

Public Trustee and Trustee Companies Legislation Amendment Bill 2006

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Western Australia

LEGISLATIVE ASSEMBLY

(As amended in Committee)

**Public Trustee and Trustee Companies
Legislation Amendment Bill 2006**

A Bill for

An Act to amend —

- **the *Public Trustee Act 1941*;**
 - **the *Trustee Companies Act 1987*,**
- and to make consequential amendments to the *Unclaimed Money Act 1990*, and for related purposes.**

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Public Trustee and Trustee Companies Legislation Amendment Act 2006*.

5 **2. Commencement**

- (1) This Part comes into operation on the day after the day on which this Act receives the Royal Assent.
- (2) This Act, other than this Part, comes into operation on a day fixed by proclamation.

Part 2 — *Public Trustee Act 1941* amended

3. The Act amended

The amendments in this Part are to the *Public Trustee Act 1941**.

5 [* Reprint 5 as at 11 August 2006.]

4. Part I heading inserted

Before section 1 the following heading is inserted —

“

Part I — Preliminary

10

”.

5. Section 1A inserted

After section 1 the following section is inserted —

“

1A. Object

15

The object of this Act is to provide community services in respect of trusts, estates and related matters.

”.

6. Section 2 amended

20

Section 2 is amended by inserting the following definitions in the appropriate alphabetical positions —

“

“certificated practitioner” has the meaning given to that term in section 3 of the *Legal Practice Act 2003*.

s. 6

“client” means —

- (a) a beneficiary of the estate of a deceased person which is administered by the Public Trustee;
- 5 (b) the donor of a power of attorney, including an enduring power of attorney, under which the Public Trustee is the donee or substitute donee;
- 10 (c) a person who appoints the Public Trustee to be the executor of the person’s will;
- (d) a person on whose behalf moneys are invested in a Fund;
- (e) a beneficiary of a trust administered by the Public Trustee;
- 15 (f) a person who has appointed the Public Trustee to act as the person’s agent; or
- (g) a member of a class of persons prescribed by the regulations.

20 **“Common Account”** means the account established and continued under section 39A(1).

“current agreement” means the agreement entered into under section 6B(1) that is currently in force.

“Fund” means the Common Account or a strategic common account.

25 **“reserve fund”** means a fund established under section 44A.

“strategic common account” means an account established under section 39B(1).

30 **“Treasurer’s guidelines”** means guidelines issued by the Treasurer under section 47B(2).

”.

7. Section 3 amended

Section 3(2) is repealed.

8. Part I heading replaced

The Part heading before section 4 is deleted and the following heading is inserted instead —

“

Part IA — The Public Trustee

”.

9. Section 4 amended

After section 4(2) the following subsection is inserted —

“

- (3) The Public Trustee is an agent of the Crown in right of the State and enjoys the status, immunities and privileges of the Crown.

”.

10. Section 5 amended

Section 5(1) is amended by deleting “referred to in section 6”.

11. Sections 6A and 6B inserted

After section 6 the following sections are inserted in Part IA —

“

6A. Use of other government staff, etc.

- (1) The Public Trustee may by arrangement with the relevant employer make use, either full-time or part-time, of the services of any officer or employee —

- (a) in the Public Service;
(b) in a State agency or instrumentality; or

s. 11

- (c) otherwise in the service of the Crown in right of the State.
- (2) The Public Trustee may by arrangement with —
- 5 (a) a department of the Public Service; or
(b) a State agency or instrumentality,
- make use of any facilities of the department, agency or instrumentality.
- (3) An arrangement under subsection (1) or (2) shall be made on such terms as are agreed to by the parties.
- 10 **6B. Management and performance**
- (1) The Minister and the Public Trustee are to enter into a written agreement for each 12 month period in relation to matters prescribed by the regulations.
- 15 (2) A current agreement may provide for any or all of the following —
- (a) the determination of a scale of fees under section 38A(1);
- 20 (b) the proportion of fees received by the Public Trustee to be credited to the Consolidated Account;
- (c) the circumstances in which moneys may be transferred to or from a reserve fund;
- (d) the uses to which moneys in a reserve fund may be put.
- 25 (3) The annual report of the Public Trustee submitted under the *Financial Management Act 2006* shall include —
- (a) a summary of the current agreement; and
- 30 (b) a report on the Public Trustee's performance in relation to matters required by the current

agreement to be reported on in the annual report.

- 5 (4) The first current agreement shall be effective on and from the day on which section 11 of the *Public Trustee and Trustee Companies Legislation Amendment Act 2006* comes into operation.
- 10 (5) If a current agreement (other than the first agreement) has not been made in respect of a 12 month period then on the commencement of that period the provisions of the current agreement for the previous 12 month period apply, to the extent that the provisions are relevant, until a current agreement is made for the first mentioned period.
- 15 (6) A current agreement is not legally enforceable. ”.

12. Heading to Part II Division (1) replaced

The heading to Part II Division (1) is deleted and the following heading is inserted instead —

“

20

Division 1 — General

”.

13. Heading to Part II Division (2) replaced

The heading to Part II Division (2) is deleted and the following heading is inserted instead —

25

“

**Division 2 — Public Trustee as executor
or administrator**

”.

s. 14

14. Section 12A inserted

After section 12 the following section is inserted —

“

12A. Public Trustee’s powers on appointment as agent of executor, administrator, etc.

In addition to the Public Trustee’s powers under section 12, if —

- (a) a person who is an executor or administrator appoints the Public Trustee as the person’s agent to act as executor or administrator in the place of the person;
- (b) a person who may be entitled to apply for a grant of probate appoints the Public Trustee as the person’s agent to apply for a grant of probate;
- (c) a person who may be entitled to obtain administration (with the will of a testator annexed) of the testator’s estate appoints the Public Trustee as the person’s agent to apply for an order to administer the estate; or
- (d) a person who is referred to in section 25 of the *Administration Act 1903* as a person who may be granted administration of an estate of a person dying intestate appoints the Public Trustee as the person’s agent to apply for an order to administer the estate,

the Public Trustee, if so appointed by power of attorney or other instrument of appointment, may act within the scope of the authority conferred on the Public Trustee as effectually as the person could have acted and may exercise all discretionary and other powers delegated by the principal as fully as the principal could have exercised them.

”.

15. Section 14 amended

(1) Section 14(1) is amended by deleting “\$10 000” and inserting instead —

“ the prescribed amount ”.

5 (2) Section 14(4) is amended by deleting “sum of \$10 000,” and inserting instead —

“ prescribed amount, ”.

(3) After section 14(5) the following subsection is inserted —

“

10 (6) In this section —

“**prescribed amount**” means the amount prescribed for the purposes of section 10 of the *Trustee Companies Act 1987* for the relevant time.

”.

15 **16. Section 18 amended**

Section 18 is amended by deleting “\$1 000, he” and inserting instead —

“ \$5 000, the Public Trustee ”.

17. Heading to Part II Division (3) replaced

20 The heading to Part II Division (3) is deleted and the following heading is inserted instead —

“

Division 3 — Public Trustee as trustee

”.

s. 18

18. Section 22A inserted

After section 22 the following section is inserted —

“

22A. Public Trustee’s powers on appointment as trustee’s agent

5

If a person who is a trustee appoints the Public Trustee as the person’s agent to act as trustee in the place of the person, the Public Trustee, if so appointed by power of attorney or other instrument of appointment, may act within the scope of the authority conferred on the Public Trustee as effectually as the person could have acted and may exercise all discretionary and other powers delegated by the principal as fully as the principal could have exercised them.

10

15

”.

19. Heading to Part II Division (4) replaced

The heading to Part II Division (4) is deleted and the following heading is inserted instead —

“

Division 4 — Estates of represented persons

20

”.

20. Section 29 amended

Section 29(4) is repealed and the following subsections are inserted instead —

25

“

(4) Where at the death of a represented person money is standing to his credit, the Public Trustee may, at his discretion, pay that money or pay from that money any amount for or towards the funeral expenses, the debts of the represented person and expenses and fees incurred in performing functions vested in the Public

30

Trustee under an administration order as defined in section 3(1) of the *Guardianship and Administration Act 1990* relating to the represented person.

- 5 (5) Subject to subsection (4), where in relation to the estate of a represented person, letters of administration have not been granted or probate has not issued and legal proof is not given of the right or title of the person claiming, the Public Trustee may, at his discretion, pay the money standing to credit of a represented person, or
10 the balance of that money, and hand over property forming the whole or part of the estate, to any person claiming as entitled in the distribution of the estate or as a beneficiary under the will of the represented person so long as the money paid or the value of the
15 property handed over does not exceed the prescribed amount as defined in section 14(6).

”.

21. **Heading to Part II Division (5) replaced**

20 The heading to Part II Division (5) is deleted and the following heading is inserted instead —

“

Division 5 — Powers and duties of Public Trustee as to moneys subject to court and other orders

”.

25 22. **Heading to Part II Division (6) replaced**

The heading to Part II Division (6) is deleted and the following heading is inserted instead —

“

30 **Division 6 — Powers and duties of Public Trustee as to uncared for property**

”.

37C. Provision of services

(1) The Public Trustee may do any of the following —

5

(a) assist an executor or administrator of a deceased's estate in exercising or performing any power or duty of the executor or administrator in relation to the administration of the estate;

10

(b) provide estate planning services to a client or a person who is contemplating appointing the Public Trustee to be the executor of the person's will;

15

(c) provide investment management services in relation to investments, whether or not in a Fund,

and do such things as are necessary for the provision of that assistance or service.

20

(2) The Public Trustee is entitled to charge and receive fees and remuneration and recover disbursements for the provision of the assistance or services referred to in subsection (1).

25

(3) The Public Trustee may continue to provide the assistance or services referred to in subsection (1) to a person who was a client even though the person is no longer a client.

30

(4) Nothing in this Division shall be read as limiting any power that the Public Trustee otherwise has, whether under this Act or any other written law, a court order or an authorisation in an instrument, to invest property other than by way of investment in a Fund.

”.

s. 24

24. Section 38 replaced by sections 38, 38A and 38B

Section 38 is repealed and the following sections are inserted instead —

“

5 **38. Term used in this Part**

In this Part —

“fees” includes commissions and other charges.

38A. Scale of fees

- 10 (1) The Public Trustee shall from time to time, in accordance with the current agreement, determine a scale of fees for a function performed, or a service provided, by the Public Trustee under this Act or any other written law.
- 15 (2) A scale of fees has no effect unless it is published in the *Gazette*.
- 20 (3) The Public Trustee shall ensure that the first scale of fees is effective on and from the day on which section 24 of the *Public Trustee and Trustee Companies Legislation Amendment Act 2006* comes into operation.
- 25 (4) The Public Trustee may fix and set out in the scale of fees different rates of fees that may be charged as remuneration in respect of different classes of estate and the time and manner of charging such fees.
- (5) The *Interpretation Act 1984* section 42 applies to and in relation to a scale of fees as if the scale of fees were regulations made under this Act.

38B. Public Trustee’s entitlement to fees and expenses

- 30 (1) The Public Trustee is entitled to charge as remuneration for the functions and services referred to

in section 38A(1) fees not exceeding those fixed from time to time by the Public Trustee and set out in the latest published scale of fees before the Public Trustee commences to perform the function or provide the service.

5

(2) Nothing in this section prevents —

(a) the payment of any fees that a testator in his will has directed to be paid; or

10

(b) the payment of any fees that have been agreed on between the Public Trustee and a person for whom the Public Trustee performs a function or provides a service under this Act or any other written law,

15

either in addition to or instead of the fees provided for by this section.

(3) Nothing in this section prevents the Public Trustee from being reimbursed for all expenses properly incurred by the Public Trustee in the administration or management of an estate.

20

(4) Any fees charged by the Public Trustee in accordance with this section are payable out of the capital or income of the estate.

25

(5) Any fees which the Public Trustee is entitled to receive in respect of an estate may be paid or deducted out of the estate, in accordance with the time and manner provided for in the latest scale of fees of the Public Trustee published before the commencement of the administration or management of the estate, at any time after the commencement of the administration or management of the estate.

30

(6) In addition to the fees chargeable under this section, the Public Trustee may, in respect of any estate, charge and receive a reasonable fee or remuneration for work

s. 24

involved in the preparation and lodging of returns for the purpose of or in connection with assessments of any duties or taxes (other than probate, death, succession or estate duties).

- 5 (7) The published scale of fees of the Public Trustee must include a statement to the effect that the Public Trustee may in addition to fees chargeable under this section charge a fee for work involved in the preparation and lodging of returns for the purpose of or in connection with assessments of any duties or taxes (other than probate, death, succession or estate duties).
- 10
- (8) There shall not be any fee payable to the Public Trustee in respect of income earned by an estate by way of interest payable to the estate under section 39A(7).
- 15 (9) Where in a particular case the Public Trustee is satisfied that there is proper cause, the Public Trustee may waive, either wholly or in part, any fees determined under this Act.
- (10) The incidence of fees under this section, as between corpus and income, shall be determined by the Public Trustee.
- 20
- (11) If immediately before the day on which section 24 of the *Public Trustee and Trustee Companies Legislation Amendment Act 2006* comes into operation the Public Trustee is responsible for performing a function or providing a service of a type referred to in section 38A(1), on or after that day the Public Trustee is entitled to charge as remuneration for performing the function or providing the service fees set out in the first scale of fees referred to in section 38A(3).
- 25
- 30

”.

25. Section 40 replaced by sections 39A to 40, and transitional

- (1) Section 40 is repealed and the following sections are inserted instead —

“

5

39A. The Common Account

- (1) The Common Account is established and —
- (a) is a continuation of the Common Account referred to in section 40(1) of this Act immediately before the day on which section 25 of the *Public Trustee and Trustee Companies Legislation Amendment Act 2006* comes into operation; and
 - (b) is, on and from that day to be treated as a Fund as defined in section 2.

10

15

- (2) The Common Account is an agency special purpose account under the *Financial Management Act 2006* section 16.

20

- (3) In addition to any other investments that the Public Trustee is authorised to make from the Common Account, the Public Trustee may, with the prior approval of the Minister, invest a portion of the moneys standing to the credit of the Common Account in acquiring vacant land and erecting a building on the land or in acquiring land for the purpose of —

25

- (a) providing office accommodation for the Public Trustee and persons appointed under this Act; and
- (b) leasing to other persons approved by the Minister portions of the building,

30

on such terms and conditions and for such periods as the Minister approves.

s. 25

- 5 (4) The Public Trustee may deduct, by way of fees in respect of the management of the Common Account, up to 6.6% of the total interest or income earned by investment of moneys forming part of the Common Account.
- 10 (5) The Public Trustee shall, in accordance with the current agreement, fix from time to time and publish in the *Gazette* the rate or rates of interest payable to the respective estates the moneys of which form part of the Common Account.
- (6) The Public Trustee may fix different rates of interest according to —
- 15 (a) the source and nature of the different amounts invested from the Common Account;
- (b) the period for which those amounts are so invested; and
- (c) such other matters as the Public Trustee considers relevant having regard to the circumstances.
- 20 (7) The interest payable to the respective estates the moneys of which form part of the Common Account, at the appropriate rate fixed under subsection (5), shall be credited to those estates half-yearly on the first day of the months of April and October in each year.
- 25 (8) Any balance of the interest received from investments of moneys forming part of the Common Account may be credited to a reserve fund after deduction of —
- (a) fees in accordance with subsection (4); and
- (b) payments under subsection (7).
- 30 (9) Moneys expressly directed to be invested otherwise than in the Common Account shall not form part of the Common Account and the Public Trustee may invest those moneys in accordance with such direction.

- 5 (10) Any loss or deficiency in respect of any investment made under subsection (9), or of the money received from or realised by such an investment, shall be borne by the trust or estate to which such moneys belong, or, if received or realised, would belong.

39B. Establishment of strategic common accounts

- 10 (1) The Public Trustee may establish and keep separately one or more accounts to be called a “strategic common account”.
- (2) Each strategic common account is to have a distinguishing name or number.
- (3) Each strategic common account is an agency special purpose account under the *Financial Management Act 2006* section 16.

15 **39C. Power to invest moneys**

- (1) The Public Trustee may invest moneys held by the Public Trustee in the course of administering, holding, managing or controlling an estate in any capacity and properly available for investment —
- 20 (a) in a Fund; or
- (b) as trust funds may be invested under Part III of the *Trustees Act 1962*.
- 25 (2) Nothing in subsection (1) authorises the investment of moneys if investment of the moneys is contrary to the terms or conditions of the instrument of appointment, the instrument creating the trust or any other instrument or order affecting the holding of the moneys by the Public Trustee.

39D. Power to invest, and restrictions on investment of, Fund moneys

The Public Trustee may invest the moneys standing to the credit of a Fund but only —

- 5
- (a) as trust funds may be invested under Part III of the *Trustees Act 1962*; and
 - (b) in accordance with the Treasurer's guidelines.

39E. How Fund moneys are to be invested, distributed etc.

- 10
- (1) Investments made from moneys standing to the credit of a Fund shall not be made in the name or on account of, and shall not belong to, any particular estate but are to be held by the Public Trustee proportionately having regard to the proportion which the amount invested in relation to each estate bears to the total amount invested in the Fund in relation to all participating estates.
- 15
- (2) At least once every 3 months, the Public Trustee shall distribute to the separate account of each estate participating in a strategic common account, in accordance with its proportional interests determined under subsection (1), the amount of any increase or decrease in the value of the investments held by the fund as determined either by independent valuation or estimated by the Public Trustee.
- 20
- (3) The Public Trustee shall deal with income earned by the Public Trustee in respect of the investment of a strategic common account in the same manner as an investment in a Fund is dealt with and the Public Trustee shall ensure that appropriate records are made in the register of investments and the separate account maintained under section 39F(1) for each participating estate.
- 25
- 30

- 5
- (4) The entitlement of each participating estate to income earned by the Public Trustee in respect of the investment of a Fund shall be calculated on a daily basis from the date of participation to the date of withdrawal.
- 10
- (5) The Public Trustee may at any time withdraw from a Fund any amount standing to the credit of an estate in that Fund and shall debit the separate account maintained by the Public Trustee under section 39F accordingly.
- 15
- (6) The amount standing to the credit of an estate in a Fund shall be determined for the purposes of withdrawal having regard to distributions made under subsection (2) and to that estate's entitlement to income calculated on a daily basis.

39F. Records as to Funds

- 20
- (1) The Public Trustee shall keep a separate account for each estate participating in a Fund, containing a record of the amount and date of each investment made in the Fund in relation to the estate and the current value of the interest of the estate calculated in accordance with section 39E(2).
- 25
- (2) The Public Trustee shall maintain a register of investments in respect of each Fund and record in that register —
- 30
- (a) a description sufficient to identify every investment made by the Fund and details of moneys held to the credit of the Fund; and
- (b) the value, determined either by independent valuation or estimated by the Public Trustee at least once in every 3 months, of every investment held by the Fund.

40. Power to enter into portfolio management contracts as to Fund investments

- 5 (1) The Public Trustee may enter into any contract or arrangement with any person approved by the Treasurer for the management by that person of a class or classes of investment forming part of a Fund.
- 10 (2) The terms and duration of a proposed contract or arrangement under subsection (1) shall be approved by the Treasurer before the contract or arrangement is entered into.
- 15 (3) Subject to any relevant Treasurer's guidelines, the Public Trustee may delegate to a person referred to in subsection (1) all or any of the Public Trustee's functions under section 39D with respect to all or part of a Fund.
- ”.
- 20 (2) The last rates of interest fixed and published in the *Gazette* before the day on which section 25 of the *Public Trustee and Trustee Companies Legislation Amendment Act 2006* comes into operation are to be taken on and after that day to be the rates fixed and published in the *Gazette* under section 39A(5) of the *Public Trustee Act 1941* until rates are fixed under section 39A(5).

26. Section 40A amended

- 25 (1) Section 40A(1) is amended as follows:
- (a) in the definition of “purchased land” by inserting after “section 40(2a)” —
- “
- 30 as in force immediately before the commencement of section 25 of the *Public Trustee and Trustee Companies Legislation Amendment Act 2006*
- ”;

(b) in the definition of “unused portion” by deleting “, on the day that the *Public Trustee Amendment Act 1982* comes into operation, not used for the purposes referred to in section 40(2a).” and inserting instead —

5

“

not used for the purposes referred to in section 39A(3).

”.

10 (2) Section 40A(2) is amended by deleting “section 40(2a)” and inserting instead —

“ section 39A(3) ”.

27. Section 44 amended

After section 44(4) the following subsection is inserted —

“

15

(4a) The interest payable under subsection (4) may be debited against an account of the estate in a Fund on the first day of the months of April and October in each year.

”.

20 **28. Section 44A inserted**

After section 44 the following section is inserted —

“

44A. Reserve funds

25

(1) The Public Trustee may establish one or more reserve funds to which may be credited amounts under this Act or moneys approved by the Minister in the current agreement.

(2) Each reserve fund is to have a distinguishing name.

s. 29

- (3) The Public Trustee may from time to time apply any of the moneys in a reserve fund in accordance with the current agreement.
- (4) The Public Trustee shall invest moneys in a reserve fund in the Common Account.

”.

29. Sections 47A and 47B inserted

After section 47 the following sections are inserted —

“

10 **47A. Fees for preparation of wills and enduring powers of attorney and providing legal services**

- (1) Despite anything to the contrary in the *Legal Practice Act 2003*, the Public Trustee may charge a fee and recover disbursements for —
 - 15 (a) the preparation of a will or an enduring power of attorney;
 - (b) the provision of a legal service to a client; or
 - (c) the provision of a legal service in relation to estates and trusts administered by the Public Trustee.
- 20 (2) Subsection (1)(a) applies only if the will or enduring power of attorney is prepared under the direction and control of a certificated practitioner.
- 25 (3) Subsection (1)(b) and (c) apply only if the legal service is provided under the direction and control of a certificated practitioner.

47B. Treasurer's approvals and guidelines

- (1) An approval given by the Treasurer under section 40(1) or (2) shall be in writing but may otherwise be given when and how the Treasurer determines.
- 5 (2) The Treasurer may issue written guidelines to be followed by the Public Trustee for the purposes of section 39D(b) or 40(3) and may, in writing, amend or revoke those guidelines.
- 10 (3) Treasurer's guidelines are not subsidiary legislation for the purposes of the *Interpretation Act 1984*.
- (4) If the Treasurer issues, amends or revokes a Treasurer's guideline, the text of the guideline, amendment or revocation shall be included in the annual report submitted by the accountable authority of the Public Trustee under the *Financial Management Act 2006* section 61.
- 15

”.

30. Section 49 amended

- (1) Section 49(1) is amended as follows:
- 20 (a) in paragraph (ea) by deleting “subject to subsections (2a) and (2b),”;
- (b) after paragraph (n) by inserting the following paragraph —
- “
- 25 (na) pay such sum or sums for the education of the beneficiary of a trust of which the Public Trustee is trustee as to the Public Trustee seems expedient and reasonable;

”.

s. 31

- (2) Section 49(2) is amended by inserting before “, the Public Trustee” —

“

5 or performing a function or exercising an authority referred to in Schedule 5 clause 1(1) or (2) or 2(1) or (2) of the *Guardianship and Administration Act 1990*

”.

- (3) Section 49(2a), (2b) and (2c) are repealed.

10 **31. Section 53 repealed**

Section 53 is repealed.

32. First Schedule repealed

The First Schedule is repealed.

Part 3 — *Trustee Companies Act 1987* amended

33. The Act amended

The amendment in this Part is to the *Trustee Companies Act 1987**.

5 [* Reprint 2 as at 6 February 2004 .
For subsequent amendments see *Western Australian
Legislation Information Tables for 2005, Table 1, and
Gazette 21 March 2006 p. 1082-3.*]

34. Section 18A inserted

10 After section 18 the following section is inserted in Part III —

“

18A. Fees for preparation of wills and enduring powers of attorney

- 15 (1) Despite anything to the contrary in the *Legal Practice Act 2003*, a trustee company may charge a fee and recover disbursements for the preparation of a will or an enduring power of attorney.
- 20 (2) Subsection (1) applies only if the will or enduring power of attorney is prepared under the direction and control of a certificated practitioner as defined in section 3 of the *Legal Practice Act 2003*.

”.

Part 4 — Unclaimed Money Act 1990 amended

35. The Act amended

The amendments in this Part are to the *Unclaimed Money Act 1990**.

5 [* Reprinted as at 5 November 1999.
For subsequent amendments see *Western Australian
Legislation Information Tables for 2005, Table 1.*]

36. Section 9 amended

10 Section 9(1)(f) is amended by deleting “the Common Fund
established under section 40 of the *Public Trustee Act 1941*”
and inserting instead —

“

the Common Account as defined in section 2 of
the *Public Trustee Act 1941*

15

”.

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