

# **NORTHERN TERRITORY OF AUSTRALIA**

## **COMPANIES (TRUSTEES AND PERSONAL REPRESENTATIVES) ACT**

As in force at 1 February 2000

### **Table of provisions**

#### **Part I**

#### **Preliminary**

1	Short title .....	1
2	Commencement .....	1
3	Repeal .....	1
4	Savings.....	1
5	Definitions.....	2

#### **Part II**

#### **Trustee companies**

6	Trustee companies .....	3
7	Local company prerequisites for authorization .....	3
8	Recognized company prerequisites for authorization .....	3
9	Conditions of authorization .....	4
10	Cancellation of authorization .....	4
11	Trustee company not to change name without approval .....	4
12	Office to be open for business.....	4
13	Declarations by trustee companies.....	5
14	Trustee company may act as executor.....	5
15	Authorization to apply for letters of administration with will annexed.....	5
16	Trustee company may obtain administration with will annexed .....	6
17	Trustee company may apply for administration of the estate of an intestate .....	6
18	Trustee company may act as executor or administrator .....	6
19	Trustee company may act under power of attorney.....	7
20	Court or person with power to appoint may appoint trustee company.....	7
21	Executor, &c., may appoint trustee company to act.....	8
22	Trustee company subject to same duties, &c., as a natural person .....	8
23	Powers conferred by this act are in addition .....	9
24	Dispensing with consents .....	9
25	Common funds .....	9
26	Investment of funds .....	10
27	Commission.....	11
28	Certificate of trustee company evidence of certain things .....	13
29	No further security required where minister certifies.....	14
30	Trustee company may be wound up in certain circumstances .....	14
31	Director ceases to be eligible to act after bankruptcy .....	14
32	Liability on part-paid shares.....	15

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33	Offence to misappropriate property .....	15
34	Unclaimed moneys .....	15
35	Treasurer may pay to lawful claimant .....	16
36	Annual balance sheet to be tabled in legislative assembly .....	16
37	Annual balance sheet to be exhibited in offices of trustee company .....	16
38	Legal practitioner may be nominated by testator .....	17
39	Trustee company bound by conditions of incorporation or registration .....	17

## **Part IIA                      Transfer of certain trust business**

39A	Definitions .....	17
39B	Transfer of trust business and appointment of old trustee to new trustee .....	19
39C	Evidence .....	21

## **Part III                      Authorized companies**

40	Definition .....	21
41	Certain companies may be executors .....	21
42	Prerequisites for company acting as executor .....	22
43	No advertising .....	22
44	Authorized company subject to same duties, &c., as a natural person .....	23
45	Testator may authorize payment of commission .....	23
46	Certain persons may apply to wind up an authorized company .....	23
47	Director ceases to be eligible to act after bankruptcy .....	24

## **Part IV                      General provisions**

48	Definition .....	24
49	Affidavits may be sworn by certain officers .....	24
50	Directors and manager personally liable .....	25
51	Trust moneys .....	25
52	Company may be removed .....	25
53	Interested party may apply for an account .....	26
54	Court may order audit .....	26
55	Restraint on voluntary winding up of a company .....	26
56	Issued capital and assets liable for failure by officers .....	27

## **Part V                      Miscellaneous**

57	Only certain companies to act as executor, &c. ....	27
58	Syndics .....	27
59	Regulations .....	28

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**Schedule 1      South Australian laws**

**Schedule 2**

**ENDNOTES**



# NORTHERN TERRITORY OF AUSTRALIA

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As in force at 1 February 2000

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## COMPANIES (TRUSTEES AND PERSONAL REPRESENTATIVES) ACT

**An Act to enable certain companies to act as trustees and personal representatives, and for other purposes**

### **Part I                      Preliminary**

#### **1                      Short title**

This Act may be cited as the *Companies (Trustees and Personal Representatives) Act*.

#### **2                      Commencement**

The several Parts and sections of this Act shall come into operation on such dates as are respectively fixed by the Administrator by notice in the *Gazette*.

#### **3                      Repeal**

The laws of the State of South Australia specified in Schedule 1 cease to have effect in the Northern Territory as laws of the Territory.

#### **4                      Savings**

- (1) Where a company specified in Schedule 2 was, immediately before the commencement of this section, an applicant for the grant of probate of a will or letters of administration of an estate, or for the reseal of a probate or letters of administration, the Court may, after the commencement of this section, make any order in relation to that company's application that it could have made had this Act not been in force.
- (2) Where a company specified in Schedule 2 has been granted, before the commencement of this section or, after the commencement of this section, in pursuance of subsection (1), probate of a will or letters of administration of an estate, or a reseal of a probate or letters of administration, the company shall continue to hold the grant, and be entitled to act upon that probate or those letters of administration and may exercise the powers and perform

and discharge the duties conferred by or arising as a result of the grant of probate or letters of administration, as if the laws of the State of South Australia specified in Schedule 1 had not ceased to have effect in the Territory as laws of the Territory.

## 5 Definitions

In this Act, unless the contrary intention appears:

**administrator** includes a person to whom letters of administration are granted.

**annual general meeting** has the same meaning as in the Corporations Law.

**authorized company** means a company authorized under Part III to act as executor and trustee of a will.

**Court** means the Supreme Court.

**estate** means real and personal property of whatever nature or kind committed in pursuance of this Act to the administration or management of a trustee company or authorized company.

**letters of administration** means:

- (a) letters of administration of the real and personal estate of a deceased person with or without the will, if any, annexed and whether granted for general, special or limited purposes;
- (b) exemplification of letters of administration; and
- (c) such other formal evidence of the right to administer the real and personal estate of a deceased person, purporting to be under the seal of a court of competent jurisdiction, as, in the opinion of the Court, is sufficient to authorize that administration of that estate under the law applicable in the place where the court of competent jurisdiction has jurisdiction.

**manager**, in relation to a trustee company or authorized company, means the principal executive officer for the time being of the company by whatever name called and whether or not he is a director.

**probate** has the same meaning as in the *Administration and Probate Act*.

**statutory manager** has the same meaning as **manager** in the *Aged and Infirm Persons' Property Act*.

**trustee company** means a company authorized under section 7(2) or 8(2) to carry on business as a trustee company.

**will** includes a codicil to a will.

## **Part II Trustee companies**

### **6 Trustee companies**

Subject to this Act, the Minister may authorize a company to carry on business as a trustee company in the Territory.

### **7 Local company prerequisites for authorization**

- (1) A company which:
- (a) is incorporated in the Territory under the Corporations Law;
  - (b) has the power to take out a grant of probate or letters of administration and to act as an executor, administrator and trustee;
  - (c) has an issued capital of not less than \$200,000 or such greater amount as may be determined from time to time by the Minister;
  - (d) has no member who is a natural person under the age of 18 years;
  - (e) has at least 3 directors who are bona fide residents of the Territory; and
  - (f) has a manager who is a bona fide resident of the Territory,

may apply to the Minister to be authorized to carry on business as a trustee company in the Territory.

- (2) If the Minister is satisfied that a company which applies under subsection (1) to be authorized complies with the requirements of that subsection and has the necessary expertise to carry on the business of a trustee company, he may, by notice in the *Gazette*, authorize the applicant company to carry on business as a trustee company in the Territory.

### **8 Recognized company prerequisites for authorization**

- (1) A company incorporated or taken to be incorporated under the Corporations Law and authorized by or under a law of a State or Territory of the Commonwealth to act in that State or Territory as an

executor, administrator and trustee, may apply to the Minister to be authorized to carry on business as a trustee company in the Territory.

- (2) If the Minister is satisfied that it is in the interest of the Territory that a company referred to in subsection (1) be authorized under this subsection, he may, by notice in the *Gazette*, authorize the company to carry on business as a trustee company in the Territory.

## **9 Conditions of authorization**

The Minister may, at the time of authorizing a company under section 7(2) or 8(2) or at any time there-after, by notice in writing to the company, impose such conditions as he thinks fit on the authorization and the authorization is subject to those conditions accordingly.

## **10 Cancellation of authorization**

An authorization under section 7(2) or 8(2) may be cancelled by the Minister where the trustee company fails to comply with a condition to which the authorization is subject or if the trustee company ceases to have the qualifications referred to in section 7(1) or 8(1), as the case may be.

## **11 Trustee company not to change name without approval**

A trustee company shall not, without the prior approval of the Minister, change its name.

Penalty: \$2,000.

## **12 Office to be open for business**

- (1) A trustee company shall open an office in the Territory within 28 days after the publication of the notice in the *Gazette* authorizing it to carry on business as a trustee company, or within such further time as the Minister, in writing, determines and shall, at all times while it remains a trustee company, maintain an office in the Territory.

Penalty: \$1,000.

- (2) An office referred to in subsection (1) shall be kept open to the public between the hours of 10.00 am and 4.00 pm on every day except Saturdays, Sundays and public holidays.

Penalty: \$1,000.



**13        Declarations by trustee companies**

- (1) The manager of a trustee company shall, during the months of January and July in each year, make a statutory declaration in the prescribed form and:
  - (a) within 14 days after making it, file a copy with the Registrar within the meaning of the *Business Names Act* or a person appointed under that Act to act as the Registrar;
  - (b) display a copy in a conspicuous place in the company's registered office in the Territory and in every branch office or place in the Territory where the business of the company is carried on; and
  - (c) give a copy to any member or creditor of the company who requests a copy.
- (2) A trustee company which fails to comply with a provision of subsection (1) shall be liable to a penalty not exceeding \$1,000 and a penalty of \$200 for each day during which the failure continues, and each director and manager of the company who authorizes or permits the failure shall be liable to the like penalty.

**14        Trustee company may act as executor**

- (1) Where a trustee company is appointed expressly or by implication as the executor in the last will of a testator, it may act as the executor and may apply to the Court for a grant of probate of the will and the Court may grant probate accordingly.
- (2) Where a trustee company is appointed expressly or by implication jointly with another person as an executor in the last will of a testator, it may act as the executor and may apply to the Court for a grant of probate of the will either with leave reserved for any person to come in and prove or jointly with any other executor, and the Court may grant probate accordingly.

**15        Authorization to apply for letters of administration with will annexed**

In any case in which a natural person may apply for and obtain letters of administration with the will annexed of the estate of a deceased person, he may:

- (a) instead of himself applying, authorize a trustee company to apply to the Court for letters of administration with the will annexed, which may be granted to the company upon its own application; or

- (b) join with a trustee company in an application for letters of administration with the will annexed, which may be granted to the person and the company jointly.

**16 Trustee company may obtain administration with will annexed**

- (1) A person who is appointed expressly or by implication as an executor in the last will of a testator and who is entitled to obtain probate of the will without reserving leave to any other person to apply for probate, may authorize a trustee company to apply to the Court for letters of administration with the will annexed, which may be granted to the trustee company upon its own application unless, in the will, the testator has expressed his desire that the office of executor is not to be delegated or that the company so applying is not to act in the trusts of the will.
- (2) A person who is appointed expressly or by implication as an executor in the last will of a testator and who is entitled to obtain probate of the will jointly with any other person, may authorize a trustee company to apply to the Court for probate either alone with leave reserved for any person to come in and prove or jointly with any person entitled to apply for probate of the will, which may be granted to the company upon its own application unless, in the will, the testator has expressed his desire that the office of executor is not to be delegated or that the company so applying is not to act in the trusts of the will.

**17 Trustee company may apply for administration of the estate of an intestate**

A person entitled to obtain letters of administration of the estate of an intestate may authorize a trustee company to apply for letters of administration of the estate, which may be granted to the company upon its own application.

**18 Trustee company may act as executor or administrator**

- (1) Where a trustee company is granted probate of a will, it may exercise all the powers, perform and discharge all the duties and shall be liable to all the obligations of, an executor.
- (2) Where a trustee company is granted letters of administration with the will annexed of an estate or letters of administration of an estate of an intestate, it may exercise all the powers, perform and discharge all the duties and shall be liable to all the obligations of, an administrator.

**19 Trustee company may act under power of attorney**

- (1) A trustee company may act under a power of attorney by which it is appointed attorney by a person (including a power of attorney to apply for and obtain a grant of probate or letters of administration) as attorney for that person, and all powers conferred upon it by a power of attorney may be exercised by:
- (a) a director of the company, its manager or secretary; or
  - (b) any other of its officers authorized in writing under the seal of the company to exercise the powers of the company as an attorney.
- (2) This section does not authorize a person to confer a power upon a trustee company which cannot be legally conferred upon a natural person.

**20 Court or person with power to appoint may appoint trustee company**

- (1) Subject to subsections (5) and (6), a court, judge or person who has power to appoint:
- (a) a trustee;
  - (b) a receiver;
  - (c) a statutory manager; or
  - (d) a liquidator or an official liquidator,
- may appoint a trustee company, either alone or jointly with any person to be a trustee, receiver, statutory manager or liquidator or official liquidator, as the case may be, and the company may act in that capacity accordingly.
- (2) Subject to subsections (5) and (6), a trustee company may be appointed, or may continue to act, as sole trustee of a trust notwithstanding any law in force in the Territory requiring the appointment of 2 or more trustees of that trust.
- (3) Subject to subsections (5) and (6), where a trustee is incapable of acting or has died, the person nominated for the purpose of appointing new trustees by the instrument creating the trust or, if there is no person willing and able so to act, the continuing or surviving trustee or the personal representative of the last-surviving trustee may, notwithstanding any law in force in the Territory, appoint a trustee company willing to be so appointed, to be the sole trustee of the trust.

- (4) Where a trustee company is appointed to an office or position referred to in subsection (1), it may exercise, perform and discharge all the powers and duties of, and shall be liable to all the obligations pertaining to, that office or position.
- (5) A trustee company shall not be appointed to an office or position referred to in subsection (1) where the instrument creating the trust or power forbids its appointment to that office or position.
- (6) A trustee company shall not be appointed or be entitled to act as sole trustee, where the instrument creating the trust or power expressly provides that there shall be another trustee in addition to a trustee company or that a trustee company shall not be appointed or act as sole trustee.
- (7) Notwithstanding any law in force in the Territory, a trustee, or other person having power to appoint a trustee may, without the consent of the Court, appoint a trustee company to be a trustee where he has power to appoint a new trustee.

## **21      Executor, &c., may appoint trustee company to act**

- (1) An executor or administrator acting under a probate or letters of administration, a trustee, a receiver appointed by the Court, a statutory manager, liquidator or official liquidator may, with the consent of the Court, appoint a trustee company to exercise, perform and discharge all the powers and duties of that executor, administrator, trustee, receiver, statutory manager, liquidator or official liquidator, as the case may be.
- (2) The costs of an application under subsection (1) for the consent of the Court and appearances in relation thereto are in the discretion of the Court and may be ordered to be paid out of the estate.
- (3) Where a trustee company is appointed under subsection (1), the person in whose place the company is appointed is released from all liability in respect of acts done or omitted to be done by the company acting under the appointment.

## **22      Trustee company subject to same duties, &c., as a natural person**

Where a trustee company is appointed or acts as an executor, administrator, attorney, trustee, receiver, statutory manager, liquidator or official liquidator, in addition to any liability imposed by this Act, it shall be subject to all the duties and obligations to which a natural person acting in that capacity would be subject.

**23 Powers conferred by this act are in addition**

The powers conferred on a trustee company by this Act are in addition to and not in derogation of the powers conferred on the company or on an executor, administrator, attorney, trustee, receiver, statutory manager, liquidator or official liquidator by any other law in force in the Territory.

**24 Dispensing with consents**

Where the consent of a person is required before an administrator or trustee is appointed and that person:

- (a) cannot be located;
- (b) refuses to consent;
- (c) has not attained the age of 18 years;
- (d) is not of full mental capacity; or
- (e) is under any other disability,

the appointment of a trustee company as administrator or trustee may be made without that consent, if the Court consents to the appointment.

**25 Common funds**

- (1) A trustee company may establish and maintain one or more common funds, each to be called a common fund, and if more than one, each with an appropriate distinguishing number.
- (2) A trustee company may invest in a common fund set up by it any trust moneys which it receives where the investment of those moneys in that common fund is not inconsistent with the terms of the trust under which those moneys are received.
- (3) The moneys constituting a common fund may be invested in any manner provided for in the *Trustee Act*.
- (5) Investments made from moneys forming part of a common fund shall not be made in the name or on account of, and they shall not belong to, a particular estate, trust, property or person.
- (6) A trustee company shall keep an account in its books showing at all times the current amount for the time being at credit in the common fund on account of each estate, trust, property or person.

- (7) A trustee company may sell investments, and may withdraw moneys, belonging to a common fund for a purpose relating to the exercise and discharge of its powers, authorities, duties and functions.
- (8) A trustee company may, on account of an estate, trust, property or person, at any time withdraw from a common fund an amount at credit in the common fund and invest it on the separate account of that estate, trust, property or person.
- (9) Amounts withdrawn under subsection (8) shall, as from the date of the withdrawal, cease to have a claim for interest or otherwise from the common fund.
- (10) A profit or loss made on the realization of an investment in a common fund shall be credited or debited, as the case may be, to the common fund and be received or borne proportionately by the several amounts invested in the common fund at the time of realization.
- (11) A trustee company shall, on the first day of each month, determine the value of the investments in each common fund as at that day.
- (12) Investments in and withdrawals from a common fund shall, during a month, be effected on the basis of the valuation made pursuant to subsection (11) in respect of that month.
- (13) A trustee company shall apportion the income arising from a common fund among the estates, trusts, properties or persons entitled to income from the capital sums invested according to the amounts invested and the periods for which they are so invested.
- (14) Where a trustee company acts jointly with any other person as an executor, administrator, attorney, trustee, receiver, statutory manager, liquidator or official liquidator, the company may, with the consent in writing of that other person, invest all or any of the moneys of the estate in a common fund of the company.
- (15) The Minister may, by notice in the *Gazette*, determine that Part 7.12 of the Corporations Law does not apply to or in relation to a fund established under this section or to any interest in that fund.

## **26 Investment of funds**

- (1) Where a trustee company holds moneys belonging to more than one estate, trust, property or person upon trusts which require or permit investment of those moneys, it may invest those moneys as one fund, and distribute the income arising therefrom proportionately among the several estates, trusts, properties and persons to which the moneys so invested belong.

- (2) A profit or loss arising from an investment made in pursuance of subsection (1) shall be received or borne proportionately among the several estates, trusts, properties and persons to which the moneys so invested belong.

## **27 Commission**

- (1) Where a trustee company is appointed or acts as an executor, administrator, attorney, trustee, receiver, statutory manager, liquidator or official liquidator, it shall be entitled to receive, in addition to all moneys properly expended by it and chargeable against each estate in respect of which it is so appointed or acts, commission at the rate fixed from time to time by its board of directors but not exceeding:
- (a) \$5 for every \$100 of the capital value of the estate without deduction of debts or liabilities, whether secured or unsecured, being the capital value thereof as at the time the estate is committed to the administration or management of the trustee company; and
- (b) \$5 for every \$100 of the income received by the company on account of the estate.
- (2) The commission referred to in subsection (1)(a) is payable out of moneys of the estate, whether capital or income, received by the trustee company, and the commission referred to in subsection (1)(b) is payable out of the income of the estate.
- (3) Subject to subsection (4), the commission referred to in subsection (1)(a) may be paid out of or deducted from the estate at any time after the administration or management of the estate has been committed to the trustee company.
- (4) A trustee company shall not be entitled to draw commission in pursuance of subsection (1)(a) in respect of more than 50% of a portion of the estate that has not been realized.
- (5) In the case of income received before or after the commencement of this Act in respect of a perpetual trust the administration and management of which has been committed to a trustee company, the scale of charges published from time to time by the company as being applicable to income of trust estates is applicable to the income received in respect of the trust while that published scale of charges is current.
- (6) Subject to this section, the commission paid under subsection (1) to a trustee company shall be received and accepted by it in full satisfaction of any claim to remuneration for acting as executor, administrator, attorney, trustee, receiver, statutory manager,

liquidator or official liquidator, as the case may be, and no other charges beyond such commission and moneys properly expended by the trustee company in so acting shall be made or allowed.

- (7) Where the Court is of the opinion that the commission charged by a trustee company is excessive it may, on the application of a person affected, review the commission charged and may reduce the amount of commission payable.
- (8) A trustee company shall, from time to time, publish its scale of charges.
- (9) Subject to this section, the commission charged by a trustee company against an estate shall not exceed the amount of the published scale of charges at the time when the administration or management of the estate was committed to the company.
- (10) In addition to the commission otherwise chargeable in pursuance of this section, a trustee company may, in respect of an estate under its administration and management, charge and receive a reasonable fee or remuneration for work carried out by it in or in connection with the preparation and lodging of returns relating to duties or taxes, other than probate, death, succession or estate duties.
- (11) Where, in the administration or management of an estate, a trustee company is authorized to carry on a business or undertaking which belongs wholly to the estate or in which the estate has an interest as a partner, the Court may, on the application of the company, either in lieu of or in addition to commission otherwise chargeable, allow the company such remuneration out of the estate as the Court thinks fit for the carrying on of that business or undertaking by the company.
- (12) Nothing in this section shall prevent:
  - (a) the payment of a commission that a testator in his will, or a settlor, has directed to be paid; or
  - (b) the payment of a commission or fee that has been agreed upon between the trustee company and the parties interested therein either in lieu of or in addition to any other commission provided for by this section.



**28 Certificate of trustee company evidence of certain things**

(1) Where a trustee company is executor or administrator of, or is by law authorized to administer the estate of, a deceased person, a certificate by its managing director, director, manager or secretary certifying:

- (a) the name of the deceased;
- (b) the residential address of the deceased at the time of his death;
- (c) the occupation of the deceased immediately before his death;
- (d) the nature or form of the authority by which the company is administering the estate;
- (e) the date of granting of the authority referred to in paragraph (d);
- (f) the reference number of the authority referred to in paragraph (d);
- (g) the manner in which the company became authorized to administer the estate; and
- (h) the time at which the company became authorized to administer the estate,

accompanied by a photographic copy of the grant of probate, letters of administration or other order or document of appointment may, notwithstanding any law to the contrary, and without other proof, be accepted by all courts, officers and persons, whether or not acting under a law, as sufficient evidence of the respective matters so certified or stated.

(2) Where a trustee company is acting as executor, administrator, attorney, trustee, receiver, statutory manager, liquidator or official liquidator, a certificate under its common seal certifying:

- (a) the capacity in which it is authorized to act;
- (b) the manner in which it became authorized to act in that capacity; and
- (c) the time at which it became authorized to act in that capacity,

accompanied by a photographic copy of the trust instrument, order or document of appointment may, notwithstanding any law to the contrary, and without other proof, be accepted by all courts, officers

and persons, whether or not acting under a law, as sufficient evidence of the respective matters so certified or stated.

- (3) A certificate under subsection (1) or (2) accompanied by the relevant photographic copy shall be sufficient authority for registering the trustee company as proprietor of an estate or interest in land or of any shares, stock or property in any body corporate, body or association and, in respect of land, may be produced and shall be accepted as though it were probate or letters of administration, as the case requires.

## **29 No further security required where minister certifies**

The Minister may, by notice in the *Gazette*, certify:

- (a) that a trustee company has complied with the conditions imposed on it under section 9; or
- (b) that no conditions have been imposed under section 9 on a trustee company,

and while the notice remains in force, the Court shall not direct the trustee company to which it relates:

- (c) to enter into an administration bond under the *Administration and Probate Act*; or
- (d) to give any other security for the administration of an estate.

## **30 Trustee company may be wound up in certain circumstances**

Where the value of the assets over liabilities of a trustee company falls below 25% of its issued capital or, if an authorization under section 7(2) or 8(2) is cancelled by the Minister, the Court may, upon the application of a creditor of the company, or a person entitled to or having an interest in an estate that is for the time being administered by the company, or the Attorney-General, make such order for the winding up of the company as it could make under the Corporations Law.

## **31 Director ceases to be eligible to act after bankruptcy**

Where a director of a trustee company becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with his creditors or makes an assignment of his remuneration for their benefit, he shall immediately cease to hold office as a director of the company.

**32 Liability on part-paid shares**

If an order is made for the winding up of a trustee company and a director or past director of the company has, during a period of 2 years immediately preceding the making of the order, transferred any part-paid shares in the company, the director or past director, as the case may be, shall be liable for the balance payable in respect of each such share if the holder of the shares is unable to pay the balance in full.

**33 Offence to misappropriate property**

A director, member or officer of a trustee company who knowingly:

- (a) appropriates or otherwise deals with any real or personal property of which the company has control, either alone or jointly with another person, under the powers conferred upon it or authorized by this Act; or
- (b) lends or otherwise deals with moneys received by the company under those powers,

in any manner other than in accordance with this Act, the instrument creating the trust, or the law for the time being in force, is guilty of an offence.

Penalty: \$4,000 or imprisonment for 2 years.

**34 Unclaimed moneys**

- (1) A trustee company shall pay to the Treasurer all moneys of an estate which the company is administering as executor, administrator, attorney, trustee, receiver, statutory manager, liquidator or official liquidator by virtue of the powers conferred by this Act, and which remain unclaimed by the person entitled to the moneys for a period of 3 years after they have become due and payable to that person, unless an order is made by a court of competent jurisdiction restraining the payment by the company to the Treasurer.
- (2) The receipt of the Treasurer for moneys paid to him pursuant to subsection (1) shall be a good and sufficient discharge for the trustee company which shall have no further liability for those moneys.
- (3) A trustee company shall, within 14 days after 30 June in each year, deliver to the Treasurer a statement of all unclaimed moneys referred to in subsection (1) which have been held by it during the 12 months immediately preceding that date.

- (4) A statement referred to in subsection (3) shall show the several estates in respect of which the moneys have been received and the dates and amounts of the payments made under subsection (1) and, if those moneys or any part of them have not been paid to the Treasurer, shall indicate the reasons for their non-payment.
- (5) A trustee company which fails to comply with a provision of this section is guilty of an offence.

Penalty: \$1,000 for each day during which the failure to comply continues.

**35 Treasurer may pay to lawful claimant**

Where the Treasurer is satisfied that a person is lawfully entitled to any moneys paid to the Treasurer under section 34, he may pay an amount equal to those moneys to that person.

**36 Annual balance sheet to be tabled in legislative assembly**

- (1) The manager of a trustee company shall forward to the Minister, within 28 days after its annual general meeting, a copy of its annual balance sheet.
- (2) The copy of the annual balance sheet referred to in subsection (1) shall be certified by the trustee company's auditor as being, in his opinion, a true and accurate representation of the state of the company's affairs.

**37 Annual balance sheet to be exhibited in offices of trustee company**

- (1) A trustee company shall, within 28 days after its annual general meeting, cause a copy of its annual balance sheet to be exhibited in a conspicuous place during the hours referred to in section 12(2) at each place of business of the company that is open to the public.

Penalty: \$1,000.

- (2) A trustee company shall, upon request, supply a copy of its annual balance sheet to any person entitled to or having an interest in an estate being administered by it, or to any of its creditors.

Penalty: \$1,000.

- (3) An offence of contravening or failing to comply with this section is a regulatory offence.

**38 Legal practitioner may be nominated by testator**

- (1) Where, in a will or settlement, a settlor or testator directs that a particular legal practitioner or firm of legal practitioners shall conduct the legal business of his estate, that legal practitioner or firm is entitled to act accordingly.
- (2) A trustee company shall not be liable for loss occasioned by the negligence, misfeasance, non-feasance or misconduct of a legal practitioner or firm of legal practitioners directed by a will or settlement to act, unless such loss could have been prevented or avoided by the exercise of due care on the part of the company.
- (3) A legal practitioner or firm of legal practitioners directed by a will or settlement to act may be removed by the Court upon the application of a trustee company or a person entitled to or having an interest in an estate administered or to be administered by the company, upon cause being shown, and the Court may appoint a legal practitioner or firm of legal practitioners nominated by the applicant to conduct the legal business of the estate.

**39 Trustee company bound by conditions of incorporation or registration**

Subject to this Act, a trustee company shall remain and be subject to the same restrictions, liabilities, penalties, privileges and powers to which it is subject under or by virtue of its incorporation or registration.

**Part IIA                      Transfer of certain trust business****39A Definitions**

In this Part:

***commencing date*** means the date on which this Part comes into operation.

***new trustee*** means the ANZ Executors and Trustee Company Ltd., a company incorporated in Victoria and registered under the *Companies Act* as a foreign company within the meaning of that Act.

***old trustee*** means TEA (1983) Limited, formerly the Trustees Executors and Agency Company Limited, a company incorporated in Victoria and registered under the *Companies Act* as a foreign company within the meaning of that Act.

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***the trust business of the old trustee*** means the business of the old trustee acting as trustee and includes:

- (a) the assets held on trust by the old trustee, including all records, securities and other documents and information, whether recorded on paper, microfilm, magnetic tape or disc or otherwise held or maintained by the old trustee in its capacity of trustee;
- (b) the liabilities and obligations properly incurred by the old trustee acting in the capacity of trustee, including undertakings to courts and public officers and authorities;
- (c) the rights of indemnity of the old trustee against trust assets in respect of liabilities incurred by the old trustee acting as trustee;
- (d) the rights of the old trustee to commission, remuneration, fees and reimbursement for disbursements, whether billed or unbilled, in respect of its acting in the capacity of trustee;
- (e) the benefit of obligations under rental or leasing contracts in respect of the computers used by the old trustee in the trust business of the old trustee;
- (f) all rights of the old trustee in respect of the use of the computer programmes used by the old trustee in the trust business of the old trustee;
- (g) the corporate and accounting records of the old trustee to the extent to which they relate to the trust business of the old trustee;
- (h) the liability to perform further administration of any trust or other administration undertaken by the old trustee;
- (j) all assets of trusts and other appointments of the old trustee in its business of acting in the capacity of trustee; and
- (k) all other assets and undertakings of the old trustee being part of or incidental to or used in its business of acting in the capacity of trustee,

but does not include:

- (m) all assets held by or for the old trustee of which the old trustee is the beneficial owner (other than the assets included in any of paragraphs (a) to (k) inclusive);

- (n) all rights of the old trustee to any security deposits or similar sums or assets lodged with any court, public office or authority;
- (p) all liabilities of the old trustee present or future, certain or contingent, ascertained or sounding only in damages, and all claims by persons against the old trustee and any officer of the old trustee in respect of breach of trust, misfeasance, non-feasance or the exercise of or failure to exercise discretion in acting in the capacity of trustee, including claims in respect of any deficiency in trust assets, whether or not the claims have been notified or ascertained;
- (q) the right of the old trustee to indemnity under any insurance policy held by it other than in the capacity of trustee; or
- (r) all the assets, undertakings and liabilities of the old trustee in its business of property developer, packager of projects, entrepreneur, property owner, renovator and dealer, short-term money market dealer, mortgage lender of its own money, dealer in securities and any other businesses it conducted on its own behalf.

**39B      Transfer of trust business and appointment of old trustee to new trustee**

- (1) On the commencing date, the trust business of the old trustee is, by virtue of this subsection, transferred to and vested in the new trustee.
- (2) Where, immediately before the commencing date, the old trustee was acting in the capacity of trustee, the new trustee is, by virtue of this subsection, appointed in its stead to act in that capacity and the new trustee:
  - (a) is entitled and obliged to exercise and discharge all the rights, powers, capacities, authorities, duties and obligations; and
  - (b) shall to the extent provided in this Act, discharge the liabilities and obligations,of the old trustee in respect of and arising from the appointment.
- (3) The old trustee shall account to the new trustee for all assets, liabilities and obligations held, or to which it is subject, in its business of acting in the capacity of trustee.

- (4) An appointment or nomination of the old trustee as trustee executor, or otherwise in the capacity of trustee, in a will or instrument, whether the appointment or nomination:

- (a) is in effect on;
- (b) takes effect after; or
- (c) has taken effect before,

the commencing date, in respect of which a further act or thing is necessary to perfect the appointment or under-taking of the office, shall be deemed to be an appointment or nomination of the new trustee.

- (5) On and after the commencing date, the production of a copy of this Part printed by the Government Printer shall be conclusive evidence in all courts and proceedings of the transfer of:

- (a) the trust business of the old trustee; and
- (b) all property held by the old trustee on trust in the capacity of trustee,

to the new trustee and of their vesting in the new trustee and, without limiting the generality of the foregoing, such a copy shall, in relation to all land and all marketable securities, operate as a duly executed transfer by the old trustee to the new trustee of the land or securities.

- (6) Where a portion of the undertaking or property held by the old trustee in the capacity of trustee cannot be, or is not, vested in the new trustee by virtue of this Act, whether because transfers of the portion are governed otherwise than by the law of the Territory or otherwise, notwithstanding that that portion relates to the trust business of the old trustee in the Territory, then the old trustee shall do all such things necessary after the commencing date for the purpose of securing that that portion is effectively and promptly transferred to the new trustee.

- (7) Where, on the application of the new trustee, it appears to a court to be necessary or proper, having regard to this Act, the new trustee may be joined as a party to any legal proceedings in addition to or instead of the old trustee.



**39C Evidence**

- (1) Where an application is made by the new trustee to have property vested in it by this Part registered under the *Real Property Act* in its name and the application is accompanied by:
  - (a) a certificate under subsection (2) that the property has vested in the new trustee; and
  - (b) the relevant certificate as to title or other instrument,the Registrar-General shall, without fee, make such notations in the Register as are necessary to record such vesting.
- (2) A certificate under the seals of the new trustee and the old trustee to the effect that the estate or interest of persons specified in the certificate in land specified in the certificate is an estate or interest vested in the new trustee by this Part shall, for the purposes of:
  - (a) an application by the new trustee to be registered under the *Real Property Act* as the proprietor of that estate or interest pursuant to the vesting;
  - (b) a transfer, conveyance, reconveyance, mortgage or other instrument or dealing whatsoever in respect of an interest in the land, whether or not under the *Real Property Act*; and
  - (c) a creation of easement or other interest in respect of the land, whether or not under the *Real Property Act*,be conclusive evidence of the matters certified.

**Part III Authorized companies****40 Definition**

In this Part, where the context so requires, **executor** includes a trustee acting under the trusts of a will.

**41 Certain companies may be executors**

- (1) Where a company:
  - (a) is incorporated under the Corporations Law (other than as a no-liability company);
  - (b) has the power to obtain a grant of probate and to act as an executor and trustee; and
  - (c) complies with the provisions of this Part,

and is named as executor in a will of a deceased person, that company may, subject to this Part, apply for a grant of probate in its own name, either alone or jointly with any other person, and may exercise the powers and perform and discharge the duties of an executor and trustee of the will of the deceased person.

- (2) An application referred to in subsection (1) may be made notwithstanding that the will was executed, or that the deceased person died, before the commencement of this section.
- (3) Subject to this Act, the appointment of a company which complies with subsection (1) as an executor of a will is valid and of the same effect as if the appointment had been of a natural person who was capable of acting as an executor of that will.

#### **42 Prerequisites for company acting as executor**

Unless a testator has, by his will or by a separate instrument executed in the same manner as a will, dispensed with the requirement to comply with this section, an authorized company shall not be granted probate of a will or continue to administer the estate of that testator unless:

- (a) it has an issued capital of not less than \$10,000 or such greater amount as may be determined from time to time by the Minister;
- (b) at least one-half of the number of its directors, and the manager, are bona fide residents of the Territory; and
- (c) no member of the company who is a natural person is under the age of 18 years.

#### **43 No advertising**

- (1) An authorized company shall not advertise or hold itself out to the public as being entitled to act as an executor of a will or to administer the estate of a deceased person.

Penalty: \$1,000.

- (2) An authorized company shall not include in its name the words "executor", "administrator" or "trustee" or any word which expresses or implies that the company is entitled to apply for and obtain a grant of probate or to act in the capacity of an executor, administrator or trustee.

Penalty: \$1,000.

- (3) While an authorized company is carrying out its functions or duties as an executor, or is administering the estate of a deceased person, it shall not, without the prior approval of the Minister, change its name.

Penalty: \$1,000.

- (4) No director, officer, employee or agent of an authorized company, or any other person on behalf of an authorized company, shall advertise or hold out to the public, either expressly or by implication, that the authorized company is authorized, empowered or otherwise entitled to act as an executor of a will or to administer the estate of a deceased person.

Penalty: \$1,000 or imprisonment for 6 months.

**44 Authorized company subject to same duties, &c., as a natural person**

- (1) Subject to this Part, an authorized company which acts as an executor of a will has the same powers and is subject to the same duties, obligations and liabilities as a natural person acting in the same capacity.
- (2) The powers conferred by this Part on an authorized company are in addition to and not in derogation of any powers given by law to a natural person acting as an executor of a will.

**45 Testator may authorize payment of commission**

- (1) Subject to this section, this Part does not confer a right on an authorized company to charge commission for the application for the grant of probate of a will or the administration of the estate of a deceased person.
- (2) A testator may, in his will or other instrument executed in the same manner as a will, authorize an authorized company to charge a commission at the rate set out in the will or other instrument.
- (3) The Court may allow to an authorized company in passing its accounts, out of the assets of an estate which the company is administering, such commission as the Court considers reasonable.

**46 Certain persons may apply to wind up an authorized company**

Where an authorized company would be liable to be proceeded against under any law for the purposes of obtaining an order for the winding up of that company, a person entitled to or having an interest in an estate which is being or has been administered by the company, or the Attorney-General, is entitled to petition the Court in

his own right, for that order.

**47 Director ceases to be eligible to act after bankruptcy**

Where a director of an authorized company becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with his creditors or makes an assignment of his remuneration for their benefit while the company is acting as an executor, he shall immediately cease to hold office as a director of the company.

## **Part IV General provisions**

**48 Definition**

In this Part **company** includes an authorized company and a trustee company.

**49 Affidavits may be sworn by certain officers**

- (1) Where a company is empowered under this Act to apply to the Court for probate of a will or letters of administration of an estate:

- (a) the managing director, manager or secretary of the company;  
or
- (b) any other officer of the company authorized in writing under the seal of the company so to do,

may make an affidavit for the purposes of the application and the Court may receive and act upon the application accordingly.

- (2) The Court may accept as evidence of the authorization under subsection (1) of an officer, a statement of that fact in an affidavit.
- (3) A person authorized by or under this section or section 19 to make an affidavit in support of an application for probate of a will or letters of administration may sign such other documents which the Court requires in support of or resulting from that application.
- (4) Where the Court requires the attendance of a company in its capacity as an executor or administrator or as an applicant for a grant of probate or letters of administration, it may require a person authorized by or under this section or section 19 to attend, and attendance by that person or, unless the Court otherwise orders, by some other person authorized by or under this section or section 19, shall be deemed to be attendance of the company.

**50 Directors and manager personally liable**

- (1) Subject to subsection (2), where a company obtains probate or letters of administration, or is appointed and acts as an executor or administers the estate of, a deceased person, or is appointed and acts as an attorney, trustee, receiver, statutory manager, liquidator or official liquidator, its directors and its manager shall be individually and collectively responsible to the Court and shall be personally liable by process of attachment, commitment for contempt or by other process, to all courts having jurisdiction, for the proper discharge of their duties and for obedience to the rules, orders and decrees of those courts, in the same manner and to the same extent as if the directors and the manager:
  - (a) had personally obtained probate or letters of administration and had acted as executors and administrators; or
  - (b) had personally been appointed as attorney, trustee, receiver, statutory manager, liquidator or official liquidator, as the case may be, and had acted in that capacity.
- (2) Where a natural person acting in any of the capacities referred to in subsection (1) would be liable for attachment, commitment or other process, the directors and the manager of a company shall, where the company is acting in any of those capacities, be liable, each for his own individual act and not otherwise, to attachment, commitment or other process.

**51 Trust moneys**

- (1) All trust moneys received by a company in respect of estates shall be placed in a separate trust account and shall not be mixed with the general funds of the company.
- (2) An account of moneys paid or received, and investments made and money advanced, in respect of a particular estate by a company, shall be kept by the company separate from all other estate accounts.

**52 Company may be removed**

- (1) Where a company is appointed or acts as executor, administrator, attorney, trustee, receiver, statutory manager, liquidator or official liquidator it shall, in addition to the liabilities and restrictions imposed by this Act, be subject in all respects to the same control, and is liable to be removed in the same manner, as a natural person who acts in the same capacity.
- (2) A person claiming relief against a company for an act done or assumed to have been done, or in respect of an act omitted to be

done, by the company or a director or officer of the company under a power conferred by this Act, may institute proceedings in the Court against the company, the director or the officers, as the case requires.

- (3) In a proceeding under subsection (2), the Court may make such order, including as to costs, as it thinks fit.

### **53 Interested party may apply for an account**

- (1) A person who is entitled to or has an interest in an estate which is in the possession, or under the control, of a company either alone or jointly with another person, or the Attorney-General, may apply to the Court for an order for account.
- (2) Where the Court is satisfied that a person is entitled to or has an interest in an estate and that a company has failed to supply to that person, upon a reasonable request, a sufficient account, or that the company has failed to supply a sufficient account to the Attorney-General upon his request, the Court may order such account to be rendered by the company as the Court thinks fit.
- (3) The Court may, in respect of an application under this section, make such order as to costs as it thinks fit.

### **54 Court may order audit**

- (1) The Court may, on an application under section 53, order that a person named in the order shall examine the books and accounts of the company relating to the estate in respect of which the order is made and file a report on the state of the books and accounts and the transactions evidenced therein.
- (2) Upon the making of an order under subsection (1), the company shall deliver to the person named in the order a list of all books and accounts kept by it relating to the estate and shall produce to that person at all reasonable times, when required, all books, accounts, vouchers, papers and other documents of the company relating to the estate and shall supply to the person all information that he may reasonably require to enable him to make the examination.
- (3) The Court may make such orders as to costs in respect of an examination under this section as it thinks fit and may adjourn the question of costs until the report of the examination has been filed.

### **55 Restraint on voluntary winding up of a company**

- (1) While any part of an estate in respect of which a company is executor, administrator, attorney, trustee, receiver, statutory manager, liquidator or official liquidator, remains unadministered,

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the company shall not, except with the approval of the Court, be voluntarily wound up.

- (2) A person who is entitled to or has an interest in an estate referred to in subsection (1), or the Attorney-General, may apply to the Court to restrain the voluntary winding up of the company.
- (3) A person who is entitled to or has an interest in an estate referred to in subsection (1), or the Attorney-General, may apply to the Court to restrain a director or shareholder from disposing of any shares that the director or shareholder may hold in the company.
- (4) In an application under this section the Court may make such order, including as to costs, as it thinks fit.

## **56 Issued capital and assets liable for failure by officers**

Notwithstanding section 50, the issued capital, both paid and unpaid, and all the assets of a company shall be liable for any loss or damage occasioned by the negligent or improper discharge of, or by the failure to discharge, an act or duty by the company, or by any of its officers, in respect of an estate for which the company holds an appointment or has acted.

## **Part V Miscellaneous**

### **57 Only certain companies to act as executor, &c.**

A body corporate shall not obtain a grant of probate or act as an executor of the will, or trustee of the estate, of a deceased person in the Territory, either alone or jointly with another person, unless it is:

- (a) a trustee company;
- (b) an authorized company; or
- (c) a body corporate that is authorized by a law in force in the Territory to obtain a grant of probate and to so act.

### **58 Syndics**

- (1) Subject to this Act, a trustee company may be appointed a syndic to apply for a grant of letters of administration with the will annexed on behalf of an executor which is a body corporate.
- (2) Nothing in this Act shall prevent the appointment of:
  - (a) a natural person;

- (b) a trustee company; or
- (c) a body corporate that is authorized under a law in force in the Territory to so act,

to be a syndic to apply for a grant of letters of administration with the will annexed on behalf of an executor which is a body corporate.

## **59 Regulations**

The Administrator may make Regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to this Act.



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## Schedule 1 South Australian laws

section 3

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Year of State Act	Title of State Act
1885	Executors Company's Act, 1885
1900	Executors Company's Amendment Act, 1900
1910	Elder's Executor Company's Act, 1910
1910	Bagot's Executor Company Act, 1910

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## **Schedule 2**

section 4(1)

Bagot's Executor and Trustee Company Limited  
Elder's Trustee and Executor Company Limited  
Executor, Trustee and Agency Company of South Australia  
Limited

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## ENDNOTES

**1****KEY**

Key to abbreviations

amd = amended  
 app = appendix  
 bl = by-law  
 ch = Chapter  
 cl = clause  
 div = Division  
 exp = expires/expired  
 f = forms  
 Gaz = Gazette  
 hdg = heading  
 ins = inserted  
 lt = long title  
 nc = not commenced

od = order  
 om = omitted  
 pt = Part  
 r = regulation/rule  
 rem = remainder  
 renum = renumbered  
 rep = repealed  
 s = section  
 sch = Schedule  
 sdiv = Subdivision  
 SL = Subordinate Legislation  
 sub = substituted

**2****LIST OF LEGISLATION*****Companies (Trustees and Personal Representatives) Act 1981 (Act No. 37, 1981)***

Assent date	8 April 1981
Commenced	28 September 1981 (Gaz S19, 28 September 1981)

***Criminal Law (Regulatory Offences) Act 1983 (Act No. 68, 1983)***

Assent date	28 November 1981
Commenced	1 January 1984 (s 2, s 2 <i>Criminal Code Act 1983</i> (Act No. 47, 1983), Gaz G46, 18 November 1983, p 11 and Gaz G8, 26 February 1986, p 5)

***Companies (Trustees and Personal Representatives) Amendment Act 1984 (Act No. 5, 1984)***

Assent date	3 April 1984
Commenced	9 May 1984 (Gaz G18, 9 May 1984, p 5)

***Companies and Securities (Consequential Amendments) Act 1986 (Act No. 18, 1986)***

Assent date	30 June 1986
Commenced	1 July 1986 (s 2)

***Companies (Trustees and Personal Representatives) Amendment Act 1987 (Act No. 8, 1987)***

Assent date	27 May 1987
Commenced	27 May 1987

***Statute Law Revision Act 1989 (Act No. 60, 1989)***

Assent date	2 October 1989
Commenced	2 October 1989

***Corporations (Consequential Amendments) Act 1990 (Act No. 59, 1990)***

Assent date 14 December 1990  
 Commenced 1 January 1991 (s 2, s 2 *Corporations (NT) Act 1990* (Act No. 56, 1990) and Gaz S76, 21 December 1990)

***Real Property (Consequential Amendments) Act 1991 (Act No. 33, 1991)***

Assent date 25 June 1991  
 Commenced 1 October 1991 (Gaz S49, 1 October 1991)

***Trustee (Consequential Amendments) Act 1996 (Act No. 8, 1996)***

Assent date 20 March 1996  
 Commenced 20 March 1996 (s 2, s 2 *Trustee Amendment Act (No. 2) 1995* (Act No. 60, 1995) and Gaz G7, 14 February 1996, p 2)

***Companies (Trustees and Personal Representatives) Amendment Act 1997 (Act No. 18, 1997)***

Assent date 7 May 1997  
 Commenced 7 May 1997

***Mental Health and Related Services (Consequential Amendments) Act 1999 (Act No. 11, 1999)***

Assent date 25 March 1999  
 Commenced 1 February 2000 (s 2, s 2 *Mental Health and Related Services Act 1998* (Act No. 63, 1998) and Gaz G3, 26 January 2000, p 2)

***Statute Law Revision Act (No. 2) 1999 (Act No. 48, 1999)***

Assent date 10 November 1999  
 Commenced 10 November 1999

**3 LIST OF AMENDMENTS**

s 1	amd No. 58, 1978, s 4
s 5	amd No. 18, 1986, s 3; No. 59, 1990, s 4; No. 11, 1999, s 4
s 7	amd No. 18, 1986, s 3; No. 59, 1990, s 4; No. 48, 1999, s 3
s 8	amd No. 18, 1986, s 3; No. 8, 1987, s 3; No. 59, 1990, s 4
s 13	amd No. 5, 1984, s 4; No. 8, 1987, s 4; No. 59, 1990, s 4
s 25	amd No. 18, 1986, s 3; No. 59, 1990, s 4; No. 8, 1996, s 3
s 30	amd No. 18, 1986, s 3; No. 59, 1990, s 4
s 36	amd No. 18, 1997, s 2
s 37	amd No. 68, 1983, s 107
pt IIA hdg	ins No. 5, 1984, s 5
ss 39A – 39B	ins No. 5, 1984, s 5
s 39C	ins No. 5, 1984, s 5
	amd No. 60, 1989, s 6; No. 33, 1991, s 7
s 41	amd No. 18, 1986, s 3; No. 59, 1990, s 4; No. 48, 1999, s 3