THE UNIVERSITY of ADELAIDE

Legal Compliance Education and Awareness

CRICOS PROVIDER 00123M

Trustee Act 1936

(South Australian)

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 <u>not</u> 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 a 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 altering either the purposes for which the trust may be applied, or the powers of trustees, may be approved, on the application of the trustee by:
  - The Attorney-General, if the value of the trust property does not exceed $300,000; or
  - Supreme Court

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 (Director, Finance Strategy)
  - 8313 5257

  - Kim Evans (Senior Legal Counsel)
  - 8313 6103

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

- Kim Evans (Senior Legal Counsel)
  - 8313 6103
- Andre Scott, Director, Finance Strategy
  - 8313 5257
- Trustee Act 1936 (SA)
- Trustee Regulations 1996 (SA)

THE UNIVERSITY of ADELAIDE

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 *Kim Evans* if you are unsure of your compliance obligations under the Act.

© University of Adelaide, 2019