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of ADELAIDE

Legal Compliance Education and Awareness

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Trustee Act 1936

(South Australian)

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What is a Trust?

- A Trust is a legal obligation binding a person or entity (a 'trustee') to deal with estate property in a particular way for the benefit of another
 - **Trustee companies** are professional organisations established to administer the terms of a trust
- Trust property may be tangible (eg. land, furniture or personal effects) or intangible (eg. shares)

What is a Trustee?

- A trustee is a person or entity (eg. the University) which holds legal title to the trust property & is responsible for the management of trust funds
- A trustee may be appointed by:
 - a settlor (ie. a person who provides the funds for the benefit of another)
 - a person with a power to appoint
 - a Will
 - the Court
- The responsibility of a trustee is ongoing & involves many obligations

What does the Trustee Act do?

- The Act provides a balance between the **powers** of trustees (what a trustee is entitled to do under the Act) and their **obligations** (what a trustee is required to do under the Act)
- The Act deals with:
 - how trust property must be managed
 - the duties of trustees in respect of their power of investment
 - matters to which trustees must have regard in exercising the power of investment
 - liability of trustees & relief from liability for breach of trust
 - the appointment & replacement of trustees
 - the powers of the Supreme Court in relation to trusts

How does the Act apply to the University?

- The Act applies where the University is a named **beneficiary** under a Trust
 - A beneficiary is a person or entity named in the Will or trust deed who is entitled to benefit from the trust
- The Act applies where a trust is created & the University is determined as a trustee or determines itself to be a trustee

Example:

- The University accepts a gift 'on trust' to be used for a specific purpose

How does the Act apply to the University? (cont.)

- The University is the trustee of hundreds of trusts established by donors
- As the trustee of those trusts, the University administers the assets & income in the manner specified by the donor

Example:

- Under the terms of a Will, a testator may bequeath *“Fifty Thousand Dollars to the University of Adelaide to be used for the purposes of medical research”* or *“Eighty Thousand Dollars to University of Adelaide for the purposes of the Dental School”*
- Such trusts provide income for a wide range of University purposes, including:
 - prizes & scholarships
 - research projects
 - Professorial & Research Fellow appointments

How does the Act apply to the University? (cont.)

The Trustee Act does not apply to the management of:

- Gifts or donations where there is an unconditional transfer of property or funds (ie. the University does not need to apply the funds for any specific stated purpose)
- A bequest under a will where there is no stipulation as to the manner in which the funds are to be used
- Sponsorships
- Research grants

General obligations & duties of Trustees

- **Always act in best interests of beneficiaries (present & future) & the person who created the trust**
- Act responsibly (not wilfully or negligently) in carrying out trustee duties
- Manage the trust according to the trust deed
- Act fairly & impartially towards beneficiaries & different classes of beneficiaries
- Do not profit or benefit personally from the trust, except as provided at law or under the trust terms
 - Trustees can be paid for their time and trouble in performing their duties only if the trust specifically provides for payment
- Avoid situations where there may be a conflict of interest or duty
 - A Trustee's duty to the Trust must not conflict with his/her private interest of making money

Power of a trustee to invest

- Part 1 of the Trustee Act (sections 5 - 13) contains very specific rules & principles relating to trustee investments that a trustee should consider when investing trust funds
 - **Relevant staff (& particularly Senior Financial Services Branch staff) should read & familiarise themselves with these sections of the Act for decisions relating to trusts & the University Composite Fund**
- A trustee must invest & reinvest trust funds prudently in any form of investment unless expressly prohibited by the Trust Deed

Powers of Investment

A Trustee has an obligation & a fiduciary responsibility (ie. a legal obligation to act in the best interest of the beneficiary) to:

- Exercise the care, diligence & skill that a '*prudent person of business*' would exercise in managing the affairs of other persons
- Act solely in the best 'financial' interests of the beneficiaries
- Keep accounts & records & provide information on demand about the financial state of the fund
 - *Accounts include receipts, credit notes, investment documents & balance sheets*
- Invest trust funds in investments that are not speculative, risky or hazardous
- At least once a year review performance of trust investments

Powers of Investment (cont.)

In making investment decisions, a trustee must have regard to factors set out in the Act (s9), including;

- The purpose of the trust & the needs & circumstances of beneficiaries
- The nature of & risk associated with existing trust investments & other trust property, such as;
 - *the risk of capital or income loss or depreciation*
 - *likely income return*
 - *the potential for capital appreciation*
- The need to maintain real value of the capital amount or income of the trust
- The length of the term of the proposed investment
- The probable duration of the trust
- The aggregate value of trust estate
- The costs of making the proposed investment

Where a trust includes real estate, Trustees have the power to:

- Sell property by auction or contract
- Insure any building or other insurable property against any risk, loss, damage
- Arrange for repairs to buildings being part of trust property
 - This power **does not** extend to altering, adding to or improving the trust property or any part thereof which requires an application to the Supreme Court to authorise such improvements
- Lease land & renew leases that are able to be renewed
- Pay rates, taxes & charges
- Raise money by sale, conversion, calling in or mortgage of all or part of trust property

Alteration of purpose of charitable trust

- A charitable trust may be altered under the following circumstances:
 - where the original purposes of the trust have as far as possible been fulfilled
 - where the original property could be more effectively used if combined with other property applicable for similar purposes & administered jointly
 - having regard to the value of the trust property, changes in circumstances & other relevant factors, it is not reasonably practicable to apply the trust property in accordance with the original purposes
 - where the original purposes, in whole or in part, have been adequately provided for by other means
- A trust variation scheme may be approved, on the application of the trustee by:
 - the Supreme Court; or
 - if the value of the trust property does not exceed \$300,000, the Attorney-General

Consequences of mismanagement or neglect of trust property

- Negative publicity & subsequent damage to the University's reputation
 - ***This may result in potential benefactors being reluctant to donate to the University***
- Removal of an individual or an entity as a trustee
 - *There are provisions under the Act that allow trustees, beneficiaries & others to apply to the Supreme Court about the management of a trust*
- Monetary penalties
 - * ***A trustee is only accountable for trust property actually received by him/her***

Consequences of mismanagement or neglect of trust property (cont.)

- A trustee is **not** liable for any loss of trust property unless:
 - the loss occurred as a result of his/her own wrongful or negligent act or omission; or
 - the loss occurred as a result of circumstances that the trustee could reasonably be expected to have foreseen or to have avoided
- The Supreme Court may relieve the trustee (either wholly or partly) from personal liability for the breach of trust if it appears:
 - that a trustee is, or may be, personally liable for a breach of trust, **but** that the trustee has acted honestly & reasonably & ought fairly to be excused for the breach of trust

If you are a staff member who manages trusts on behalf of the University

- Become very familiar with the terms of the trust document & understand the structure of the foundation with which you are associated, as that will influence what is required of you
- **ALWAYS** seek advice if there is any concern or doubt about your responsibilities under a trust or under the Act
 - [Andre Scott](#) (Associate Director, Financial Services)
 - 8313 5257
 - [Richard Duddy](#) (Legal Counsel)
 - 8313 0085

If you are a staff member who manages trusts on behalf of the University (cont.)

- If you are responsible for the preparation &/or authorisation of Rules for scholarships and/or prizes, ensure that you comply with the terms of the source document (ie. the Will) before publication
- Execute the trust according to its terms & only invest trust funds in a manner authorised by the trust document
 - *Trust funds are generally managed centrally through Financial Services by investment in the Composite Fund*
- Avoid any conflict of interest. If you find yourself in such a position, cease to act &/or exercise your powers of delegation
- Do not delegate your powers or discretions except in accordance with the provisions of the trust document
- Ensure you maintain the full list of records expected of a Trustee
 - Refer to s84B of the [Trustee Regulations](#)

Additional Resources

- [Richard Duddy](#) (Legal Counsel)
 - 8313 0085
- [Andre Scott](#), Associate Director, Financial Services
 - 8313 5257
- [Trustee Act 1936 \(SA\)](#)
- [Trustee Regulations 1996 \(SA\)](#)



Disclaimer

The content of this material is intended only to provide a summary and general overview of the *Trustee Act* as it applies to the University of Adelaide.

It is not intended to be comprehensive nor does it constitute legal advice.

Please contact *Richard Duddy* if you are unsure of your compliance obligations under the Act.