

TRUSTEE ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part II: Investment

15. [Sections 3 to 7](#) form Part II of the Act. This Part creates and defines a new default power of investment for trustees who do not have specific powers of investment under the trust instrument or legislation or whose trust instruments do not make provision which would be contrary to the new powers. Section 3 creates the general power of investment. Sections 4 and 5 create additional duties on the trustees to consider standard investment criteria and to take proper advice in exercising any power of investment. Section 6 provides that the general power of investment is a default power. Section 7 defines the trusts to which the new power and duties will apply.
16. Under the present law the powers of a trustee are defined by the trust instrument or by legislation. Most modern trust instruments expressly confer wide investment powers. Older trust instruments frequently do not. In the absence of express powers under the trust instrument the trustees must look to legislation to define their powers. Some trustees, such as occupational pension trustees, have wide statutory powers of investment (Pensions Act 1995 section 34(1)) but most do not. These trustees are restricted to the powers contained in the Trustee Investments Act 1961. These powers, although a generous provision when enacted, are now generally considered too narrow. The 1961 Act divides the investments which trustees may make into narrower and wider range investments. Typically, narrower range investments are fixed-interest securities and wider range investments are shares.
17. Under the new provisions trustees able to take advantage of the new default powers will no longer be restricted to specified “authorised investments” and will be able to invest in the same range of investments as an absolute owner. Coupled with the new duty of care (section 1) the new power is intended to confer the widest possible investment powers whilst ensuring that trustees act prudently in safeguarding the capital of the trust.
18. The new power will be a default power. That is, it will apply to the extent that the investment powers of the trustees are not expressed in the instrument creating the trust or any relevant legislation. The new power is expected to be most beneficial in relation to older trusts (including many charities), trusts arising under “home made” wills and on intestacy.
19. The provisions of Part II do not apply to occupational pension schemes, authorised unit trusts or certain schemes under the Charities Act 1993 (see sections 36-38) which are governed by their own statutory rules.

Section 3: General powers of investment

20. [Section 3\(1\)](#) will implement the Law Commission’s recommendation in relation to investment powers by giving trustees, subject to the safeguards and limitations in sections 3-7 of the Act, the same power to invest trust assets as if they owned the assets

outright rather than holding them on trust. This new power will enable trustees to hold investments jointly or in common with other persons thereby reversing the present rule.

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

Section 4: Standard investment criteria

23. **Section 4(1)** provides that in exercising a power of investment, whether under section 3 or otherwise, a trustee must have regard to the suitability to the trust of the investment and, secondly, to the extent that it is appropriate in the circumstances, to the need for diversification of the trust’s investments. These factors are defined in the Act (section 4(3)) as the standard investment criteria. “Suitability” relates both to the kind of investment proposed and to the particular investment as an investment of that kind. It will include considerations as to the size and risk of the investment and the need to produce an appropriate balance between income and capital growth to meet the needs of the trust. It will also include any relevant ethical considerations as to the kind of investments which it is appropriate for the trust to make.
24. **Section 4(2)** requires a trustee to keep the investments of the trust under review and to consider whether, in the light of the standard investment criteria, they should be varied. This provision codifies the common law position, under which “a trustee with a power of investment must undertake periodic reviews of the investments held by the trust”: *Nestle v National Westminster Bank plc (No 2)* [1993] 1 WLR 1260, 1282G, per Leggatt LJ.
25. The definition of the standard investment criteria in section 4(3) is closely modelled on section 6(1) of the Trustee Investments Act 1961 and accords with modern portfolio theory. The general duty of care applies in relation to the application of the standard investment criteria by a trustee (Schedule 1 paragraph 1(b)). As the exercise of a power of investment is subject to the duty of care in section 1, trustees may need to have regard to other matters in addition to the standard investment criteria, as defined. However, the standard investment criteria will be of central importance in every case.

Section 5: Advice

26. **Section 5** introduces a safeguard for beneficiaries in relation to powers of investment under section 3 or otherwise. The new safeguard is that a trustee, when considering the exercise of a power of investment or carrying out a review of the investments of the trust, must obtain and consider proper advice about how, in view of the standard investment criteria (see note on section 4), the power to invest should be exercised or the investments of the trust be varied (section 5(1) and (2)). However, as the imposition of an unqualified duty to take and consider advice before making any investment or change in investments would be unnecessarily burdensome, section 5(3) provides that the new duties to obtain advice will not apply if the trustee reasonably concludes that it is unnecessary or inappropriate to do so. This would be the case, for example, if the proposed investment is small, so that the cost of obtaining advice would be disproportionate to the benefit to be gained from doing so, or where the trustees themselves possess skills and knowledge making separate advice unnecessary. These provisions are at once more extensive and more flexible than the obligation to take advice in relation to most narrower and all wider range investments under the Trustee Investments Act 1961 section 6. Where the 1961 Act does not apply at present, the obligation of a trustee to take advice (if any) is dependent upon the application of the rule that trustees must act with reasonable prudence in exercising powers of investment.
27. “Proper advice” is defined in section 5(4). This definition is based on that in section 6(4) of the Trustee Investments Act 1961 and recognises that there may be circumstances in which a person is qualified to give advice by reason of his or her ability in and practical experience of issues other than financial matters. Although financial expertise will be the primary attribute of an investment adviser, other skills may also be relevant. For example, when an investment in land is proposed, the necessary qualities of the person giving the advice are likely to include expertise in the valuation of land. In addition, if the trustees propose to invest in works of art, they would no doubt require advice from an expert in the relevant field.
28. **Section 5(1)** builds upon and extends the present duty on trustees wishing to invest in anything other than a very restricted class of investments (for example, National Savings Certificates and Bonds) to obtain and consider proper advice (such advice to be given or confirmed in writing) as to whether the investment is satisfactory bearing in mind the need for suitability and diversification (Trustee Investments Act 1961 section 6(2) and (5)). There is no express requirement in section 5 for the advice to be given or confirmed in writing, but to do so will no doubt be regarded as best practice in many circumstances, and may be necessary for trustees to show compliance with the general duty of care in section 1.
29. The new general statutory duty of care is to apply in relation to the exercise of the duty to obtain and consider proper advice under section 5 (Schedule 1 paragraph 1(b)).
30. Subject to sections 36-38, which exclude the provisions of Part II from occupational pension schemes, authorised unit trusts or certain schemes under the Charities Act 1993 sections 6 and 7 define the trusts to which the new power of investment will apply.

Section 6: Restriction or exclusions of this part etc.

31. **Section 6** provides that the new general power of investment (defined in section 3(2)) is a default provision. It specifies that subject to the provisions of section 7 relating to trusts in existence when the Act is brought into force, the new power will be available to all trustees in addition to any limited express power of investment vested in them, but subject to any limitation imposed by the trust instrument or by primary or subordinate legislation (section 6(1)). This provision follows the precedent of section 69(2) of the Trustee Act 1925 in relation to the powers conferred by that Act.
32. “Subordinate legislation” is defined in section 6(3) by reference to the Interpretation Act 1978 to mean Orders in Council, orders, rules, regulations, schemes, warrants,

byelaws and other instruments made or to be made under any Act (Interpretation Act 1978 section 21(1)).

Section 7: Existing trusts

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