

PUBLIC TRUSTEE AND TRUSTEE COMPANIES LEGISLATION  
AMENDMENT BILL 2006

**EXPLANATORY MEMORANDUM**

The purpose of this Bill is to modernise the Public Trustee's legislative framework which has remained largely unchanged for over 60 years. This will allow the Public Trustee to remove inequitable investment and fee arrangements which currently disadvantage some of the most vulnerable members of the Western Australian community, and to provide full trustee services in terms of performing essential financial and legal functions. This Bill will provide for the reform of the Public Trustee's operations and services and enable it to bring its activities up to date with industry best practice, in line with the other Public Trustees in Australia and the *Trustee Companies Act 1987*. It will also allow the Public Trustee to achieve self-funding over time.

**Part 1 – Preliminary**

**Clause 1. Short title**

Short title of the Act.

**Clause 2. Commencement**

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

**Part 2 – *Public Trustee Act 1941* amended**

**Clause 3. The Act amended**

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

**Clause 4. Part I heading inserted**

**Clause 5. Section 1A inserted**

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

The reason for including an objects clause is to clarify the need for the Public Trustee's continued existence, to enable it to provide community services in relation to trusts, estates and related matters.

**Clause 6. Section 2 amended**

Section 2 of the Act contains the definitions. Clause 6 amends the definitions to include the following:

- Certified practitioner

- Client (definition of client has been clarified, as this dictates who the Public Trustee can provide certain services to)
- Common Account
- Current agreement
- Fund Reserve Fund
- Strategic Common Account
- Treasurer's guidelines

**Clause 7. Section 3 amended**

Clause 7 repeals section 3(2) of the Act, as this section would continue to have effect under section 37 of the *Interpretation Act* 1984.

**Clause 8. Part I heading replaced**

**Clause 9. Section 4 amended**

This clause confirms the status of the Public Trustee as an agent of the Crown.

**Clause 10. Section 5 amended**

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

The effect of this clause is to remove restrictions as to whom the Public Trustee can delegate its powers or duties to. This will allow the Public Trustee to delegate some of its duties to other government agencies, where appropriate. For example, the Disability Services Commission (DSC) and the Public Trustee occasionally have common clients. This clause will enable the Public Trustee to allow the DSC to have some involvement in managing the day-to-day finances of these clients, subject to the appropriate controls being put in place.

**Clause 11. Sections 6A and 6B inserted**

Section 6A is inserted. This clause enables the Public Trustee to use staff and facilities from other government agencies or instrumentalities as agreed to by the parties. See clause 10 above for further detail.

Section 6B is inserted. This part of the clause outlines the matters that are to be included in the annual agreement between the Minister and the Public Trustee. See clause 24 for more detail regarding fees.

**Clause 12. Heading to Part II Division (1) replaced**

**Clause 13. Heading to Part II Division (2) replaced**

**Clause 14. Section 12A inserted**

This clause will enable the Public Trustee to enhance the estate administration services that it currently provides by enabling it to act as agent for executors and administrators, without having to take on the entire role of Executor or Administrator.

For example, an Executor may wish the Public Trustee to apply for a grant of probate on their behalf, however, the Executor would like to carry out the rest of the administration of the estate.

**Clause 15. Section 14 amended**

If an Executor or Administrator applies to the Supreme Court to administer a deceased estate, they normally have to ask for a grant of probate or letters of administration. For small estates, however, the Public Trustee and private trustees under the *Trustee Companies Act 1987* can instead file a document at court called an “election”. This is a cheaper and quicker process.

Currently, if the Public Trustee wants to file an election, the gross value of the estate cannot be more than \$10,000. This amount has been the same since 1978. If a private trustee under the *Trustee Companies Act 1987* wants to file an election, the limit is \$50,000.

This clause will give the Public Trustee the same limit that private trustees have under the *Trustee Companies Act 1987* (that is, it will go from \$10,000 to \$50,000).

This will save time and lead to savings for the beneficiaries of small estates; for example, an estate of say \$40,000 that was administered under an election would pay filing fees of \$44 compared to probate fees of \$272.

**Clause 16. Section 18 amended**

Currently if an infant is entitled to less than \$1,000 from a deceased estate, the Public Trustee may pay money to the widow of the dead person, or carer of the infant, without having to check on how it is spent, and incurring any liability in respect of such payment. This limit of \$1,000 has been the same since 1984.

This clause changes the limit from \$1,000 to \$5,000. This is necessary to promote efficient administration.

**Clause 17. Heading to Part II Division (3) replaced**

**Clause 18. Section 22A inserted**

This clause gives trustees the power to appoint the Public Trustee as their agent via a Power of Attorney or other instrument. This will enable the Public Trustee to assist other trustees in performing their role without having to take on the whole role.

**Clause 19. Heading to Part II Division (4) replaced**

**Clause 20. Section 29 amended**

The Public Trustee sometimes acts as Administrator of mentally disabled persons under the *Guardianship and Administration Act 1990*. They are called “represented

persons”. Section 29 of the *Public Trustee Act* 1941 gives the Public Trustee certain powers in relation to the estate of a represented person after they have passed away.

**Subsection (4)** deals with the payment of outstanding liabilities and funeral expenses. Currently the Public Trustee may only make such payments where the gross value of the estate does not exceed \$6,000. This clause removes that limit.

**Subsection (5)** will allow the Public Trustee to distribute the assets of a deceased represented person, up to a prescribed amount (currently \$50,000), without requiring those entitled to the represented person’s estate to obtain a grant of probate or letters of administration. Currently, the Public Trustee can only pay up to \$6,000 without requiring grant of probate or letters of administration. This will bring the Public Trustee more in line with the practice of banks and other financial service providers.

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

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

**Clause 23. Part II Division 7 inserted**

**Section 37(B)** defines what investment management services include.

**Section 37(C)** gives the Public Trustee the power to assist an executor or administrator of a deceased estate in performing their duties, provide estate planning services to clients, and to provide investment management services. The Public Trustee is also entitled to charge for the above services.

**Clause 24. Section 38 replaced by sections 38, 38A and 39B**

**Section 38A** outlines how 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.

The current agreement is the annual agreement referred to in clause 11 above.

Having the fees in the annual agreement gives the Public Trustee more flexibility in setting and changing fees for services it provides whilst at the same time being subject to the oversight of the Minister and Treasury.

**Section 38B** gives the Public Trustee the power to charge for functions and services that it provides to clients and outlines the administrative procedures involved in publishing those fees and charges.

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

**Section 39A** deals with the existing Public Trustee Common Account and has changed little from the current section 40. (As a result of the *Financial Legislation Amendment and Repeal Act* 2006, the Public Trustee’s “Common Fund” was legally changed to “Common Account”. For the moment, however, it is still generally known

as the “Common Fund”. This memorandum uses the official term, which is “Common Account”.)

**Section 39B** establishes the new strategic common accounts that are to enable the Public Trustee to meet the needs of a varied client base consistent with the *Trustees Companies Act 1987*. A number of strategic common accounts with diverse investment strategies will ensure that the short and long term needs of clients are effectively served. The existing Common Account will be retained as a cash-enhanced fund, containing cash, fixed interest and real property (‘cash common account’).

In order to implement this, the Public Trustee must be able to adopt the “prudent person” rule of investment. At present there is no opportunity for capital growth in the Common Account – only interest payments. Adoption of the ‘prudent person’ rule will enable provision of capital growth investments in the strategic common accounts for long term clients.

Governance will be similar to that existing for current funds operated by the State Government, such as the GESB, through a series of guidelines issued by the Treasurer and with specific approval for the appointment of fund managers.

**Section 39C** gives the Public Trustee the power to invest client funds in the Common Account or the strategic common accounts outlined above, as well as the power to invest client funds elsewhere, but in accordance with Part III of the *Trustees Act 1962* (‘prudent person’ rule).

**Section 39D** outlines the investment powers that the Public Trustee has in relation to the Common Account and strategic common accounts.

**Section 39E** outlines how the Public Trustee must invest the monies in the Common Account and strategic common accounts on their clients’ behalf and how the income on those investments must be allocated to clients.

**Section 39F** deals with the record keeping obligations of the Public Trustee in relation to the investments of the Common Account and strategic common accounts, and the proportional shares of the estates that are invested in them.

**Section 40** gives the Public Trustee the power to engage people (subject to Treasury approval) to manage the different classes of investments that will form part of the Common Account and strategic common accounts. It is envisaged that the Public Trustee will engage asset managers (Fund Managers) to manage the various investment portfolios that the strategic common accounts will have.

**Clause 26. Section 40A amended**

**Clause 27. Section 44 amended**

This section is introduced to clarify when debit interest is to be debited to client accounts. The Act was previously silent on this matter.

**Clause 28. Section 44A inserted**

This section gives the Public Trustee the ability to create reserve funds to which surplus operating revenues can be transferred. The level of reserves and the uses to which reserves are put are determined with the Minister's and the Treasurer's agreement.

The Public Trustee operates in a dynamic financial market and the ability to transfer money to and from reserves to meet operating requirements is crucial to enabling the Public Trustee to smooth out fluctuations in revenue.

**Clause 29. Section 47A and 47B inserted**

**Section 47A** gives the Public Trustee the power to charge for the preparation of wills and enduring power of attorneys, provided they are prepared under the control and direction of a certified practitioner.

Other jurisdictions that allow their Public Trustee to charge clients for the preparation of a will include Victoria, Tasmania, ACT, Northern Territory and New Zealand.

**Section 47B** outlines some of the administrative detail around the Treasurer's approvals and guidelines.

**Clause 30. Section 49 amended**

This clause gives the Public Trustee the power to spend money on the education of the beneficiary of a trust. The Act was previously silent on this, referring only to education of children of the beneficiary.

**Clause 31. Section 53 repealed**

This section is regarded as unfair and anti-competitive.

**Clause 32. First schedule repealed**

**Part 3 – *Trustees Company Act 1987* amended**

**Clause 33. The Act amended**

The amendment in Part 3 is to the *Trustee Companies Act 1987*.

**Clause 34. Section 18A inserted**

This section gives trustee companies the power to charge a fee and recover disbursements for the preparation of a will or an enduring power of attorney, provided the preparation is done under the direction and control of a certified practitioner.

This is the same power that the Public Trustee has been given under clause 29 above.

**Part 4 – *Unclaimed Money Act 1990* amended**

**Clause 35. The Act amended**

The amendments in Part 4 relate to the *Unclaimed Money Act 1990*.

**Clause 36. Section 9 amended**

This clause changes the reference to the Public Trustee's Common Account to the new definition of the Common Account in Section 2 of the *Public Trustee Act 1941*.