

ACTS AMENDMENT (PUBLIC TRUSTEE AND TRUSTEE COMPANIES)
BILL 2000 – EXPLANATORY NOTES

Part I – Preliminary

Clause 1 - Short Title

Short Title of Act

Clause 2 - Commencement

The proposed Act will come into operation on a day fixed by proclamation.

Part 2 – Amendments to the Public Trustee Act 1941

Division 1 – Public Trustee Act 1941 amended in this Part.

Clause 3 – The Act amended.

The amendments in Part 2 are to the Public Trustee Act 1941

Division 2 – Substantive Amendments

Clause 4 – Long Title Amended

Clause 4 amends the long title of the Public Trustee Act 1941 (“the Act”) to delete reference to the appointment of a public trustee and the powers and duties thereof and to substitute the establishment of the Public Trust Office (PTO) and for the functions thereof.

Clause 5 – Section 1 replaced

Clause 5 creates a new Part I headed “Preliminary”. The short title of the Act is changed from the Public Trustee Act 1941 to the Public Trust Office Act 1941.

Clause 6 – Section 2 amended

Section 2 of the Act contains the definitions. Clause 6 amends the section to add the following definitions –

- common fund (see explanatory notes for clause 26, in particular, those dealing with new sections 39C – 39J inclusive, which establish a new common funds regime)
- Executive Director (see explanatory notes for clause 8)
- member of staff (see explanatory notes for clause 8)
- Treasurer (see explanatory notes for clause 8)
- Treasurer’s guidelines (see explanatory notes for clause 34).

The present definition of Public Trustee is deleted and a new definition of PTO or Public Trust Office is included (see explanatory notes for clause 8)

Clause 7 – Section 3 amended

Clause 7 repeals Section 3 (2) of the Act as this provision would continue to have effect under section 37 of the Interpretation Act.

Cause 8 – Part I replaced

Clause 8 replaces the existing Part I of the Act (which dealt with the establishment of the Public Trust Office and the Public Trustee, and delegation, judicial notice and appointment of staff) and provides for a new Part 2 ('the Public Trust Office') and Part 3 ('staff') encompassing sections 3 to 5 (Part 2) and sections 6 and 6A (Part 3).

The purpose of the amendment is to effect a change of name of the body corporate from the Public Trustee to the Public Trust Office, to alter the structure of the Public Trust Office and to define its relationship with the Minister and the Ministry of Justice.

The Public Trust Office has, for administrative purposes, been treated as part of the Ministry of Justice. It is presently administered by an officer called the Public Trustee and is a body corporate under that name. The Public Trustee has no separate existence under the Public Sector Management Act ("PSM Act"). However, the provisions of the Financial Administration and Audit Act 1985 ("the FAA Act") regulating the financial administration, audit and reporting of statutory authorities apply to the Public Trustee and its operations.

Part 2 establishes a new body corporate called the Public Trust Office ("PTO") with crown agency status separate and distinct from the Ministry of Justice. The PTO is added to the list of SES organisations in Schedule 2 of the PSM Act (see explanatory notes for clause 109).

The office of the Executive Director, Public Trust Office is created and the chief executive officer of the PTO, appointed under Part 3 of the PSM Act, holds that office. The Executive Director is responsible for the day to day operations of the PTO and performs the functions, determines the policies and controls the affairs of the PTO.

The PTO is authorised to delegate the performance of any function to a member of the PTO staff or to any other person with the approval of the Minister.

The Minister is the responsible authority of the PTO and is given power to give written directions to the PTO. The PTO is required to give effect to any direction when it becomes effective which is 7 days after it is received by the PTO or such longer period as determined by the Minister.

The Minister is entitled to have access to information, to retain copies of documents containing information and to make use of the PTO's staff to obtain such information. However, the Minister is not entitled to have information in a form which discloses the identity of a person or may enable the identity of the person to be ascertained unless that person has consented to the provision of that information to the Minister.

Extensive provision is made for disclosure of information in relation to the administration and planning of the PTO by way of an annual agreement to be entered into between the PTO and the Minister (or his delegate, the Chief Executive Officer of the Department of the Public Service principally assisting the Minister in the administration of the Court Security and Custodial Services Act 1999). This agreement must provide for the Executive Director to submit for the Minister's approval:

- a draft annual operational plan; and
- a draft five year business plan.

The PTO must include in the draft annual operational plan details of non-commercial functions to be performed in the year including costings, funding and the ways in which compensation will be made for those functions. The PTO's medium to long term objectives in relation to those functions are required to be included in the draft 5 year plan.

The intention of these provisions is to ensure greater transparency and disclosure in the operations and funding of those operations of the PTO and in particular the PTO's non-commercial functions.

Once the agreement is made the Minister is required to lay the text of the agreement and the text of a business plan or an annual operational plan that has been approved by the Minister before each House of Parliament or the Clerk of the House if the House is not sitting. The agreement is not legally enforceable.

The above accountability and transparency provisions are similar to those in corporatisation legislation relating to the establishment of Western Power, Alinta Gas and the Water Corporation.

Provision is made in Part 3 for the Executive Director to engage and manage the staff of the PTO. The PTO can also make use of any other employee in the Public Service or State Agency or instrumentality or use the facilities of those organisations by arrangement with the relevant employer or organisation.

Clause 9 - Part II Division (1) replaced

The heading to Part II and Division(1)of Part II which is “Powers and duties of Public Trustee Division (1) – General” are deleted and a new Part 4 is included headed “Part 4 -Functions of the Public Trust Office Division 1 – General”.

Clause 10 – Heading to Part II Division (2) replaced

The heading to Part II Division (2) which is “Public Trustee as executor or administrator” is replaced and the heading “Division 2 – Public Trust Office as executor or administrator” is inserted.

Clause 11 – Section 9 amended

Clause 11 repeals the second sentence of section 9 which provides that any estate or property which was vested in the Chief Justice under the provisions of section 22 of the Administration Act 1903 at the commencement of the Act vests in the Public Trustee. This reference is now obsolete.

Clause 12 – Section 12 amended

This clause amends section 12(8) which provides for the appointment of the Public Trustee as administrator to be made without the consent of any person who refuses or where the person is an infant, idiot, or lunatic, or of unsound mind or absent from Western Australia, or has any other disability, if a Supreme Court Judge so orders.

The words “idiot” and “lunatic” are deleted from section 12 (8) as it is considered that these words are no longer appropriate and do not add anything to the meaning of “unsound” mind or “any other disability”.

Clause 13 Section 12A inserted

There has been some uncertainty as to whether the Public Trustee has the power to act as agent for an executor or administrator under the Act and to date the Public Trustee has only acted in an estate matter where a person has authorised it to obtain administration and to act as administrator. Section 12A specifically allows the PTO to act as an agent for an executor or an administrator or a person entitled to obtain administration of a deceased estate so that the PTO may assist executors or administrators in the administration of estates.

This power to act as agent is intended to cover situations where the executor or administrator of a deceased estate (or a person entitled to so act) wishes to retain the role but does not wish to actually perform all of the duties normally associated with that appointment. The section provides that the PTO may act if so appointed by power of attorney or other instrument of appointment.

Clause 14 - Section 14 amended

Currently the Public Trustee is required to seek a formal grant of probate for all deceased estates with a value in excess of \$10,000.00. The threshold applying to trustee companies under the Trustee Companies Act is an amount prescribed by regulation. The amount currently prescribed by regulation is \$50,000.00.

The amendment removes the \$10,000.00 threshold and substitutes a “prescribed amount” which is defined to mean the amount prescribed for the purposes of Section 10 of the Trustee Companies Act for the relevant time.

The purpose of this amendment is to allow the PTO to operate on a similar basis to the trustee companies.

Clause 15 - Section 15 repealed

Section 15 provided that the Public Trustee was the deemed successor of a deceased person for licensing purposes. This clause is now obsolete. The Liquor Licensing Act 1988 now applies, and makes provision for executors and administrators.

Clause 16 - Section 18 amended

Section 18 presently provides that where an amount payable to an infant in relation to an estate of which the Public Trustee is executor or administrator is less than \$1,000.00, then the Public Trustee may pay that amount to the widow or to such person having custody of the infant without seeing to the application of that money.

The amendment increases the distributable amount to \$5,000.00. Given the increased investment minima and fees, this is considered a reasonable adjustment.

Clause 17 - Heading to Part II Division (3) replaced

The heading to Part II Division (3) which is “Public Trustee as trustee” is deleted and the heading “Division 3 – Public Trust Office as trustee” is inserted.

Clause 18 - Section 22A inserted

This provision allows the PTO to act as agent for a trustee if that trustee so appoints the PTO by power of attorney or other instrument of appointment.

This amendment will allow the PTO to operate on the same basis as the trustee companies who currently have the power under section 14 of the Trustee Companies Act to act under a power of attorney. The intent of the legislation is to eliminate any competitive differences between the Acts.

Clause 19 - Section 23 amended

This section has been amended to reflect the investment powers under Part III of the Trustees Act 1962, as outlined in new sections 39F, G and I dealt with in the explanatory notes for clause 26.

Clause 20 - Heading to Part II Division (4) replaced

The heading to Part II Division (4) which is “Provisions relating to estates of represented persons” is deleted and the heading “Division 4 – Estates of represented persons” is inserted.

Clause 21 - Section 33 amended

Section 33 is updated so that any personal effects belonging to a represented person held by the PTO and not claimed within 2 years of discharge or death of the represented person are to be paid to the Treasurer as unclaimed monies under the Unclaimed Money Act 1990, the successor to the Unclaimed Monies Act 1912.

Clause 22 - Heading to Part II Division 5 replaced

The heading to Part II Division (5) which is “Powers and duties of Public Trustee with respect to persons under disability, and others, in certain cases” is deleted and the heading “Division 5 – Functions of Public Trust Office as to moneys subject to court and other orders is ” inserted.

Clause 23 – Section 37 amended

Section 37(3)(a) presently provides that all moneys ordered to be invested under the Workers Compensation Act 1912 are to be paid to the PTO.

Clause 23 amends section 37 (3)(a) so that it now refers to the Workers Compensation and Rehabilitation Act 1981 rather than the Workers Compensation Act 1912.

The words “Public Trustee” in this sub-section are amended to “PTO”.

Section 37(4) is amended so that it now refers to the “seal of the PTO” in relation to a certificate showing receipt of the money rather than the “hand and seal of the Public Trustee”.

Clause 24 - Heading to Part II Division 6 replaced

The heading to Part II Division 6 which is “Powers and duties of the Public Trustee with respect to uncared for property is deleted and “Division 6 – Functions of Public Trust Office as to uncared for property” is inserted.

Clause 25 – Part II Division 7 inserted

After section 37A a new Division 7 is inserted in Part II. Extensive provision is made in Division 7 for the future introduction of new services to be provided by the PTO to its clients subject to approval by the Minister and with the concurrence of the Treasurer. Section 37C defines these services to include:

- conveyancing and property settlement;
- financial planning;
- taxation; and
- investment management services in relation to investments other than those in the common fund.

“Investment management services” is extensively defined and these services are included to cover those situations where certain clients of the PTO wish to have investments outside those in any common fund established and operated by the PTO.

The purpose of these amendments is to enable to PTO to expand its client base and to provide a broader range of services to its clients which are likely to generate a commercial return.

“Client” is defined to mean:

- a beneficiary of a deceased estate administered by the PTO;
- the donor of a power of attorney where the PTO is the donee;
- a person who appoints the PTO to be executor;
- a person on whose behalf monies are invested in the common fund;
- a beneficiary of a trust administered by the PTO;
- a person who has appointed the PTO agent; or
- a member of a prescribed class of person.

The PTO is also authorised to continue to provide a service to a person who was a client but is no longer a client.

Before granting approval to a new service, the Minister may require the PTO to provide such information, business plans, budgets, forecasts and other details as the Minister or Treasurer considers necessary.

The Minister may attach conditions to the approval and if the approval is granted, the Minister is required within 14 days to lay a report of the approved service before each House of Parliament or the Clerk of the House if the House is not sitting (see also explanatory notes in relation to clause 38).

The PTO is authorised to charge for the provision of these services.

Clause 26 – Part III amended

The heading to Part III which is “Financial” is deleted and a new Part 5 headed “Financial Provisions” is inserted with the sub-headings “Division 1 –

Financial provisions relating to administration of Public Trust Office” and “Division 2 – Financial provisions relating to functions of Public Trust Office”.

The existing sections 38, 39, 40, and 40A are repealed and replaced with new sections 38, 38A, 38B, 38C, 39, 39A-J and 40.

Provision is made in Division 1 for the funds available to the PTO to be credited to an account called the Public Trust Office Account (“the Account”) at the Treasury or a bank (with the approval of the Treasurer) and if the account is at the Treasury then it forms part of the Trust Fund constituted under section 9 of the Financial Administration and Audit Act 1985 (‘FAA Act’).

The funds available to enable the PTO to perform its functions are stated in the new section 38 to consist of -

- moneys appropriated from Parliament;
- moneys received by the PTO in the performance of its functions;
- income from the investment of moneys in the Public Trust Office account; and
- any other moneys received by the PTO.

The Account is charged with the payment of salaries and allowances and all other expenditure incurred by the PTO in carrying out its functions.

Provision is made for the investment, if approved by the Treasurer, of any funds of the PTO that are not immediately required in any manner that moneys in the Public Bank Account may be invested under the FAA Act.

Division 2 provides for substantial amendment in relation to the fees to be charged by the PTO. Currently, by section 38 of the Act, the fee structure for the Public Trustee's services is prescribed by regulations made under the Act and section 38(2) sets out the type of fees and maximum amounts which can be charged. It is considered that the fees presently applying to certain services/customers are not competitive and a fair proportion of the Public Trustee's fees do not reflect the user pays principles applying in normal commercial operations.

The new section 39 provides for the PTO to determine a scale of fees not exceeding any limits set by the Minister for the services provided other than for an approved service (see explanatory notes for clause 25 relating to section 37C) or for the preparation of wills or enduring powers of attorney.

Section 39 also allows the PTO flexibility in relation to the determination of the scale of fees in that:

- different rates of fees may be charged in relation to different classes of estates and the scale may provide for the time and manner of charging such fees;
- charging of fees in respect of capital or income;

- a rate of fee for the PTO's services for the management of a common fund investment which has been determined by the PTO having regard to fees charged by similar bodies for similar investments;
- the time and manner in which fees may be paid or deducted from an estate; and
- charging for the preparation and lodging of assessments of any duties or taxes in relation to an estate.

The new provisions in relation to fees are analogous to the provisions of section 18 of the Trustee Companies Act 1987 which authorise the board of directors to determine commissions and other charges from time to time.

Section 39A allows the PTO to charge a fee as remuneration for performing a function or providing a service (except for a section 37C approved service or for the preparation of a will or an enduring power of attorney) in accordance with the scale set in section 39. It also allows the PTO to agree to fees with an interested party in addition to or instead of the scale fees. This alters the present situation in which the Public Trustee can only waive fees either wholly or in part with Ministerial approval.

Section 39B provides that a fee can be paid out of an estate, as is current practice.

Sections 39D – 39K contain extensive amendments in relation to the structure, investment and income distribution of the common fund. These amendments are analogous to sections 19 and 20 of the Trustee Companies Act which authorise trustee companies to offer and manage multiple common funds.

The present section 40(1) of the Act authorises only one common fund into which all capital monies vested in the Public Trustee are to be paid. The Act provides for the Public Trustee to be paid a fixed management fee in relation to the management of the common fund of 6% of the total interest or income earned by investment of those monies. The Public Trustee, with the approval of the Minister, determines the rate of interest payable to the respective estates and pays that interest. The balance of the interest received is paid to the consolidated fund as 'surplus interest.'

Section 39D provides the PTO with the power to create one or more common funds. The purpose of this amendment is to enable the PTO to offer a broader range of common funds to meet the needs and objectives of the varied client base. The new section 39 gives the PTO flexibility to charge a management fee in accordance with market rates. Note that there is now no Common Fund 'surplus interest' provision.

The Act currently provides the Public Trustee with the power to invest the existing common fund in investments authorised by the law as in force immediately before the coming into operation of the Trustees Amendment Act 1997. Accordingly, the Public Trustee is limited to investing in "authorised trustee investments" rather than being able to invest in any form of investment

subject to the “prudent person” rule pursuant to the amendments made in 1997 to the Trustees Act.

Section 39F provides that generally the PTO may invest common fund monies as trust funds may be invested under Part III of the Trustees Act 1962 (ie “the prudent person” rule). However, the PTO is given this power to invest common fund moneys only as approved by the Treasurer. If the PTO invests money in this way, then it must be invested in accordance with any Treasurer’s guidelines and in accordance with the broad investment strategy which the PTO is required to formulate (see section 39J) for each common fund.

Currently, the Public Trustee is required to credit interest from common fund moneys at the rate which has been determined by the PTO with the approval of the Minister to the estates participating in the common fund half-yearly in April and October.

Section 39G provides that the PTO is required to distribute every 3 months to each estate participating in a common fund the amount of any increase or decrease in the investments held by the fund as determined by independent valuation or estimated by the PTO in accordance with the estate’s proportional interest. This means that the income from a common fund is fully distributable.

Section 39H gives the PTO “derivative powers” in relation to the administration of a common fund. These derivative powers include –

- a forward interest rate agreement;
- an interest rate swap;
- a forward interest rate swap;
- an interest rate cap, an interest rate collar or an interest rate floor;
- an option for interest rate management purposes; and
- any transaction which is a combination of two or more of the above.

The circumstances in which these powers may be exercised by the PTO are limited.

The PTO is required to formulate a prudent credit policy in relation to the exercise of the derivative powers and is also required to monitor the exercise of these powers and the compliance therewith by the PTO on a daily basis. The PTO must ensure that the credit policy is not inconsistent with any relevant Treasurer’s guidelines.

Section 39J requires the PTO to formulate an investment strategy for the investment of common fund moneys and to endeavour to optimise returns having regard to the matters referred in section 20(1) of the Trustees Act 1962. The PTO is also required to:

- review its broad investment strategy and management and performance of its investments from time to time in accordance with any relevant Treasurer's guidelines; and
- provide the Treasurer with a copy of each review.

The PTO is given power in section 39K to enter into any contract or arrangement with a person approved by the Treasurer for the management of any investments forming part of a common fund. The terms and duration of the contract must also be approved by the Treasurer. Subject to relevant Treasurer's guidelines, the PTO is given power to delegate to that person all or any of the PTO's functions with respect to the investment of common fund moneys.

The new section 40 relates to land purchased by the Public Trustee pursuant to section 40(2a) of the Act with money from the common fund ("the purchased land"). The building presently occupied by the Public Trustee was erected on part of the purchased land and this building has since provided the Public Trustee with office accommodation. The Public Trustee holds the building by way of an investment of the common fund.

Part of the purchased land includes the land and building on the corner of Hay and Pier Streets on which the Morgan Stockbroking building is built. The Public Trustee owns part of this property and the Perth Diocesan Trustees (the Anglican Church) own the balance. In 1982 it was proposed to lease this building. The Act was amended to include section 40A in 1992 to allow this to occur. Consequently, there are currently ground leases in relation to this property. Neither the land nor the building erected on it are used for the purposes of office accommodation for the Public Trustee or its officers.

Provision is made in the Bill for the PTO to lease portions of the purchased land not being used by the PTO (ie parts of the Public Trustee building and the Morgan Stockbroking building) to any person approved by the Minister on such terms and conditions as the Minister approves. Power is given to the PTO, with the approval of the Minister and Treasurer to sell the purchased land or portions of the purchased land at such price, at such time and on such terms and conditions as the PTO considers to be prudent.

The proceeds of the sale of the purchased land are to be credited to the 'saved common fund' which is to be treated as a common fund as defined in the Public Trust Office Act 1941 from the day the Bill comes into operation. (See explanatory notes for clause 61).

If the proceeds of sale of the purchased land are less than the book value of the purchased land then the extent of the deficiency is to be credited to the

existing common fund from the amount of reserve moneys agreed between the Public Trust Office and the Treasurer, with the balance to be credited to Consolidated Fund (see explanatory notes for clause 60).

Clause 27 – Section 41 amended

The present section 41 relates to temporary advances to the Public Trustee from the Treasurer with the approval of the Minister in connection with estates by pledging securities held in respect of investments of the common fund.

Clause 41 replaces reference to “the Common Fund” with “a common fund” so that the section applies to all of the common funds which are set up by the PTO.

Section 41(2) is amended so that the interest rate in relation to every advance is at such commercial rates as are approved by the Treasurer, to ensure that commercial rates are used for national competition policy purposes.

Clause 28 – Section 42 repealed

The existing section 42 contains the authority where, if the moneys in the common fund are insufficient to meet any lawful claims, any deficiency is to be paid out of the Consolidated Fund.

Clause 28 repeals section 42 as none of the multiple common funds are to have the benefit of the existing or continuing guarantee, although existing amounts in the common fund as at the commencement date of the legislation will continue to have the benefit of the guarantee for five years (see explanatory notes for clause 62).

The government guarantee has not been applied to the multiple common funds because it is not considered to be commercially justified, may provide an unnecessary level of exposure and is “anti-competitive”.

Clause 29 – section 43 repealed

Parliamentary Counsel have advised that the existing section 43 is obsolete, given the Public Trust Office’s corporate status and Crown agency status.

Clause 30 – Section 44 amended

The present section 44 provides for the Public Trustee to make advances from the common fund for the purposes of any trust or estate in the course of administration or about to be administered.

This section is amended by deleting the reference to the Common Fund and substituting “a common fund”. The amendment enables this provision to apply to any of the common funds set up by the PTO.

Section 44(5) is amended in a similar manner so that all interest received on any advance made is credited to a “common fund” rather than “the Common Fund”.

Clause 31 – Section 45 amended

The present section 45 relates to unclaimed monies. Section 45(1) requires the Public Trustee to pay any money relating to any trust or estate being administered by him for a period of 6 years and where he has no information or knowledge of the existence of any person entitled in distribution to the Consolidated Fund for the Public Service. Section 45 (2) requires the Public Trustee to advertise in respect of such sum of money where it is equal to or exceeds a prescribed amount before it is paid to the Treasury.

Clause 31 amends section 45(2) by changing “Treasury” to “Consolidated Fund”. This is consistent with the amendment to section 45(1) made in 1996.

Clause 32 – Section 46 repealed

Clause 32 repeals the present section 46 which allows the Minister to have access to the books, accounts, documents and papers in the Public Trustee's Office and directs the Public Trustee to furnish to the Minister all such information as the Minister requires.

Extensive provision has been made in the new section 4B (clause 8 of the Bill) for Ministerial access to information.

Clause 33 – Section 47 amended

The present section 47 requires the Public Trustee to keep an index listing all estates in a course of administration by him and an account of all his receipts, payments and dealings in every such estate.

Clause 33 amends section 47(1) so that the section applies in addition to the requirements of section 39I which relates to records to be kept as to the common funds.

Clause 34 – Section 48 replaced

Clause 34 repeals section 48 which provides for the application of the FAA Act and inserts new sections 48 and 48A. The new section 38C (clause 26 of the Bill) provides for the application of the provisions of the FAA Act which regulate the financial administration, audit and reporting of statutory authorities to the PTO and its operations.

Currently the Public Trustee drafts wills and enduring powers of attorney at no charge to testators or appointors respectively, as a market development initiative designed to attract future clients for its deceased estates management business. The wills and enduring powers of attorney drafting services do not have a specific mandate in the Act.

The new section 48 provides that despite anything to the contrary in the Legal Practitioners Act 1893, the PTO may charge a fee and recover disbursements for the preparation of a will or an enduring power of attorney. This only applies if the will or enduring power of attorney is prepared under the direction and control of a certificated legal practitioner.

To achieve “competitive neutrality” the Bill also provides for a similar provision to be inserted in the Trustee Companies Act (see Part 3 – Amendments to the Trustee Companies Act 1987, clause 66)

The new section 48A relates to Treasurer’s approvals and guidelines. It provides for certain approvals given by the Treasurer to be in writing. These guidelines are similar to those issued to other government entities who make investments, such as the Government Employees Superannuation Board.

The Treasurer is given power to issue written guidelines for the purposes of certain specified sections and any concurrence under section 37C(1).

Section 48A provides that guidelines are not subsidiary legislation for the purposes of the Interpretation Act 1984 and if there is any inconsistency between guidelines issued by the Treasurer and a direction given to the PTO by the Minister with respect to the performance of its functions, then the guidelines are to prevail.

If the Treasurer issues, amends or revokes a guideline then the text of such amendment or revocation is to be included in the annual report of the PTO. The guidelines, in conjunction with provisions of the Trustee Companies Act, provide a framework of control for all Public Trust Office investments.

Clause 35 - Part IV heading replaced

The heading to Part IV is deleted which is “General” and the heading “Part 6 – Miscellaneous” is inserted.

Clause 36 – Section 49 amended

Section 49(1)(ea) presently allows the Public Trustee to purchase land in the State in the course of administration of any trust or estate subject to sections 49(2a) and (2b) which require a written report from a licensed valuer to be obtained and restrict the purchase price to not more than 5% of the value of the land as stated in the valuer’s report.

Clause 36 amends section 49(1)(ea) by dispensing with these requirements repealing sections 49(2a) and (2b) and also (2c), which is a consequential provision.

Section 49(1)(n) presently authorises the Public Trustee to pay for the maintenance of any person and for the maintenance of “his wife or any child, parent or other person dependant on him, and for the education of his children”. Clause 36(2) amends section 49(1)(n) by making it gender neutral so that the section refers to “the person’s spouse or any child, parent or other person dependant on the person, and for the education of the person or the person’s children”. This means that educational expenses of the beneficiary of the trust can also be paid.

Clause 36(3) amends section 49(1)(r) which allows the Public Trustee generally to do all acts and exercise all powers with respect to the estate or person as effectually and in the same manner as the person whom he represents himself might have done. The word “himself” is deleted.

Section 49(e) presently allows the Public Trustee to sell, exchange, realise, mortgage or charge any property. Section 49(2) currently restricts the Public Trustee in the exercise of this power in that the Public Trustee cannot sell real property exceeding \$50,000.00 in value, exchange real property exceeding \$25,000.00 in value or join in a partition in which the interest of any person entitled exceeds \$25,000.00 or borrow money in an amount exceeding \$20,000.00 unless an order from the Supreme Court is obtained or express authority is provided in the Act or any instrument. However, this section does not apply where the Public Trustee is acting as executor or administrator for the purpose of administration.

The Bill amends section 49(2) by extending the exception to the application of section 49(2) to those clients administered under the provisions of the Act which were repealed on passage of the Guardianship and Administration Act 1990. This allows clients with disabilities to be treated in a similar fashion, regardless of which Act they are administered under.

Clause 37 – Section 52 replaced

Section 52 presently provides that the Public Trustee may, acting in one capacity, commence proceedings in his corporate name against himself acting in another capacity. In every such case the Public Trustee is required to obtain the directions of the Supreme Court as to how the opposing interests are to be represented.

Section 52 is repealed and replaced with a re-drafted section 52 which is essentially the same as the existing section but refers to the “PTO” rather than the Public Trustee.

Clause 38 – Section 53 replaced

Section 53 is repealed and replaced with a new section 53 and 53A.

Section 53(1) currently provides guidelines for employment of professional persons outside the office by the Public Trustee. The section sets out the considerations that the Public Trustee has to take into account in the employment of solicitors, counsel, bankers, accountants and brokers or other persons as he considers necessary in relation to work to be done for any trust.

53(2) sets out the principles by which the Public Trustee is to be guided in relation to the employment of solicitors to conduct legal business arising in connection with the performance of its duties including applications for probate or administration.

These provision are of an anti-competitive nature, and restrict the Public Trustee's ability to choose a solicitor based on cost, merit or other relevant factors.

The new section 53 relates to execution of documents by the PTO. The Act currently does not detail how documents are to be executed. Provision is made for the PTO to have a common seal and for a document to be duly executed if the common seal is affixed in accordance with the provisions of that section.

The PTO is given power to authorise the Executive Director or members of staff to sign documents on behalf of the PTO.

The new section 53A is a supplementary provision about laying documents before Parliament. It provides that if the Minister is of the opinion that a House of Parliament will not sit during the period that the Minister is required to lay a document before the House pursuant to sections 4(3) (Ministerial direction), 5(5) (annual agreement, business plan and annual operational plan) or 37C(5)(report of approved service) then the Minister shall transmit a copy of the document to the Clerk of that House. A copy of the document transmitted is to be regarded as having been laid before that House and as being published by order or under the authority of that House. It is also to be recorded in the Minutes, or Votes and Proceedings of the House on the first sitting day of the House after the Clerk received the copy.

The intention is to ensure disclosure and transparency of the operations of the PTO.

Clause 39 – Section 54 amended

Section 54(1) currently provides that any testator may deposit his will with the Public Trustee for safe custody. Section 54(1) is amended so that any testator may deposit his or her will with the PTO.

Section 54(2) currently provides that any person who has in his custody or control any testamentary paper of any insane patient, insane person or represented person may deposit the same in the office of the Public Trustee.

Sub-section 54(2) is amended to include the feminine and to delete the reference to “insane patient”.

Clause 40 – Section 55 amended

Section 55(1) currently provides that the Public Trustee is entitled to require all persons to deliver, convey, transfer or assign to him all property to which he is entitled and 55(2) allows the Public Trustee to institute such enquiries as he thinks proper and by summons require any person to appear before him and answer all questions.

Section 55(2) is amended to substitute PTO for Public Trustee and to provide that a person is to appear before the Executive Director and answer all questions that the Executive Director may put to such person rather than the Public Trustee.

Clause 41 – Section 56 amended

Section 56(2) currently provides that the Consolidated Fund or such other prescribed fund is liable to make good all sums required to discharge any liability of the Public Trustee in his corporate capacity.

Clause 41 amends section 56(2) so that the words “Public Trustee in his corporate capacity” are deleted and “PTO” is inserted.

Clause 42 – Section 59 amended

Section 59 is amended to refer to a certificate issued with the seal of the PTO certifying the nature of the PTO’s appointment or authority is to be accepted by all courts, offices and other persons as sufficient evidence of all the facts set out in the certificate, rather than the Public Trustee.

Clause 43 – Section 60 amended

Section 60 presently provides that all documents held by the Public Trustee are to be kept in safe custody in such manner as he directs or may be produced or parted with by his authority as and when he thinks proper in the conduct of the business of his office.

Clause 43 amends section 60 to delete the reference to “his office” and inserts “the PTO”.

Clause 44 – Section 62 amended

Section 62 currently provides for fees and commissions charged by the Public Trustee to be deemed to be a testamentary expense.

Clause 44 amends section 62 so that the section now provides for the fees and commissions charged by the PTO in relation to a deceased person’s estate to be deemed a testamentary expense.

Clause 45 – Section 64 amended

Section 64 currently provides for the Governor in council to make regulations with respect to various matters.

Clause 45 provides for the present section 64 to be designated sub-section (1) and for a new sub-section 2 to be inserted.

The new sub-section 2 provides that section 45(1) and (2) of the Interpretation Act 1984 applies in respect of fees, commissions and charges prescribed under this Act despite sections 3(3) and 45(3) of that Act.

Clause 46 – Section 66 inserted

A new section 66 is added to allow the PTO, in determining a fee that may be charged other than by way of regulations, to provide for all of any of the following:

- specific fees;
- maximum or minimum fees;
- fees in proportion to the estimated value of the functions to be performed or the services to be provided;
- the payment of fees either generally or under specified conditions or in specified circumstances;
- the reduction, waiver or refund in whole or in part, of such fees.

The present section 38 (2b) requires the Public Trustee to obtain the approval of the Minister to waive wholly or in part any fees fixed. The new section gives the PTO the ability to adjust its fees to enable it to price its products and services competitively as and when required based on market pressures.

Clause 47 and 48 – First Schedule repealed and Sixth Schedule amended

Repeal of First Schedule, and correction of numbering to Sixth Schedule.

Division 3 – Minor amendments to make gender of persons referred to in the Act non-specific and as to corporate name

Gender and corporate name corrections only.

Division 4 – Savings and Transitional Provisions

Clause 56 – Definitions

This clause contains the following definitions for the purposes of the transitional provisions:

- commencement day; (see explanatory notes for clause 59)

- existing participant; (see explanatory notes for clause 62)
- purchased land; (see explanatory notes for clause 60)
- reserve moneys; (see explanatory notes for clause 60) and
- saved Common Fund. (see explanatory notes for clause 62)

Clause 57 - Interpretation Act 1984 not affected

Clause 57 provides that the provisions of this division do not prejudice or affect the application of the Interpretation Act 1984 to and in relation to the repeal affected by section 8.

Clause 58 - The Public Trustee continues as the Public Trust Office

Clause 58 provides that the Public Trust Office is a continuation of and the same legal entity as the body corporate currently known as the Public Trustee

It also provides:

- that a reference to the Public Trustee in a written law or other document or instrument is to be read as if it had been amended to the Public Trust Office; and
- for the Registrar of Titles to take notice of the provisions of this division and to record and register the necessary documents and otherwise to give effect to the provisions of this division.

Clause 59 - Staff

Clause 59 provides that the officer holding the position of Public Trustee immediately before the day on which the Bill comes into operation (“commencement day”) continues in office as the Executive Director, Public Trust Office and has the same remuneration and rights unless otherwise agreed.

Clause 60 - Crediting of certain reserve moneys to Consolidated Fund

This provision relates to the proposed sale of the purchased land and to the crediting of certain reserve moneys that have been set aside by the Public Trustee and which are not recognised by the Act (see also explanatory notes for clause 26).

These reserve moneys consist of a “General Reserve” and a “Superannuation Fund Reserve”. Both reserves were created by setting aside moneys in the existing common fund which would otherwise have been credited to the Consolidated Fund in accordance with section 40(4)(c) of the Act to meet potential liabilities and future superannuation commitments.

The Public Trustee wishes to sell the purchased land which is an asset of the existing common fund. However, there is a concern about the potential liability of the Public Trustee if the purchased land is sold for less than “book value” or recent valuations. As it is an asset of the existing common fund, then the proceeds of sale would be paid into that common fund. Accordingly, any loss would have to be borne by that common fund and if there was any deficiency then the government guarantee in section 42 of the Act may be called upon.

It is considered appropriate that any loss on the sale of the purchased land be recouped out of the reserve moneys rather than using the government guarantee.

Clause 60 provides for the PTO and the Treasurer to:

- agree on the amount of reserve moneys or on a means of assessing the amount of reserve moneys that is to be held by the PTO until the purchased land is sold in the event that the proceeds of sale are less than the book value; and
- identify the reserve moneys that are to be credited to the Consolidated Fund and the circumstances in which those moneys are to be transferred to the Consolidated Fund.

If such agreement is not reached, then the matter is to be determined by the Treasurer.

The purposes of this provision are:

- to give legislative recognition to the reserve moneys;
- allow any “loss” on disposal of the purchased land to be recovered from the reserve moneys rather than a call being made on the government guarantee; and
- transfer the balance remaining in the reserves to the Consolidated Fund.

Clause 61 - The Common Fund as a saved common fund

Clause 61 provides for the existing common fund to be treated as a common fund as defined in the Public Trust Office Act 1941 (see explanatory notes in relation to clauses 6 and 26).

Accordingly, the provisions of the Bill relating to the new multiple common funds will apply to the existing common fund from the commencement day.

Clause 62 - Power to meet deficiency in the saved Common Fund from the Consolidated Fund continues for 5 years in respect of existing participants

Clause 62 preserves the application of the government guarantee in section 42 of the Act to the existing common fund (defined in clause 56 as the “saved Common Fund”) for 5 years after the commencement day. The benefit of section 42 will apply to a trust or estate on behalf of which moneys were invested before the commencement day (defined in clause 56 as “existing participants”) and their respective investment balances immediately before the commencement day. Funds may be withdrawn after the commencement day and new investment funds may be added. However, these transactions will not be entitled to the benefit of section 42.

No later than 6 months after the commencement day, the PTO is required to give notice to existing participants with money still invested that section 42 will no longer apply when the 5 year period expires. The PTO is also required to give similar notice 6 months before the expiration of the 5 year period.

At the expiration of the 5 year period, section 42 ceases to have any effect despite any failure of the PTO to give either of the requisite notices or an existing participant not receiving any notice.

Clause 63 - Savings of leases under appealed section 40(2a) (b) and 40A.

This provision preserves the leases of the purchased land that have already been entered into (see explanatory notes for clause 26 in relation to the new section 40).

Clause 64 - Interim business plan and interim annual operation plan

Provision is made in clause 64 for the Executive Director to submit to the Minister for the Minister’s approval as soon as practicable after the commencement day a draft interim business plan and a draft interim annual operational plan.

Once approved, these documents become the business plan and the annual operational plan for the balance of the financial year in which the Bill comes into operation or until the Minister approves subsequent plans (see explanatory notes for clause 8 in relation to the new section 5).

Part 3 – Amendments to the Trustee Companies Act 1987

See clause 34.

Part 4 – Consequential amendments to various other Acts