Speech by

Hon. M. FOLEY

MEMBER FOR YERONGA

Hansard 8 June 1999

TRUSTS (INVESTMENTS) AMENDMENT BILL

Hon. M. J. FOLEY (Yeronga—ALP) (Attorney-General and Minister for Justice and Minister for The Arts) (12.32 p.m.): I move—

"That the Bill be now read a second time."

This Bill makes the most significant amendments to the Trusts Act 1973 since its enactment many years ago. This Bill is similar to a Bill of the same name which lapsed under the previous Government as a result of the calling of the last State election. The primary purpose of this Bill is that it alters the law relating to the investment of trust funds. This law on investment of trust funds is located in Part III of the Trusts Act 1973 and includes a list of "authorised trustee investments" which is sometimes referred to as the "statutory list" approach.

Over the last several years all of the Australian States and Territories have replaced, or are in the process of replacing, this list of authorised trustee investments. As I am informed, Queensland and the Australian Capital Territory are the last two remaining jurisdictions to remove this list and replace it with a new approach to investment called the "prudent person rule".

Before I outline the main objects of this Bill, I consider it important to briefly describe what is a trust and how it operates. A trust may be broadly defined as the relationship which arises wherever a person, called a "trustee", holds a legal or an equitable interest in property under a personal obligation, annexed to that property, which requires the trustee to deal with it for the benefit of another person, called a "beneficiary", or for some object permitted by law. Generally speaking, any person who is capable at law of holding property in his or her own right may be a trustee. In fact, a wide range of persons, including specialised companies, are trustees. As a result, the skill and capacity of trustees varies considerably, from those who are expert in the field to those who have no experience in such matters at all.

Another important feature of trusts is the varying circumstances in which they are created. Some are created with the benefit of legal and other advice. In such cases they will usually be created by a formal written document, either a deed or a will, which may confer on the trustee broader powers of investment than those provided by the Trusts Act 1973. In other cases the trust may not be created with such care or knowledge, or may be created by law without a written instrument. In these circumstances, a trustee may find that his or her only powers of investment are those contained in the Trusts Act 1973. These may or may not be adequate depending on such factors as the duration and purpose of the trust.

A trustee may invest trust funds in the manner and upon the securities authorised—

by the trust instrument, if any;

by the Trusts Act 1973;

by any other statute giving trustees authority to invest trust funds; or

by the Supreme Court under section 94 of the Trusts Act 1973.

The powers of investment conferred by the Trusts Act 1973 are in addition to those given by any other Act and the instrument, if any, creating the trust. Statutory provisions for trustee investments historically arose from the need to ensure that trustees did not jeopardise the interests of beneficiaries by investing in hazardous or speculative ventures.

This Bill removes the list of authorised trustee investments and replaces it with the concept of the "prudent person rule". The prudent person rule requires the trustee to act prudently both in determining the suitability of a particular category of investment as well as when considering actual proposals for investment.

Until a couple of years ago the other Australian States and Northern Territory used the statutory list approach to trustee investment. It should be noted that this approach was not uniform amongst them. Furthermore, apart from the lack of uniformity, there are a number of difficulties with the "statutory list". In practice, it has effectively diverted trustees from their responsibility for determining whether investment in a particular category—for example, Government bonds, shares, and so on—is prudent. It has the potential to mislead the inexperienced trustee and the public because it is read as implying a basic presumption that those investments included on the list are safe, but does not indicate which investments are suitable for which types of trust. In addition to this potential defect, the inflexibility of the "statutory list" approach means that, in a rapidly changing financial environment, many new investment vehicles likely to be just as sound by objective criteria are not authorised investments.

The Bill gives a trustee power to invest in any property, subject to the trust instrument, but at the same time he or she is required to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of others. A trustee whose profession, employment or business is acting as a trustee or investing money on behalf of others is required to exercise the care, diligence and skill of a prudent person engaged in that profession. This requires a higher standard for professional trustees.

One of the important features of the provisions is the codification of factors which should be considered by trustees in making investment decisions. Experience in overseas countries which operate a prudent person investment regime indicates that the courts regard such provisions as defining a standard of conduct to be observed by trustees when investing rather than the investment performance they must achieve. As Davis and Shaw, the authors of a major Australasian text on trustee investment, state in their book at page 103—

> "Prudence is a test of conduct and not of performance. Trustees will not be able to shelter behind a legal list of authorised investments. They are required to focus attention on the suitability of investments according to the circumstances of each individual trust and the circumstances and needs of beneficiaries."

A court, in considering whether a trustee is liable, in respect of any investment made, for a breach of trust, is required to have regard to the nature and purposes of the trust, to whether the investments of the trust are diversified, so far as is appropriate to the circumstances of the trust, and to whether the investment was made pursuant to an investment strategy formulated in accordance with the duty of the trustee.

By an amendment to the Trustee Companies Act 1968, the Bill allows trustee companies to invest estate common trust funds and investment common trust funds in "prudent person" investments. The flexibility and diversification that the "prudent person" approach brings to investment choices could be considered to be vital to the wellbeing of any trust fund in today's economy. Investments should be labelled as prudent or imprudent not because of their nature but because of their appropriateness, taking into account the terms, purposes and circumstances of the trust.

Finally, I stress that all trustees should read this Bill so that they can ascertain their duties. Moreover, in order that trustees have enough time to become acquainted with their new duties, it is proposed to delay the commencement of this Bill for a period of six months for this to occur. I commend the Bill to the House.