

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005

EXPLANATORY NOTES

COMMENTARY ON PARTS

Part 3: Investment Powers of Trustees

101. **Sections 93 to 95** amend the Trusts (Scotland) Act 1921 to provide an extension to the investment powers of trustees (of all trusts, whether charities or not).

Extension of general powers of trustees

102. **Section 4** of the Trusts (Scotland) Act 1921 is amended (by **section 93(2)**), adding a provision allowing a trustee to make any kind of investment of the trust estate (including an investment in heritable property). The effect is that trustees will generally have the same powers of investment as if they were the beneficial owners of the trust estate. **Subsection (2)** also provides a new wide power for trustees to acquire heritable property for any other reason. These wider powers are subject to any restriction or exclusion imposed by other enactments and do not extend to certain categories of trustees (**subsection (3)**). **Subsection (3)** continues the policy of the Trustee Investments Act 1961 in relation to pre-existing trust deeds. No term in a private trust deed made before the passing of the 1961 Act was to restrict the investment powers granted to trustees by that Act. The new general power in **subsection (2)** is similarly not to be restricted. In relation to trust deeds made after the passing of the 1961 Act, where the investment powers contained in the 1961 Act are conferred the trustees are to have the new general powers. But if trustees in existing post-1961 Act deeds or in future deeds are prohibited from making certain investments then these prohibitions will continue to apply. This is because **section 4(1)** of the 1921 Act, in which the new general investment power is inserted, authorises only acts which are not at variance with the terms and purposes of the trust.

Exercise of power of investment: duties of trustee

- “**103** **Section 94** makes further amendments to section 4 of 1921 Act, adding a new section (4A) to it, to provide a number of duties that apply to trustees and must be followed before exercising the wider investment powers under **section 93(2)**.”

Exercise of power of investment: power to appoint nominees

104. **Section 94** also inserts a new section (4B) into the 1921 Act to provide for a new statutory default power to appoint nominees for the purpose of investment. This will allow trustees to transfer title to property to nominees where a trust deed is silent. This provision also sets out key elements of the duty of care to which trustees must pay particular regard in exercising the power. The existing common law duty of care trustees owe to the beneficiaries for the management of the trust, the standard of which is the prudent man acting in his own affairs, remains unaffected. Trustees should select nominees whom they reasonably believe to have the skills, knowledge and expertise to carry out this role and they must reasonably believe that the appointment

is appropriate in the circumstances of the trust. The trustees will be under a duty to keep the arrangements under which the nominee operates under review. This will include considering whether it is appropriate in the circumstances to give directions to the nominee or revoke the nominee's appointment, and to exercise these powers if necessary.

- “**105** It also provides that trustees should have discretion in relation to the terms and conditions on which they appoint nominees subject to certain exclusions, unless the excluded terms and conditions are reasonably necessary. The test of what is reasonably necessary is whether the prudent man in the exercise of his own affairs would agree in the circumstances to the inclusion of such a term.

Declaration of power to delegate investment management functions

106. **Section 94** also inserts a new section (4C) into the 1921 Act which is a declaratory provision on trustee powers to delegate investment and management of funds where a trust deed is silent. Trustees are not bound to perform the whole duties of the trust personally. Delegation, if properly carried out, is not a breach of trust. Trustees do have a statutory power to appoint law agents and factors and, in addition, have common law powers to appoint agents, managers and others. This provision gives a statutory default provision setting out the power to delegate management of investments and makes specific reference to the power to delegate the discretionary management of investments. This is not a new power and is already covered by the trustees' common law duty of care. Trustees should select agents with care, determine the investment policy, set guidelines, and communicate with and monitor agents.
- “**107** **Section 95** introduces **Schedule 3** which makes a number of amendments consequential on **sections 93 and 94** to other legislation relating to investment powers of trustees.