or release an obligation undertaken or security given, wholly or partially, because of the condition.

*Clause 138* provides that if a trustee imposes a condition under clause 137 an amount repaid to the trustee by the beneficiary, or recovered by the trustee from the beneficiary, is taken not to have been paid or applied by the trustee to that beneficiary.

*Clause 139* provides when a trustee will not be liable for a loss that may be incurred in relation to an amount or part of trust income or capital that is paid or applied, due to a failure to impose, maintain, or enforce conditions under clause 137.

## **Part 9 – Indemnities and protection of trustees and other persons**

### **Division 1 - Distributing trust property**

*Clause 140* provides how a trustee who is intending to distribute trust property may publish a notice requiring a person who has any claim to or against the trust property to send particulars of the person's claim to the trustee by no later than a stated day (the *closing day*) that is at least 2 months after the day the notice is published.

*Clause 141* protects trustees who distribute trust property after the closing day (as defined in clause 140) for the last of all notices given, having regard only to the claims of which the trustee has notice at the time of the distribution. This section does not affect the rights of any person to enforce their claim against a person who receives a distribution from the trustee, and nor does it limit any defences under the Act, or in law or in equity available to the person who received a distribution from the trustee.

### **Division 2 - Claims against trust property and trustees**

*Clause 142* defines, *claim*, *claimant* and *potential claimant* for division 2.

*Clause 143* provides that, where a trustee does not accept a claim in relation to the trust, the trustee may give a claimant or potential claimant a written notice requiring the person to start a proceeding to enforce the claim within six months after the notice is given, and to prosecute the proceeding with appropriate diligence.

*Clause 144* provides that a trustee may make an application to court seeking orders under clause 145 against one or more potential claimants who had been given the six months' notice under clause 143 before the application was made.

*Clause 145* provides that, where an application is made under clause 144 by the trustee, and the claimant or potential claimant does not satisfy the court that it has started a proceeding to enforce their claim, or prosecuted the proceeding with appropriate diligence, the court may make the orders or directions listed in the clause, or as it considers appropriate.

*Clause 146* applies when a beneficiary of the trust is not made a party to the trustee's application under clause 144 or a respondent to the trustee's application under clause 145(3)(b). The clause allows this beneficiary to contest a claim of the trustee to indemnify themselves out of the trust property in relation to the application notwithstanding that an order was made by the court in relation to the application.

### **Division 3 - Remedies for wrongful distribution of trust property**

*Clause 147* defines *recipient* for the division 3.

*Clause 148* provides that a person who suffers loss because a trustee has wrongfully distributed trust property may enforce the same remedies against the trustee, and against any person to whom the distribution has been made (a *recipient*), as the person could enforce against a personal representative who has wrongfully distributed the estate of a deceased person. The person is not required to exhaust all remedies that may be available to them against the trustee before seeking to enforce a remedy against a recipient.

*Clause 149* provides that if a recipient of a wrongful distribution of trust property received the distribution in good faith and has changed their position in reliance on the propriety of the distribution so that, in the court's opinion, it would be inequitable to enforce the remedy, then the court may make an order it considers to be just in all the circumstances.

*Clause 150* confirms that clause 149 does not limit any other defence that may be available to the recipient under the Act, at law, or in equity.

### **Division 4 - Particular protections for trustees**

*Clause 151* provides that when a person is trustee of more than one trust, the trustee is not, in the absence of fraud, taken to have notice of any matter in relation to a trust only because notice of the matter is, or was, given to the trustee when acting for another trust.

*Clause 152* provides that if a trustee signs a receipt for the payment of an amount or for securities in order to comply with the requirements in relation to the giving of receipts by the trustees but the trustee does not receive all, or any, of the amount or the securities, the trustee is accountable only for the amount or securities actually received by that trustee.

*Clause 153* provides that, subject to clauses 57, 59, 82 and 103, a trustee is only personally liable for their own acts or omissions and is not personally liable for the acts of certain third parties, or for any insufficiency or deficiency of any security or other loss, unless this insufficiency, deficiency or loss results from the trustee's own breach of trust.

*Clause 154* provides a trustee may reimburse themselves out of trust property for, or pay or discharge from trust property, the expenses reasonably incurred in administering the trust.

*Clause 155* provides when a trustee is relieved of liability arising from a lease or agreement for a lease to enable a trustee to distribute the remaining trust property and avoid personal liability for a claim under the lease or agreement. However, this does not affect the rights of the lessor to follow the trust property into the hands of the persons who have received it.

## **Division 5 - General**

*Clause 156* provides that a statement in an instrument about the circumstances in which the vacancy in the office of trustee arose or the circumstances in which the trustee was removed is conclusive evidence for a subsequent purchaser, debtor making a payment to a new or continuing trustee, or a registrar or person registering or recording a dealing with trust property, who acts in good faith. Further, the vesting of property on the appointment, or removal, of a trustee is as valid in favour of a subsequent purchaser acting in good faith as it would be if the statement were true.

*Clause 157* provides that, when registering or recording dealings, a registrar or person registering or recording a dealing with trust property is not required to make inquiries about, or take notice of, the circumstances of the apportionment of the proceeds of sale when a trustee joins with another person in the sale of trust property. Nor is the registrar required to inquire about the surrender, by a trustee, of freehold land, leasehold land, a water allocation or the lease of a water allocation.

*Clause 158* protects a purchaser or mortgagee when paying or lending an amount to a trustee on a sale or mortgage of trust property by providing that they do not have to inquire into: whether the amount is needed, or is more than is needed; whether the trustee has the power to effect the sale or grant the mortgage; or how the amount is applied.

*Clause 159* allows a person who pays an amount, or transfers or delivers property, to a trustee to rely on a written receipt given by the trustee or their agent for that amount, or transfer or delivery, and the person is not required to see to the application of the amount

or property and is not answerable for any loss or misapplication of the amount or property.

*Clause 160* gives the court the power to relieve a trustee wholly or partially from personal liability for a breach of the trust if the court is satisfied the trustee has acted honestly and reasonably and should fairly be excused for the breach of trust and for omitting to obtain the court's directions in the matter in which the trustee committed a breach of trust.

*Clause 161* provides that if a trustee commits a breach of trust at the instigation or request, or with the written consent of, a beneficiary, the court may make an order indemnifying the trustee out of the beneficiary's interest in the trust property.

*Clause 162* provides that each order purporting to be made under the Act is a complete indemnity to a person for any act done under the order.

## **Part 10 - Remuneration of trustees**

*Clause 163* defines *professional charges*, *professional trustee* and *trustee* for part 10.

*Clause 164* provides that, subject to an express contrary intention in the trust instrument, a professional trustee, for whom no benefit or remuneration is provided in the trust instrument, may charge the trustee's professional costs in relation to the trust to be paid out of the trust property.

*Clause 165* provides that a court may, on the application of a trustee (including a professional trustee), make an order authorising the trustee to charge remuneration for the trustee's services that the court considers appropriate if the circumstances appear to the court to justify the charge, taking into account any professional charges paid out of the trust property under clause 164.

*Clause 166* allows the court, on its own initiative or because any person who is interested in the trust has made an application, to review and reduce amounts (or part of any amount) paid to, or charged or proposed to be charged by, certain trustees, for commission or professional charges in relation to a trust if the court considers the commission or charges to be excessive.

## **Part 11- Court powers**

### **Division 1 - Preliminary**

*Clause 167* defines *possessed*, of property, for part 11.

### **Division 2 - Applications for orders**

*Clause 168* provides who may apply to the court for certain applications under this Act relating to a trust and trust property.



*Clause 169* provides who may apply to the court for orders under this Act in relation to an interest in any property subject to a mortgage.

*Clause 170* provides who may apply to the court for an order under this Act in relation to property other than trust property or property the subject of a mortgage.

### **Division 3 - Appointment and removal of trustees and other office holders and related matters**

*Clause 171* provides when a court may order the removal, appointment and/or replacement of a trustee (other than a personal representative) and the effect of that order.

*Clause 172* provides that a trustee appointed under an order of the court under clause 171(2) has all the same powers, authorities and discretions of, and may in all matters act as, a person who had originally been appointed a trustee of the trust property under the trust instrument, both before and after the trust property is vested in the appointed trustee.

*Clause 173* provides a court, after removing a trustee under clause 171(2)(c), may disqualify the (removed) trustee from appointment as a trustee of any trust for a stated period and may also remove them as a trustee of other trusts, if the court is satisfied that the person committed a breach or breaches of trust and the nature or seriousness of the breach or breaches of trust make the person unfit to act as a trustee.

*Clause 174* provides when a court may remove and/or appoint certain office holders of the trust and who may bring this application.

### **Division 4 - Vesting orders and related matters**

*Clause 175* provides when division 4 applies.

*Clause 176* allows the court to make vesting and declaratory orders, or give any directions it thinks appropriate, in relation to trust property or other property.

*Clause 177* provides when restrictions may apply to the vesting of trust property under a vesting order of the court.

*Clause 178* provides for the effect of vesting and other orders made by the court.

*Clause 179* provides how a person who is vested with property under a vesting order may effect the notification, registration or recording of the order to transfer the property that is the subject of the vesting order. This order, or its notification, registration or recording, will not breach a covenant or condition, or give rise to the forfeiture of any lease or agreement for lease or other property and, where consent is required, unless the order provides otherwise, the vesting of the property under the order is still subject to that consent, which may be obtained after the making of the vesting order.

*Clause 180* provides that a trustee who is vested with property has all the powers, authorities and discretions of, and may in all matters act as, a person who had originally been appointed a trustee of the trust property under the trust instrument, subject to any enlargement or limitation on the trustee's powers as the court considers appropriate.

*Clause 181* provides that, where any vesting order, or any other order, declaration or direction made under clause 176 is improperly obtained, the court may make further orders, declarations or directions including directing a reconveyance of the property the subject of any vesting order or for payment of costs associated with the improperly obtained order, direction or declaration.

## **Division 5 – Orders in relation to property and claims of children**

*Clause 182* allows a court to make orders appointing a person to: deal with, or exercise the powers a trustee would have in relation to: property that a child is beneficially entitled to for which there is no trustee appointed; or settle or compromise a child's claim to property.

## **Division 6 - Conferral of additional management powers**

*Clause 183* defines *management power* for division 6.

*Clause 184* provides when the court may confer on the trustee, either generally, or in a particular matter, an additional management power on the terms and conditions the court considers appropriate, irrespective of whether the Act confers that power which is able to be excluded or modified under the trust instrument and that power is excluded or modified under the trust instrument.

*Clause 185* provides that the court may vary or revoke an order made under clause 184 but any act or thing done in reliance on that court order before the person doing the act or thing became aware of the application to the court to revoke or vary the order, is not affected.

*Clause 186* provides who may apply for an order under clause 184 or 185 of the Act.

## **Division 7 - Variations of trusts**

*Clause 187* defines *protective trust* for division 7.

*Clause 188* provides when a court may make an order to approve an arrangement to vary or revoke all or any of certain trusts or enlarge the powers of the trustee to manage or administer the trust property of that trust, where the arrangement is for the benefit of certain restricted beneficiaries.

## **Division 8 - Applications for directions**

*Clause 189* provides that, on application of the trustee, the court may give directions as it considers appropriate about the trust property, the management or administration of

the trust property, or the exercise of any power or discretion vested in the trustee, after the application is served on any person having an interest in the application or any of them as the court considers expedient.

*Clause 190* provides that a trustee is taken to have discharged their duty as trustee and will not be personally liable when acting in accordance with the court's directions under clause 189 even if the direction is later varied or set aside, provided that the trustee did not commit a fraud, wilfully conceal a material matter, or misrepresent a material matter, when obtaining the direction or agreeing with the court in making the order giving the direction.

## **Division 9 - Review of decisions and apprehended decisions**

*Clause 191* provides when a person is an *aggrieved person* for division 9.

*Clause 192* defines *aggrieved person* (by reference to clause 191), *decision*, and *relevant power* for division 9.

*Clause 193* provides an aggrieved person may apply to the court to review a decision of the trustee or other person or to give directions in relation to an apprehended decision of the trustee or other person.

*Clause 194* provides the grounds on which the court may review a decision or give directions about the apprehended decision. It also allows the Court to require the trustee or other person to appear before it to substantiate and uphold the grounds of the decision or apprehended decision.

*Clause 195* provides what directions and orders that the court may make and what the orders must not do.

## **Division 10 - Other matters**

*Clause 196* provides when a court may determine proceedings in the absence of a trustee who is a defendant to the proceedings. It also provides that any judgment issued by the court against the trustee will not affect any interest the trustee may have in the matter in another capacity.

*Clause 197* provides the court with the power to appoint a person to represent a party or a person interested in the proceeding, or proceed in the absence of a party or a person interested in the proceeding in certain circumstances, with any order made by the court in the proceeding being binding on the party or the interested person.

*Clause 198* provides the court may order that the costs of an application under the Act be paid or raised out of: the property to which the application relates, or the income of that property; or be borne in the way and by the persons the court considers just.

*Clause 199* provides for the payment into court of trust property on the agreement of all of the trustees, or, where a majority of trustees wish to pay trust property into court but not all the trustees agree, then the court may order that the trust property be paid

into court or provide directions to give effect to this where the property is held by financial institutions, brokers or other depositaries.

## **Part 12 - Charitable trusts**

### **Division 1 - Trusts containing non-charitable and invalid purposes**

*Clause 200* applies to trusts that are declared on or after 1 July 1973 and to the estate of a deceased person who left a will who died on or after 1 July 1973. In these cases, if the purposes of the trust include both a charitable purpose and a non-charitable and invalid purpose, then the trust is not invalid because of the inclusion of the non-charitable and invalid purpose and the trust may be construed as if the trust did not direct or allow for the trust property to be applied for the non-charitable and invalid purpose.

### **Division 2 - Applications to court in relation to charitable trusts**

*Clause 201* provides who may apply to a court for an order under part 12 in relation to a charitable trust.

*Clause 202* provides who an applicant must give written notice to of an application under part 12.

*Clause 203* provides what orders that a court may make in relation to the charitable trust.

### **Division 3 - Schemes to allow trust property to be applied cy pres**

#### **Subdivision 1 - Preliminary**

*Clause 204* provides that a reference in division 3 to the purposes of a charitable trust is a reference to: if the application of the trust property has been changed or regulated by a scheme approved under division 3 or otherwise, the purposes for which the trust property may, for the time being, be applied; or, if such a scheme has not been approved, the original purposes of the trust.

*Clause 205* provides the circumstances in which the purposes of a charitable trust may be changed under subdivision 2 or 3 to allow the trust property to be applied cy pres.

*Clause 206* provides that division 3 does not affect the application of the *Charitable Funds Act 1958* to the funds to which that Act applies.

#### **Subdivision 2 - Approval of schemes by court**

*Clause 207* provides when the court may consider an application to approve a scheme to change the purposes of a charitable trust to allow the trust property to be applied cy pres and the orders which the court may make.

### **Subdivision 3 - Approval of schemes by Attorney-General**

*Clause 208* provides when and how a trustee of a charitable trust may apply to the Attorney-General, rather than the court under subdivision 2, to seek approval for a scheme to change the purposes of the trust to allow the trust property to be applied cy pres.

*Clause 209* provides that the Attorney-General must require the trustee to give public notice of the application in the way the Attorney-General considers appropriate. The notice must invite persons and charities interested in the proper administration of the trust to make written submissions to the Attorney-General within a stated period and provide how these submissions must be made.

*Clause 210* allows the Attorney-General to request the trustee to provide any information, opinions or advice and also to make any investigations and inquiries the Attorney-General considers appropriate. It also allows the Attorney-General to propose a variation to the scheme by consulting with the trustee on the proposed variation.

*Clause 211* provides that the Attorney-General must consider the application and decide to approve, approve with variations, or refuse to approve the scheme. This clause also sets out what the Attorney-General must consider and be satisfied of in making a decision. If the Attorney-General refuses to approve the scheme, the Attorney-General must give the trustee written notice of the decision, including the reasons for the decision.

*Clause 212* provides that the Attorney-General must give public notice of their decision in relation to the scheme and, if the scheme is approved, then the notice must give information about the appeal rights of a person aggrieved by the decision and when the scheme takes effect if an appeal is not started.

*Clause 213* provides, if the Attorney-General decides to approve the scheme, when the scheme takes effect.

*Clause 214* provides that, if a scheme is approved by the Attorney-General, a person aggrieved by the decision may appeal against the decision to the Supreme Court which must be started within 28 days after public notice of the decision to approve the scheme is given under clause 212.

*Clause 215* provides that if the Attorney-General refuses to approve a scheme under clause 211, the trustee may apply to court under subdivision 2 or otherwise to approve the scheme.

*Clause 216* requires the chief executive to keep a register of all schemes approved by the Attorney-General under clause 211 and provides for the information that the register may include and how the register must be published.

## **Subdivision 4 - Duty of trustees to make cy pres applications**

*Clause 217* provides that, if the circumstances permit trust property to be applied cy pres, a trustee has a duty to secure the effective use of the trust property for charitable purposes by making an appropriate application to have the property applied cy pres.

## **Part 13 - Gifts by particular trustees for philanthropic purposes**

*Clause 218* defines *eligible recipient*, *government entity*, *prescribed power* and *prescribed trust* for part 13.

*Clause 219* defines a *prescribed power* for a trust to include an express power in the trust instrument for the trustees to provide money, property or benefits: to or for an eligible recipient; or for the establishment of an eligible recipient.

*Clause 220* defines a *prescribed power* for a trust, where the trust instrument does not include an express power under clause 219, to include the power to provide money, property or benefits: to or for an eligible recipient; or for the establishment of an eligible recipient; irrespective of any contrary provision in the trust deed. However, this power does not apply where, in relation to particular eligible recipients, or to eligible recipients of a particular class, there is an express prohibition in the trust instrument against the trustee providing money, property or benefits to or for that eligible recipient or eligible recipients of that class, or for the establishment of that eligible recipient or eligible recipients of that class.

*Clause 221* provides that the Act applies in relation to a prescribed trust as if the prescribed power for the trust were a power exercisable for a charitable purpose and how this is not limited.

## **Part 14 – Statutory trustees**

*Clause 222* limits the powers a statutory trustee may exercise in relation to the trust unless the statutory trustee has the approval of the court.

*Clause 223* provides what rights, duties, liabilities, indemnities and protections apply to a statutory trustee in exercising a power under the Act.

## **Part 15 – Miscellaneous**

*Clause 224* provides that the Governor in Council may make regulations under the Act.

*Clause 225* provides the chief executive may approve forms for use under the Act.

## **Part 16 – Repeal**

*Clause 226* repeals the *Trusts Act 1973*.

## **Part 17 -Transitional and validation provisions**

### **Division 1 – Preliminary**

*Clause 227* defines the *repealed Act* for part 17.

*Clause 228* provides that part 17 does not limit or otherwise affect the operation of section 20 or 20A of the *Acts Interpretation Act 1954*.

### **Division 2 – Restrictions on appointment of trustees**

*Clause 229* provides that clause 13 of the Act does not apply to the appointment of a trustee that took effect before commencement.

*Clause 230* provides that existing trusts with more than four trustees can continue to have more than four trustees, notwithstanding clause 14 of the Act, until the number of trustees of the trust is reduced to 4 or less, or the court approves the appointment of more than 4 trustees under clause 15 of the Act.

*Clause 231* provides that any Minister’s certificate under section 11(3)(b) of the repealed Act approving more than four trustees that was still in effect immediately before the commencement alters clause 14 of the Act so that the number of approved trustees in the certificate shall replace the four trustees permitted in clauses 14(2) and (3) of the Act.

### **Division 3 – Provisions for appointment, discharge and removal of trustees and devolution of trusts**

*Clause 232* provides that clause 20 of the Act applies to a relevant trustee whether a circumstance mentioned in clause 20(1) happened, or started to apply, in relation to the trustee, before or after the commencement. This clause also saves the power under clause 12(1)(g) of the repealed Act to replace a child as trustee where that child was appointed as trustee prior to commencement.

*Clause 233* provides that clause 21 of the Act applies in relation to the last continuing trustee of the trust who is dead whether the death happened before or after the commencement. However, for a trust created before the commencement, clause 21(5) only applies to the personal representative of the last continuing trustee of the trust as if the provision were not expressed to be subject to a contrary intention in the trust instrument.

*Clause 234* provides that clauses 22 and 23 of the Act only apply to trusts created after the commencement.

*Clause 235* provides that: if a Minister’s certificate is given under section 11(3)(b) of the repealed Act and continued to have effect, clause 24(1)(a) applies as if the number

of trustees permitted under clause 14 of the Act is increased to the number of trustees approved for the trust under that certificate; and for a trust created before the commencement, clause 24(4) applies to an appointor for the trust as if the provision were not expressed to be subject to a contrary intention of the trust instrument.

*Clause 236* provides that where one or more trustees were appointed under section 12 of the repealed Act, and any assurance or thing required for vesting the trust property or any part of the trust property in the trusts had not been executed or done under section 12(2)(d) before the commencement, section 12(2)(d) of the repealed Act continues to apply as if the Act had not commenced so that any assurance or thing required to be done to vest the trust property must still be done.

*Clause 237* provides that, for the purposes of clause 26(1) of the Act, a person who was appointed as trustee under part 3, division 2 of the Act includes a person who was appointed as a trustee of trust property under section 12 of the repealed Act and whose appointment was still in effect immediately before the commencement.

*Clause 238* provides that, under clause 29, trustees may be removed and discharged without the appointment of a new trustee, whether the circumstances leading to the trustee's replacement (as set out under clause 20(1)(c) to (h) of the Act) happened, or started to apply, in relation to the trustee, before or after the commencement. This clause also saves the power under section 12(1)(g) and (2)(c) of the repealed Act to remove a child as trustee where the child was appointed as trustee before commencement of the Act.

*Clause 239* provides that clause 31 of the Act only applies if the replacement, removal or discharge of the delegating trustee happens after the commencement.

*Clause 240* provides that, where vesting of trust property in a trustee required notification, registration or recording by a registrar or another person under section 15(3) of the repealed Act and this had not been attended to prior to commencement, section 15 of the repealed Act continues to apply in relation to the vesting or divesting of the trust property as if the Act had not been enacted.

*Clause 241* provides that clause 36 of the Act applies to a surviving trustee whether the trustee they survive died before or after the commencement.

*Clause 242* provides where section 16 of the repealed Act continues to apply where trust property is vested in the public trustee under section 16(2) of the repealed Act before the commencement.

*Clause 243* provides that part 3, division 7 of the Act only applies where the last continuing trustee of the trust dies after the commencement.

*Clause 244* provides that part 3, division 8 of the Act only applies if an appointment or a decision mentioned under clause 44(1)(a) or (b) is made for, or in relation to, the last continuing trustee of a trust after the commencement.

*Clause 245* provides that section 17 of the repealed Act continues to apply as if the Act had not been enacted, if immediately before commencement, an estate or interest in



property by way of mortgage was vested in the public trustee under section 17(1) of the repealed Act.

*Clause 246* provides that clause 50 of the Act applies to a person who is appointed by will as both executor of the will and trustee including as if the reference in clause 50(1)(a)(i) to a person being taken to have disclaimed a trust contained in the will under clause 49 of the Act included a reference to a person's conduct being deemed to be a disclaimer of the trust contained in the will under section 18(1) of the repealed Act.

## **Division 4 – Provisions for custodian trustees**

*Clause 247* defines *existing custodian trustee* for division 4.

*Clause 248* provides how clauses 53(5), 54(4), 55(3), 56(3), 57(3) and 59(3) of the Act apply to a trust created before the commencement.

*Clause 249* provides that, without limiting clause 248, how the Act applies to an existing custodian trustee.

## **Division 5 – Provisions for investments**

*Clause 250* provides when clause 76 of the Act applies to an advice obtained by the trustee under section 24(2) of the repealed Act before the commencement.

*Clause 251* provides how a trustee will comply with their duty to review the trust investments under clause 77 of the Act where trust investments were held by the trustee immediately before the commencement.

*Clause 252* provides when clause 80 of the Act will apply to a dwelling house purchased, retained or otherwise secured under section 28 of the repealed Act prior to the commencement.

*Clause 253* provides that clauses 83 and 84 of the Act apply to a loan of trust funds on security of property whether made before or after the commencement.

*Clause 254* provides that section 30B of the repealed Act continues to apply in relation to a proceeding started before the commencement as if the Act had not been enacted. It also provides how clause 86 of the Act applies to proceedings started after the commencement.

*Clause 255* provides that section 30C of the repealed Act continues to apply in relation to a proceeding started before the commencement as if the Act had not been enacted. It also provides that clause 86 of the Act applies only to proceedings started after the commencement in relation to an investment, irrespective of whether the investment is made before or after the commencement.

*Clause 256* provides how part 6 and clause 184 of the Act will apply to an investment under a provision in a document which authorises or requires a person to invest an

amount in the investments authorised by the repealed Act as in force immediately before the commencement of the *Trusts (Investments) Amendment Act 1991*.

## **Division 6 – Provisions for general powers of trustees**

*Clause 257* provides that the general powers in relation to trust property conferred on a trustee under clause 87 of the Act apply to trust property held by the trustee immediately before the commencement. This includes the power to renew, extend or vary a lease or mortgage of trust property where that lease or mortgage was in existence immediately before the commencement.

*Clause 258* provides that, for an expenditure or payment made under section 33(1)(a) to (f) of the repealed Act which has not yet been apportioned prior to commencement, the power to apportion expenditure between capital and income under clause 91 applies to expenditure or a payment made under clause 90, as if it included a reference to expenditure or a payment made under section 33(1)(a) to (f) of the repealed Act.

*Clause 259* provides that section 33(1)(l), (2) and (4) of the repealed Act continue to apply as if the Act had not been enacted to any notice of appropriation of trust property given to a person prior to the commencement under section 33(1)(l)(ii) of the repealed Act where that appropriation has not been made, or an application to court to vary that appropriation has not been decided, before the Act commenced.

*Clause 260* provides when sections 33(1)(m) and section 33(5) of the repealed Act continue to apply as if the Act had not been enacted.

*Clause 261* provides when section 33(5) of the repealed Act continues to apply to a relevant official as if the Act had had not been enacted.

*Clause 262* provides that section 37 of the repealed Act continues to apply as if the Act had not been enacted in relation to a sale of property by a trustee before the commencement on terms of deferred payment where the balance of the purchase money and any interest payable on the balance of the purchase money had not been paid before the commencement.

*Clause 263* provides that, if a trustee has used a power of attorney to delegate a matter before the commencement, then section 56 of the repealed Act continues to apply as if the Act had not been enacted except that the delegation will end on the earlier of the power of attorney being revoked under section 56(5) of the repealed Act, the end of a day that is 1 year after the commencement of this section, and when the power of attorney providing for the delegation ends.

*Clause 264* provides that the appointment of agents under the repealed Act before commencement remain in effect.

*Clause 265* provides that part 7, division 6 applies only in relation to a trustee who becomes mortgagee in possession of land in the circumstances mentioned in clause 115(1) after commencement. If a trustee became mortgagee in possession of mortgaged

land before commencement in the circumstances mentioned in section 42(1) of the repealed Act, then section 42 of the repealed Act continues to apply.

*Clause 266* provides that where a trustee received the proceeds of an insurance policy before the commencement, section 48 of the repealed Act applies to the application of those proceeds by the trustee as if the Act had not been enacted. Where a trustee received proceeds from an insurance policy after the commencement, irrespective of whether the insurance policy was taken out before or after the commencement, clause 120 of the Act applies.

*Clause 267* provides when section 49 of the repealed Act continues to apply to any sum payable in respect of the deposit by a trustee of a document into safe custody before the commencement of the Act as if the Act had not been enacted.

*Clause 268* provides that where a trustee has consulted a duly qualified person about the value of property under section 51 of the repealed Act and immediately before the commencement the trustee had not fixed the value of that property, then clause 122 of the Act applies as if the consultation was performed under clause 122(3)(a) of the Act.

*Clause 269* provides when section 52 of the repealed Act continues to apply in relation to the costs of the examination or audit of the accounts of trust property as if the Act had not been enacted.

*Clause 270* provides that clause 125 of the Act applies in relation to the costs, expenses and charges incurred by a trustee in making inquiries to ascertain the existence or whereabouts of a beneficiary. However, for a trust created before the commencement, clause 125 applies as if clause 125(3) included a reference to a contrary intention in the trust instrument rather than an express contrary intention in the trust instrument.

*Clause 271* provides that a reference in clause 127 of the Act to an exercise of power under this Act is taken to include a reference to the exercise of power under the repealed Act.

*Clause 272* provides that where a trustee was carrying on a business under section 57 of the repealed Act before the commencement of this Act, section 57 of the repealed Act continues to apply to the trustee as if the Act had not been enacted.

## **Division 7 – Provisions for maintenance, education and advancement**

*Clause 273* provides that clause 130 of the Act, including as it is applied under clause 132 of the Act in relation to annuities, applies in relation to accumulations of income of trust property immediately before the commencement under section 61(2) of the repealed Act, including as applied under section 61(5) of the repealed Act in relation to annuities.

*Clause 274* provides that where trust capital is paid or applied by the trustee under section 62 of the repealed Act before the commencement, these amounts are included in the calculation of the amount of relevant capital paid or applied in relation to the

beneficiary under clause 133(4) of the Act and a reference to the amount paid or applied out of relevant capital under part 8, division 3, in clause 136 of the Act includes any amounts paid or applied out of the trust capital in relation to the beneficiary under section 62 of the repealed Act before the commencement.

*Clause 275* provides when the chief executive must first publish the prescribed amount for a financial year under clause 135 of the Act.

*Clause 276* provides that if any condition imposed under section 63 of the repealed Act before the commencement is still in effect after commencement, then part 8, division 4 applies in relation to the condition as if the condition were imposed under clause 137(2) of the Act in exercising a power under clause 137(1) of the Act.

*Clause 277* provides that where any income was directed to be held on protective trusts for the benefit of any person for the period of the person's life or for any less period immediately before the commencement, the income continues to be held, until the end of that period, on the trusts provided for under section 64 of the repealed Act, as if the Act had not been enacted.

## **Division 8 – Provisions for indemnities and protection of trustees and other persons**

*Clause 278* provides when section 66 of the repealed Act continues to apply to protect a trustee in relation to distribution of the residuary real and personal estate of the trust estate from liabilities for rents and covenants under a lease, grant or indemnity as if the Act had not been enacted.

*Clause 279* provides section 67 of the repealed Act continues to apply as if the Act had not been enacted if: a trustee or personal representative gave notice under section 67(1) in relation to the distribution of any trust property or estate before the commencement; and the date fixed by the notice for the sending of particulars of claims was on or after commencement, or, if the date fixed by the notices was not on or after commencement, immediately before the commencement, the trust property or estate had not been distributed.

*Clause 280* provides when section 68 of the repealed Act continues to apply, as if the Act had not been enacted, to enable the trustee, after serving notice on a claimant or person who may become a claimant against the trustee or the trust property, to apply to the court for an order to bar the claim. However, where section 68 of the repealed Act applies, a reference in section 68(3)(a) of the repealed Act to barring a claim is taken to be a reference to barring the claim (including for all purposes).

*Clause 281* provides that, if an application under section 68(2) of the repealed Act was made but not decided before the commencement, then section 68 continues to apply in relation to that application and the application must be decided as if the Act was not enacted. However, references to barring the claim in 68(3)(a) of the repealed Act are taken to be references to barring the claim (including for all purposes).

*Clause 282* provides part 9, division 3 of the Act only applies to proceedings to enforce a remedy for the wrongful distribution of trust property that are started after the commencement, irrespective of whether the wrongful distribution of the trust property was made before or after the commencement. Any previous order of the court refusing leave to bring an application under section 113(2) of the repealed Act ceases to have effect from commencement and section 148(3) of the Act will apply. However, section 113 of the repealed Act will continue to apply in relation to a proceeding started before the commencement to enforce a remedy for the wrongful distribution of trust property as if this Act had not been enacted.

*Clause 283* provides that clause 154 of the Act applies to expenses reasonably incurred in administering a trust whether incurred before or after the commencement.

*Clause 284* provides that clause 156 of the Act applies in relation to an instrument under which a new trustee is appointed or a trustee is removed whether signed before or after the commencement.

*Clause 285* provides that clause 160 of the Act applies in relation to a breach of trust whether committed before or after the commencement.

*Clause 286* provides that clause 161 of the Act applies in relation to a breach of trust whether committed before or after the commencement.

*Clause 287* provides that a reference in clause 162 of the Act to an order purporting to be made under the Act includes a reference to an order purporting to be made under a provision of the repealed Act that, under a provision of the Act, continues to apply after the commencement.

## **Division 9 – Provisions for remuneration of trustees**

*Clause 288* provides that the repealed Act continues to apply in relation to proceeding under section 101(1) of the repealed Act started prior to the commencement which is yet to be heard and determined by the court prior to the commencement as if the Act had not been enacted.

*Clause 289* provides that clause 165 of the Act applies in relation to the proceedings under section 165 brought after commencement where charges were paid out of trust property to a trustee under section 101(2) of the repealed Act before the commencement, as if a reference to professional charges paid out the trust property to the trustee under clause 164 in clause 165(2) included a reference to charges paid out of the trust property to the trustee under section 101(2) of the repealed Act.

*Clause 290* provides that clause 166 of the Act only applies in relation to an amount for commission or professional charges that is charged, or is proposed to be charged, after the commencement.

## **Division 10 – Provisions for court powers**

*Clause 291* provides that the repealed Act continues to apply in relation to proceedings started under section 8, or part 7, division 2 or 3, or part 7, division 4 (other than section 101) of the repealed Act if these proceedings had been started but not yet heard and finally decided before the commencement and that those proceedings must be heard and decided as if the Act had not been enacted.

*Clause 292* provides that a reference in clause 172(1) to a person appointed by an order made under clause 172(2) as the trustee of trust property is taken to include a reference to a person appointed as trustee under section 80 of the repealed Act (whose appointment was in effect immediately before the commencement) and a person appointed as trustee after commencement under the Act, as applied by clause 291 of the Act.

*Clause 293* provides that the reference in section 173(1)(a) to a person who has been removed as trustee of a trust under section 171(2)(c) is taken to include a person who was replaced as a trustee, after the commencement, on the making of an order appointing a new trustee in substitution for that person under section 80 of the repealed Act as applied by clause 291 of the Act.

*Clause 294* applies to vesting orders or any other order, declaration or direction, other than a relevant property order, made or given before the commencement under part 7, division 3 of the repealed Act or after the commencement under the part 7, division 3 of the repealed Act, as applied by clause 291. It provides that clause 181 of the Act applies to that order, declaration or direction as if it had been made or given under clause 176 of the Act.

*Clause 295* provides when section 86(2) of the repealed Act continues to apply to an agreement entered into under an order under section 86(1) of the repealed Act after the commencement in accordance with section 86 of the repealed Act including that section as applied by clause 291 of the Act.

*Clause 296* when section 87(2) of the repealed Act continues to apply to an act done after the commencement in accordance with an order under section 87 of the repealed Act, including as section 87 is applied by clause 291 of the Act.

*Clause 297* provides that, if, before the commencement, the trustees of a trust had not complied with section 90(3) of the repealed Act to notify, register or record a vesting order or, after commencement, in relation to a vesting order is made under part 7, division 3 of the repealed Act, including as applied by clause 291 of the Act, section 90(1) to (5) of the repealed Act continues to apply as if the Act had not been enacted.

*Clause 298* provides that if a vesting order was made under part 7, division 3 of the repealed Act in favour of a person before the commencement, or after commencement as applied by clause 291 of the Act, then clause 90(6) of the repealed Act continues to apply to the person as if the Act had not been enacted.

Clause 299 provides that clause 92 of the repealed Act will continue to apply to the conveyance of land, or the release of the contingent right in conformity of an order made under section 92 of the repealed Act before the commencement, or after commencement where section 92 applies under clause 291 of the Act.

*Clause 300* provides that a reference in clause 185 of the Act to an order made under clause 184 of the Act includes a reference to an order made under section 94(1) of the repealed Act which was still in effect at commencement or made after commencement as applied by clause 291.

*Clause 301* provides that clause 190 applies to a trustee in relation to a direction given in a proceeding under clause 189 of the Act as if a direction under clause 189 of the Act included a direction under section 96 of the repealed Act which was still in effect before the commencement, or a direction made after the commencement under section 96 of the repealed Act as applied under clause 291 of the Act as if the direction had been made in a proceeding under clause 189.

*Clause 302* provides that clauses 196 and 197 of the Act apply only to proceedings that are started after the commencement. Section 99 of the repealed Act continues to apply to a proceeding started before the commencement as if the Act was not enacted.

*Clause 303* provides that section 100 of the repealed Act continues to apply to a proceeding started before the commencement as if the Act had not been enacted.

*Clause 304* provides that section 102(5) of the repealed Act continues to apply as if the Act had not been enacted to any payment or delivery of money or securities made after the commencement in accordance with a court order made prior to commencement which, at commencement, had not yet been paid into court under section 102(3) of the repealed Act, or had not been paid or delivered to the trustees under section 102(4) of the repealed Act.

*Clause 305* provides that clause 199(4) of the Act applies to money or securities to be paid into court under section 102 of the repealed Act before the commencement, which had not been paid out of court before the commencement, as if those money or securities had been paid into court under clause 199(2) of the Act.

## **Division 11 – Provisions for charitable trusts**

*Clause 306* provides that the repealed Act continues to apply as if the Act had not been enacted to proceedings under section 106 of the repealed Act which was started, but not finally decided, before the commencement.

## **Division 12 – Provisions for particular philanthropic gifts**

*Clause 307* provides when an exercise or purported exercise of a former prescribed power by the trustee under section 110 of the repealed Act is taken to be, and has always been, valid despite a failure of the trustee to comply with certain requirements of section 109 of the repealed Act.

## **Division 13 – Provision for particular statutory trustees under repealed Act**

*Clause 308* provides when the repealed Act continues to apply to statutory trustees in respect of settled land as if the Act had not been enacted.

## **Division 14 - Other matters**

*Clause 309* provides that on the commencement, section 117 of the repealed Act ceases to apply in relation to the instrument of transfer of land, including to any transfer which has been lodged but not yet registered prior to the commencement.

*Clause 310* provides that a reference in any instrument in the repealed Act may, if the context permits, be taken to be a reference to the Act.

*Clause 311* provides power to make a transitional regulation with both this clause and the regulation to expire on a day that is 2 years after this clause commences.

## **Part 18 - Amendment of Acts**

### **Division 1 - Amendment of this Act**

*Clause 312* states that division 18 amends the Act.

*Clause 313* amends the long title of the Act.

### **Division 2 - Amendment of Aboriginal Land Act 1991**

*Clause 314* provides that division 2 amends the *Aboriginal Land Act 1991*.

*Clause 315* provides an amendment to the heading of part 21, division 2 of the *Aboriginal Land Act 1991* so that it references both the Supreme Court and the District Court.

*Clause 316* inserts a new clause 268A to define *court* for part 21, division 2 of the *Aboriginal Land Act 1991*.

*Clause 317* amends section 269 of the *Aboriginal Land Act 1991* to replace the reference to Supreme Court with a reference to Court and a reference to the repealed Act.

*Clause 318* amends Schedule 1 of the *Aboriginal Land Act 1991* to define *court*.

### **Division 3 - Amendment of Corrective Services Act 2006**

*Clause 319* provides that division 3 amends the *Corrective Services Act 2006*.

*Clause 320* amends section 311 of the *Corrective Services Act 2006* and inserts a new subclause which provides that the Act does not apply in relation to the prisoners trust fund and renumbers the following subclauses.



*Clause 321* amends section 315(1) of the *Corrective Services Act 2006* inserting a new note confirming that the Act does not apply to the prisoners trust fund.

*Clause 322* inserts a new section 319KA in the *Corrective Services Act 2006* which provides that the Act does not apply in relation to a victim trust fund.

## **Division 4 – Amendment of District Court of Queensland Act 1967**

*Clause 323* provides that division 4 amends the *District Court of Queensland Act 1967*.

*Clause 324* amends section 68(1)(b) of the *District Court of Queensland Act 1967* to extend the District Court’s jurisdiction to applications under the Act for: an application relating to a trust or trust property where the value of all of the trust property of the trust does not exceed the monetary limit; and another application where the value of the property to which the application relates does not exceed the monetary limit.

## **Division 5 - Amendment of Funeral Benefit Business Act 1982**

*Clauses 325* provides that division 5 amends the *Funeral Benefit Business Act 1982*.

*Clause 326* amends section 79 of the *Funeral Benefit Business Act 1982* to provide that the Act applies to payments made under section 79(2) to (3) of that Act in the way and to the extent prescribed by regulation. These clauses also update the language used in section 79(1) to clarify that the provision applies to payments made by or on behalf of a contributor under a funeral benefit agreement and the heading of section 79 to replace a reference to the repealed Act.

*Clause 327* amends the heading for part 9 of the *Funeral Benefit Business Act 1982* to insert a new division 1 heading.

*Clause 328* amends the references in section 90 of the *Funeral Benefit Business Act 1981* from “part 9” or “part” to “division”.

*Clause 329* inserts a new part 9, division 2 in the *Funeral Benefit Business Act 1982* to provide for transition to the amendments to section 79 of the *Funeral Benefit Business Act 1983* inserted in clause 326 of the Act.

## **Division 6 - Amendment of Public Trustee Act 1978**

*Clause 330* provides that division 6 amends the *Public Trustee Act 1978*.

*Clause 331* replaces section 40 of the *Public Trustee Act 1978* with a new section 40 and adds new section 40A to provide for consequential amendments associated with statutory trustees and custodian trustees under the Act.

*Clause 332* inserts a new part 10, division 4 into the *Public Trustee Act 1978* to provide for transition to the new sections 40 and 40A inserted by clause 331 of the Act.

## **Division 7 - Amendment of River Improvement Trust Act 1940**

*Clause 333* provides that division 7 amends the *River Improvement Trust Act 1940*.

*Clause 334* inserts a new section 5BA into the *River Improvement Trust Act 1940* which provides that clause 14 does not apply to a trust established under the *River Improvement Trust Act 1940*.

*Clauses 335* removes the existing part 9 heading in the *River Improvement Trust Act 1940* to replace it with a part 9, division 1 heading.

*Clause 336* inserts a new part 9, division 2 into the *River Improvement Trust Act 1940* to validate that section 11 of the repealed Act never applied to a trust established under the *River Improvement Trust Act 1940*, or affected the appointment of a member of a trust appointed under part 3, division 1 of the *River Improvement Trust Act 1940*.

## **Division 8 - Amendment of Succession Act 1981**

*Clause 337* provides that division 8 amends the *Succession Act 1981*.

*Clause 338* inserts new sections 49B, 49C and 49D into the *Succession Act 1981*. Section 49B provides that, subject to a contrary intention in the will, the personal representative of the deceased person may carry on a business that the deceased person was engaged in at their death, for the period that is reasonably necessary for realising the business which is not more than 2 years from the deceased person's death, or any further period with the court's approval. Section 49C provides that the personal representative of the deceased person who is carrying on a business under section 49B has the power to subscribe to a relevant fund in connection with the business if the personal representative considers it would, if the personal representative were acting for themselves, be prudent to subscribe to the fund. Section 49D provides that a court can order that the personal representative may carry on the business for a stated period, including on the conditions the court considers appropriate and make the order retrospective to a stated date. An application for an order may be made at any time under this clause even if any previous authority to carry on the business has ended.

*Clause 339* inserts a new section 53A into the *Succession Act 1981*. Section 53A provides protections for a personal representative of a deceased person when dealing with shares in a company that were owned by the deceased at the date of the deceased's death that were not fully paid up.

*Clause 340* inserts a new section 61AA to the *Succession Act 1981* which provides for the way in which income, derived from any property included in a disposition of the residuary estate that is settled in succession, is to be applied by the personal representative of the deceased person. The clause applies subject to a contrary intention appearing in the deceased person's will and the provisions of any Act as to charges on the property of the deceased person's estate.

## **Division 9 - Amendment of Torres Strait Islander Land Act 1991**

*Clause 341* provides that division 9 amends the *Torres Strait Islander Land Act 1991*.

*Clause 342* amends the heading to part 15, division 2 of the *Torres Strait Islander Land Act 1991* to reference both the Supreme Court and the District Court.

*Clause 343* inserts a new section 173A into the *Torres Strait Islander Land Act 1991* which defines *court* for the division.

*Clause 344* amends section 174 of the *Torres Strait Islander Land Act 1991* to replace the reference to the Supreme Court with a reference to the court and a reference to the repealed Act.

*Clause 345* amends schedule 1 of the *Torres Strait Islander Land Act 1991* to define *court*.

## **Division 10 - Amendment of United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942**

*Clause 346* provides that division 10 amends the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942*.

*Clause 347* replaces section 3D of the *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942* to reflect consequential amendments as a result of the Act.

## **Part 19 – Other Amendments**

*Clause 348* provides that other legislation is amended as set out in Schedule 2 of the Act.

### **Schedule 1 – Dictionary**

*Schedule 1* provides a definition of the terms used in the Act.

### **Schedule 2 – Other amendments**

*Schedule 2* sets out the consequential amendments to legislation across the statute book as a result of the Act.