

ACT Auditor-General's Office

Performance Audit Report

<h3>Management of Trust Moneys and Other Non-Public Moneys</h3>

June 2006



ACT AUDITOR-GENERAL'S OFFICE



PA05/21

The Speaker
ACT Legislative Assembly
Civic Square, London Circuit
CANBERRA ACT 2601

Dear Mr Speaker

I am pleased to forward to you a Performance Audit Report titled '**Management of Trust Moneys and Other Non-Public Moneys**', conducted under the authority contained in the *Auditor-General Act 1996*.

I would appreciate if you could arrange for the tabling of the Report in the Legislative Assembly pursuant to Section 17(4) of the *Auditor-General Act 1996*.

Yours sincerely

Tu Pham
Auditor-General
6 June 2006

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LIST OF ABBREVIATIONS

ACT	Australian Capital Territory
ACTPLA	ACT Planning and Land Authority
CIT	Canberra Institute of Technology
DUS	Department of Urban Services
JACS	Department of Justice and Community Safety
GSO	Government Solicitor Office
Treasury	Department of Treasury

1. REPORT SUMMARY AND AUDIT OPINION

INTRODUCTION

1.1 This report presents the results of a performance audit that reviewed the efficiency and effectiveness of management of trust moneys and other non-public moneys (third party moneys) across ACT Government agencies. A particular focus was to ascertain whether administering agencies complied with relevant legislation and guidelines issued by the Government.

BACKGROUND

1.2 A trust exists when one party (the trustee) holds assets for the benefit of another (the beneficiary), or for charitable or statutory purposes.

1.3 The Territory receives and manages certain moneys held in trust, and third party moneys. Trust moneys are generally not for the use of, or the benefit of the Territory, and must be handled in accordance with relevant legislation, general trust law, trust deeds or agreements. In the ACT, the relevant Acts that govern the administration of trust moneys are as follows:

- *Financial Management Act 1996* (the FMA).
- *Trustee Act 1925* (the Trustee Act);
- *Public Trustee Act 1985* (the Public Trustee Act); and
- *Unclaimed Money Act 1950* (the Unclaimed Money Act).

1.4 The Territory reported \$208 million being held in trust as at 30 June 2005 (\$230 million for 2004).¹

1.5 The size and complexity of trusts within the ACT public sector vary from highly structured to the more cursory. Examples of trusts that are highly structured are those given status as statutory bodies under the enabling legislation and the FMA. An example is the ACT Public Cemeteries Authority, which manages three cemeteries perpetual trusts. These trusts prepare financial statements and annual reports and accountability is therefore at a high level.

1.6 There are also trusts established by legislation. The Rental Bond Trust Fund is an example of this type of trust. Finally, there are trusts operating without legislative obligations, for example the Health Ethics Committee Trust, which appear to have evolved by necessity as part of an agency's activities. Most of the trusts reported by Territory agencies are 'managed trusts' for which the agencies only

¹ ACT Consolidated Financial Statements for the year ended 30 June 2005 (Note No. 39).

perform a custodial role, for example ACT Health's Private Practice Funds. These trusts are disclosed by way of notes to the agencies' financial statements.

1.7 As trust accounts or moneys require an agency to handle a third party's cash or property, they are a high-risk activity. The less stringent the legislative requirements for accountability, the higher the risk. 'Managed trusts' appear to be the highest risk. This is because managed trusts create additional fiduciary responsibilities for the agency to act impartially and for the benefit of another person or entity.

AUDIT OBJECTIVES

1.8 The objective of the audit was to provide an independent opinion to the Legislative Assembly on whether the trust moneys and other non-public (third party) moneys held by agencies are:

- managed in accordance with relevant legal requirements;
- accounted for accurately and transparently and in accordance with better practices; and
- managed to adequately protect the rights of beneficiaries.

AUDIT APPROACH AND FOCUS

1.9 This performance audit was conducted under the authority contained in the *Auditor-General Act 1996*.

1.10 The ACT Government agencies reviewed for this audit were:

- Department of Justice and Community Safety;
- ACT Health;
- Department of Urban Services;
- ACT Planning and Land Authority;
- Canberra Institute of Technology; and
- Public Trustee for the ACT.

1.11 The audit focused on compliance with legislation, policies and procedures. Any departures from the legislative or policy framework were analysed and reported so that improvements can be made in the future. The audit did not involve the evaluation of the legislative or policy framework underpinning management and practices of public trust moneys in the Territory.

1.12 As the audit was primarily concerned with 'managed trusts', the audit did not cover the operations of the Public Trustee for the ACT in respect of its trustee and related services provided to the community, which are not 'managed trusts'. The

audit primarily focused on the activities associated with the Public Trustee's role and responsibilities for investment of trust moneys held by Territory agencies.

1.13 Appendix A provides further details regarding the audit criteria, approach, and methodology.

AUDIT OPINION

1.14 The audit opinions, formed against the audit objectives, are set out below:

- Overall, most of the audited Territory agencies have managed trust moneys in accordance with relevant legal and administrative requirements. Also, most agencies have satisfactorily fulfilled their responsibility to invest trust moneys prudently in accordance with the legislation.
- Most agencies have put in place adequate controls and procedures to ensure trust accounting records are accurate and transparent. However, Audit noted that some agencies did not correctly classify some of their third party moneys as trust moneys. Consequently, these moneys were not managed, accounted for, and reported in accordance with their proper legal status.
- The management of trust moneys can be improved through:
 - > amendment to the *Financial Management Act 1996* to apply the definition and management of trust moneys to Territory authorities;
 - > provision of comprehensive policy and guidelines by Treasury to ensure agencies comply with relevant legislative and administrative requirements in the management of trust moneys and in accordance with better practice; and
 - > provision of clear guidelines by agencies to staff in trust administration. Agencies need to develop policies and/or procedures on trust moneys that, amongst other things, incorporate consideration of the need to seek legal advice on the status of moneys, before consenting to be trustee.

KEY FINDINGS

1.15 The audit opinions are supported by the following key findings:

Legal Status of Reported Trusts

- The provisions in the *Financial Management Act 1996* (FMA), in relation to the definition and management of Territory trust moneys do not apply to Territory authorities. As a result, these entities are not required to adhere to the same legislative framework in the management of trust moneys. This may create inconsistent and less effective practice in trust management across the ACT public sector.

- All of the audited agencies had the legislative authority to accept and manage trust moneys.
- Most of the third party moneys held in trust reported by the audited agencies constituted either legal trusts or trust moneys as defined in the FMA.
- Canberra Institute of Technology may have not classified some of its third party moneys as trust moneys in accordance with general trust law. As a result, these third party moneys may not have been managed, accounted for and reported in accordance with their proper legal status.
- To be consistent with a legal opinion obtained by InTACT, InTACT would need to recognise moneys deposited by Territory authorities for fortnightly salary payment of their employees as trust moneys.

Accountability and Administrative Framework

- Generally, agencies have adequate controls in place to ensure trust transactions are conducted in accordance with the FMA and relevant legislation.
- Guidance papers issued by the Department of Treasury to assist departments to understand and comply with the FMA in the management of trust moneys and unclaimed moneys are only relevant to the departments. Further policy papers may be useful to provide guidance to all Territory agencies, including Territory authorities, in the classification and management of legal trusts and trust moneys.
- Not all of the audited agencies have issued agency-wide policies and procedures in relation to the management of trust moneys. The instructions provided in the agencies' Chief Executive Financial Instructions are either very brief or inadequate.
- Agencies have generally complied with ACT Government policy in reporting their trust moneys and assets in their annual financial statements. However, ACT Planning and Land Authority (ACTPLA) did not disclose the security bonds (\$3.1 million) and the unconditional bank undertakings (\$6.3 million) collected from lessees and developers at the time of the audit.

Investment of Trust Moneys

- Most of the audited agencies have complied with the requirement in the FMA to invest their trust moneys with the Public Trustee.
- The security bonds held by ACTPLA and moneys in the Health Ethics Committee Fund maintained by ACT Health were not invested with the Public Trustee.

- Surplus funds held in the Department of Justice and Community Safety’s trust account were not invested with the Public Trustee on a regular basis. As a result, the Department has not fully complied with the Treasurer’s instruction in the investment of trust moneys.

RECOMMENDATIONS AND RESPONSE TO THE REPORT

1.16 The audit made eight recommendations to address the audit findings detailed in this report.

1.17 In accordance with section 18 of the *Auditor-General Act 1996*, a final draft of this report was provided to the Chief Executive of the Department of Treasury and to each of the agencies that were audited. The overall responses from the Chief Executives are shown below.

Response from the Chief Executive of Department of Justice and Community Safety (JACS):

“The Department appreciates the guidance provided by your staff during the audit process. I support all of the recommendations made in the Report. Agencies operating trust accounts across government would benefit from a consistent Whole-of-Government approach to the classification and management of trust money.

I note that the Report found that surplus funds in this agency’s trust account were not invested with the Public Trustee on a regular basis. In response to this finding, I have directed that processes be improved to ensure that surplus funds held in the departmental trust account be reviewed each month and invested with the Public Trustee on a regular basis.”

Response from the Chief Executive of Department of Urban Services (DUS):

“I support the overall findings of the audit and have no specific comments to provide on the recommendations contained in the Report.”

Response from the Public Trustee:

“The Report highlighted that the Treasurer has delegated the responsibility to invest, as a trustee, to relevant officers of the Public Trustee and for investment purposes, current policy is that departmental trust moneys can only be invested by the Public Trustee. The Report also noted that the Public Trustee has complied with the ‘Prudent Person Principles’ in undertaking that function.

The Public Trustee appropriately has no authority to ensure that trust moneys be invested with the Public Trustee. In the absence of any such authority, I support any recommendations that you may make in respect to agencies that fail their obligations and responsibilities in this respect.”

1.18 Agencies also provided responses to each recommendation, as shown below.

Recommendation 1 (Chapter 2)

The Department of Treasury should consider amendments to the FMA to extend the application of the current legislative requirements for trust moneys to Territory authorities.

Agencies' Response:

JACS, ACT Health, DUS, ACTPLA, and Public Trustee: Agreed.

Treasury: Not Agreed

“Territory authorities have enabling legislation formulated to address specific operating needs, including, if necessary, any issues relating to the management of trust moneys e.g. Public Trustee Act 1985. It is not considered that inclusion of more general trust provisions in the Financial Management Act 1996 (FMA) would be beneficial for Territory authorities as the more general provisions of the FMA could result in conflicts with the more specific provisions included in other related legislation.

Treasury is not aware of any other Australian jurisdictions including its main financial legislation trust requirements for authorities. Treasury is not aware of any problems having arisen as a result of trust requirements not being included in the FMA for authorities.”

CIT: Not Agreed.

“CIT does not believe that amendments to the FMA to extend the application of departmental trust moneys to include Territory authorities would improve trust management across the ACT public sector. CIT position is that general law principles for managing trust moneys are sufficient and increased regulation would result in additional administrative overheads, which are unnecessary.”

Audit Office's further comment:

Audit considers that amendment to the FMA to apply the trust provisions to Territory authorities would not cause unnecessary administrative burdens to authorities. Rather the amendment would allow authorities to achieve consistent and more effective management of their trust moneys. For example, under the general trust law for management of trust moneys, the authority would be required to maintain a separate bank account for each trust fund and could not mix the trust money with other trust moneys for investment purposes, unless authorised to do otherwise by law or the trust instrument. However, the current provisions in the FMA allow departments to more efficiently maintain at least one trust banking account for all trust moneys and invest all trust moneys with the Public Trustee.

Recommendation 2 (Chapter 3)

Where uncertainty exists under the FMA, agencies should seek legal advice to ensure that the third party moneys held by agencies are classified, accounted for, and reported correctly.

Agencies' Response:

JACS, ACT Health, DUS, CIT, and Public Trustee: Agreed.

ACTPLA: Agreed.

“Legal advice has been sought by the Authority, and will be acted upon accordingly.”

Recommendation 3 (Chapter 4)

The Department of Treasury should issue policies and guidance to assist agencies, in particular the Territory authorities, in the classification and management of trust money.

Agencies' Response:

JACS, ACT Health, DUS, CIT, and Public Trustee: Agreed.

ACTPLA: Agreed.

“The Department of Treasury should issue policies and guidelines to assist agencies in interpreting the requirements of the FMA. Ambiguity surrounding the need to invest surplus funds with the Public Trustee should be clarified.”

Treasury: Not Agreed.

“Various types of trust moneys are held across the Territory. The differing nature of the trust moneys requires application of procedures specific to those circumstances. Where a general requirement may exist across trusts held, e.g. management of unclaimed moneys, then Treasury provides instruction and guidance. A Treasury Memorandum was recently issued regarding management of unclaimed moneys.

Treasury has also issued Model Financial Reports for both departments and authorities. The Model Financial Reports include both example disclosure for the financial statements plus several paragraphs of commentary regarding accounting requirements for trust moneys.

It should be noted that the referred guidance issued by the New Zealand Treasury regarding trust moneys only applies to agencies and is not

applicable to authorities or government companies. Similarly, it is not considered appropriate to issue overarching general guidance regarding management of trust moneys to authorities as any guidance provided needs to be consistent with requirements for the specific trust moneys managed by the authority.”

Recommendation 4 (Chapter 4)

Agencies should issue agency-specific policies and guidelines to assist staff in administering trust moneys and property. The policies and guidelines should:

- a) clearly define legislative requirements and the trustee’s obligations; and
- b) include a requirement for the agency to conduct an assessment of the financial management risks (particularly regarding administration and accountability) in accepting and managing trust moneys and property.

Agencies’ Response:

JACS, ACT Health, DUS, ACTPLA, CIT, and Public Trustee: Agreed.

Recommendation 5 (Chapter 4)

ACT Health should improve the current ‘third party moneys’ disclosure in its notes to the financial statements regarding the Private Practice Hospital Account.

ACT Health Response: Agreed.

Recommendation 6 (Chapter 4)

ACT Planning and Land Authority should ensure security bonds and the deeds of unconditional bank undertakings received from lessees and developers are appropriately disclosed in its financial statements.

ACTPLA Response: Agreed.

Recommendation 7 (Chapter 4)

The Canberra Institute of Technology should improve its disclosure of ‘third party moneys’ in its notes to the financial statements.

CIT Response: Agreed in part.

“CIT will review, and if applicable improve, its disclosure of ‘third party moneys’ in the notes to the financial statements upon receipt of advice from the ACT Government Solicitor.”

Recommendation 8 (Chapter 5)

Agencies should regularly review their trust accounts and ensure that any moneys held in their trust account that may not be required for immediate use are invested with the Public Trustee.

Agencies' Response:

JACS, DUS, ACTPLA, and Public Trustee: Agreed.

ACT Health: Agreed.

“The Health Ethics Trust bank account is an interest bearing account and earns a rate of interest commensurate with that being earned by the Public Trustee’s investment. Following the discussions with your Office during the audit, the Ethics moneys are now invested through the Public Trustee Office.”

Treasury: Agreed.

“Treasury agrees that prudent management of trust funds would result in surplus trust funds being invested with the Pubic trustee. However, there is not considered to be any ambiguity in the FMA in regard to the investment of trust funds. Section 53 of the FMA requires that when trust moneys are to be invested, the only investment option available is through the Public Trustee. The FMA does not have a requirement for investment action to occur for trust moneys, but rather specifies an appropriate investment process when a decision is made to invest trust moneys.”

2. LEGISLATIVE FRAMEWORK FOR TRUST MONEYS

INTRODUCTION

2.1 This chapter outlines the legislative framework for Territory agencies to accept and manage trust moneys.

KEY FINDINGS

- The provisions in the *Financial Management Act 1996* (FMA), in relation to the definition and management of Territory trust moneys do not apply to Territory authorities. As a result, these entities are not required to adhere to the same legislative framework in the management of trust moneys. This may create inconsistent and less effective management practice in trust management across the ACT public sector.

DEFINITION OF A LEGAL TRUST

2.2 A trust may be broadly defined as the relationship that arises when a person, a ‘trustee’, holds a legal or an equitable interest in property under a personal obligation, annexed to that property, which requires the trustee to deal with it for the benefit of a specific person, group of people or organisation known as the beneficiary, or for some object permitted by law.²

2.3 Essentially, a trust involves ownership between two different people or groups:

- the beneficial owner (‘the beneficiary’) has the beneficial aspects of property ownership; and
- the equitable owner (‘the trustee’) has legal title, and is entrusted with the task of ensuring the property is maintained, preserved and applied for those having beneficial interests.

2.4 A trust may be created expressly by a person (a ‘settlor’ or ‘testator’),³ or by operation of law. Trusts may also be created for other reasons such as the furtherance of charitable or non-charitable purposes.

² Western Australia Law Reform Commission, ‘Trusts and the Administration of Estates - Part V Trustees’ Power of Investment’, 1984 and Philip H Pettit 1984, *Equity and the Law of Trusts*, 5th Edn, Butterworths London, chapter 2.

³ A person who creates a trust is called either a ‘settlor’ or ‘testator’ depending on whether the trust is created and commences to operate during the person’s lifetime or whether it is created by will and therefore operates from the person’s death.

2.5 Some trusts are created with the benefit of legal and other advice. In such cases they will usually be created by a formal written document, either a deed or a will, which may confer on the trustee broader powers of investment than those provided by the Trustee Act.

2.6 In other cases the trust may not be created with such care or knowledge or may be created by law without a written instrument at all. In these circumstances, a trustee may find that the only powers of investment he or she has are those presently contained in the Trustee Act. These may or may not be adequate depending on such circumstances as the duration and purpose of the trust.

Essential requirements of a trust

2.7 Certain requirements must be met before a valid trust is created. These essential criteria are outlined in Table 2.1.

Table 2.1: Essential requirements of a trust

Trustee	For a trust to be operating, there must be a trustee who has control of the trust property.
Property	There must be property held ‘in trust’. This property may be real or personal.
Beneficiary	There must a beneficiary, or beneficiaries, for those benefit the trust is created, or alternatively, a lawful purpose or object, the achievement of which is the concern of the trust.
Obligation	There must be an obligation binding on the trustee to deal with the property for the benefit of the beneficiary (beneficiaries), or a purpose recognised by law.

2.8 In addition to the above requirements, some specific certainties must be present in order for a trust to be valid, including:⁴

- certainty of words – words must be used that when taken as a whole can be construed as imperative;
- certainty of subject – a declaration of trust by will, deed or implied by acts or conduct or by circumstances taken as a whole, must clearly spell out what property is to be bound by the terms of the trust; and
- certainty of objects – the trust must specify the beneficiary or the object (the persons or entities) to which the trust property is to be applied.

2.9 As the consequences of creating a trust are far reaching (in the establishment of rights and responsibilities in others), the law requires that absolute certainty exists that a trust has, in fact, been created. Where there is doubt regarding any of the ‘three certainties’, the Court may rule that the purported trust is altogether void, or that different results may be determined.

⁴ Philip H Pettit 1984, Equity and the Law of Trusts, 5th Edn, Butterworths London, p38.

TRUST MONEY FOR THE PURPOSE OF THE FMA

Definition of trust money in the FMA

2.10 The framework for financial management in the ACT Government is legislated in the FMA. Territory agencies are required to adhere to the FMA in management of their financial matters, including trust moneys.

2.11 The FMA has provisions dealing specifically with trust money, and it defines trust money as follows:

- (a) money deposited with the Territory pending the completion of a transaction or the determination of a dispute and that may become repayable to the depositor or payable to the Territory or anyone else; or
- (b) all money that is paid into a territory court for possible repayment to the payee or a third party because of any Act, order, instruction or authority; or
- (c) money that belongs to or is owing to any person and is collected by the Territory because of an arrangement between the Territory and that person; or
- (d) unclaimed money that is owing to or belongs to anyone and is deposited with the Territory; or
- (e) money that is paid to the Territory in trust for any other lawful purpose including interest on trust money.

2.12 Advice received from the ACT Government Solicitor's Office (GSO) indicates that the FMA 'trust money' definition covers matters that might not constitute a trust on general principles of trust law. Money received by the Territory that falls within the meaning of any of the paragraphs (a) to (d) above may not ordinarily be seen as a 'legal trust', but must be administered in accordance with the FMA. It is only in relation to paragraph (e) of the FMA definition that the general principles and requirements based on trust law should be referred to in deciding whether money is 'trust money'.

Application of the FMA

2.13 Part 7 of the FMA governs the Territory's administration of trust moneys. All administrative units (departments) are required to administer their trust moneys in accordance with the provisions of Part 7 of the FMA.

2.14 A reference to the Territory in Part 7 does not include a Territory authority⁵ or a Territory-owned corporation (TOC).

⁵ A 'Territory authority' means 'a body corporate established by an Act, but does not include a body declared under section 3B not to be a Territory authority'. The ACT Emergency Services Authority and ACTPLA are declared not to be Territory authorities for the purposes of Part 8 of the FMA.

2.15 Part 8 of the FMA deals specifically with the financial arrangements of Territory authorities. There are no specific provisions relating to trust accounts or how trust moneys may be dealt with by a Territory authority. This silence does not have the effect of prohibiting a Territory authority from operating a trust banking account.

2.16 According to the GSO, Territory authorities can operate a trust account, provided that:⁶

- the trust banking account complies with section 55 of the FMA, which deals with provisions for Territory authorities' banking accounts;
- there is no restriction for the Territory authority, under its establishing legislation (the particular legislation under which a Territory authority is established), from holding trust money or operating a trust account;
- the Territory authority has complied with all relevant banking arrangements provisions; and
- the operation of a trust account and the holding of trust money is 'necessary and convenient' to exercise of the authority's functions under the establishing legislation (refer section 196 of the *Legislation Act 2001*).

2.17 However, when considered in the context of other provisions of the FMA, it becomes apparent that Territory authorities and Territory-owned corporations (TOCs)⁷ are not part of the 'Territory' and are therefore not caught by the provisions concerning the administration of trust money.

2.18 Territory authorities and Territory-owned corporations are, however, required to apply the general trust law for the management of trusts. This dichotomy has the potential to create inconsistent practice across the ACT public sector entities and possibly ineffective management of trusts.

2.19 To ensure consistent and effective management of all public sector trust moneys and in line with better practice, Audit considers Treasury should review the administrative complications of this legal structure. It may be appropriate to amend the provisions in the FMA in relation to the definition and management of trust moneys to also apply to Territory authorities.

2.20 Currently, Territory authorities would need a suitable administrative framework for the management of trust moneys in accordance with general trust law. For example, under general trust law, it is required to have a separate bank account for each trust fund. Further, mixing trust moneys with other trust moneys for banking and/or investment purposes would not be allowed unless authorised to do otherwise by law or the trust instrument. Audit believes that amending the trust provisions in the FMA to apply to all Territory authorities would assist the authorities to achieve consistent and more effective management of their trust moneys.

⁶ Extract of advice from the GSO on 18 August 2004.

⁷ TOC is required to comply with the *Territory-owned Act 1990* and the FMA does not apply to TOC.

Recommendation 1

The Department of Treasury should consider amendments to the FMA to extend the application of the current legislative requirements for trust moneys to Territory authorities.

CONCLUSION

2.21 Part 7 of the FMA governs the Territory's administration of trust moneys. The general principles concerning the identification and treatment of trust moneys in accordance with general trust law are of less relevance to the departments.

2.22 The provisions in the FMA relating to trust management do not apply to Territory authorities and TOCs. Therefore, these entities are required to comply with other legislation, such as the Trustee Act, and the common law, if they are acting as trustees in the normal legal sense.

2.23 As the FMA does not apply to all Territory agencies, this has created uncertainty in the classification and administration of trust moneys by the departments and the authorities as illustrated in the subsequent chapter.

3. MANAGEMENT OF TRUST MONEYS

INTRODUCTION

3.1 This chapter assesses the legal status of trust moneys or third party moneys held by Territory agencies; and considers whether 'trusts' are properly classified in accordance with general trust law and/or the FMA.

KEY FINDINGS

- All of the audited agencies had the legislative authority to accept and manage trust money.
- Most of the third party moneys held in trust reported by the audited agencies constituted either legal trusts or trust moneys as defined in the FMA.
- Canberra Institute of Technology may have not classified some of its third party moneys as trust moneys in accordance with general trust law. As a result, these third party moneys may not have been managed, accounted for and reported in accordance with their proper legal status.
- To be consistent with a legal opinion obtained by InTACT, InTACT would need to recognise moneys deposited by Territory authorities for fortnightly salary payment of their employees as trust moneys.

BACKGROUND

Trust moneys reported by Territory agencies

3.2 The Territory managed \$208 million of third party moneys 'held in trust' as reported in the notes to its Consolidated Financial Statements for 2004-2005.

3.3 The five audited agencies (excluding Public Trustee) reported a total of 24 major funds, comprising balances totalling \$67.1 million (or 32% of total Territory's trust funds), as moneys held in trust in their annual financial statements for the year ended 30 June 2005. The Public Trustee is responsible for the investment of trust moneys held by Territory agencies (Government Trust Moneys). The Government Trust Moneys held by Public Trustee as at 30 June 2005 amounted to \$45.9 million.

3.4 Tables 3.1 and 3.2 summarise the closing balances of moneys held in trust as at 30 June 2005 by major Territory agencies and the audited agencies respectively.

Table 3.1: Closing balances of third party moneys held in trust by Territory agencies

Agencies	Total balance of moneys held in trust as at 30 June 2005 (\$ million)
Public Trustee (Common Fund)	119
Department of Justice and Community Safety	51
Construction Industry and Cleaning Industry Long Services Leave Boards	16
ACT Health	14
ACT Public Cemeteries Board	4
Department of Urban Services	2
Other	2
TOTAL	208
Source: Territory Consolidated Financial Statements 2004-05 (Note 39).	

Table 3.2: Closing balances of moneys held in trust by audited agencies

Agencies	Number of reported trust funds	Total moneys held in trust as at 30 June 2005 (\$ million)
Department of Justice and Community Safety	10	50.4
ACT Health	6	13.5
Department of Urban Services	1	2.3
ACT Planning & Land Authority	1	0.5
Canberra Institute of Technology (a)	6	0.4
TOTAL	24	67.1
Source: Agencies' audited financial statements 2004-05. (a) CIT reported \$0.5m third party moneys in its audited financial statements as at 31 December 2005.		

LEGAL STATUS OF REPORTED TRUSTS

Assessment of legal status of reported trust moneys

3.5 To comment on whether trust moneys were being managed appropriately, it was essential for Audit to first ensure that 'the moneys held in trust' being selected for detailed examination were trusts in a legal sense, or trust moneys as defined in the FMA. The legal status of 'the moneys held in trust' by the departments, including

JACS, ACT Health, DUS and ACTPLA, was primarily assessed based on the definition of 'trust money' in the FMA.⁸

3.6 For trust moneys held by a Territory authority, for example the CIT, Audit reviewed whether the establishing legislation allowed the authority to operate and manage a legal trust account.

3.7 Where there was any uncertainty about the legal status of agencies' moneys 'held in trust', Audit requested that the relevant agency seek legal advice from the GSO.

3.8 Audit also examined some other accounts or funds held by the agencies to determine whether these accounts or funds should be classified as trusts or otherwise.

Department of Justice and Community Safety (JACS)

3.9 More than ten major trust funds were reported by JACS in its 2004-2005 financial statements. Audit selected three major trusts for detailed testing (see Table 3.3). These trust funds represented 84% of total reported trust funds held by JACS for the year ended 30 June 2005.

3.10 Audit noted that these managed trust accounts were established in accordance with the relevant legislation and therefore constituted trust moneys as defined in the FMA.

3.11 The relevant legislation also specifies how the interest received from the trust account may be used. For example, interest received from the investment of the Rental Bonds Trust can be used for the operating expenses of administering the Act pursuant to section 28 of the *Residential Tenancies Act 1997*. Other than those purposes specified in section 163 of the *Agents Act 2003*, interest received from the trust account of the Occupational Registration Fund and the Consumer Compensation Fund are allowed to fund the cost of administering the *Agents Act 2003* and the Consumer and Trader Tribunal.

⁸ ACTPLA is defined as a department (administrative unit) in accordance with section 3B of the FMA.

Table 3.3: JACS reported trust funds

Name of trust fund	Applicable legislation	Nature of trust	Balance at 30/6/2005 (\$ million)	Classification of trust
Rental Bonds Trust	<i>Residential Tenancies Act 1997</i>	The Trust was established in accordance with section 27 of the Act to collect the rental bonds lodged by either the lessor or tenant at the commencement of a residential tenancy.	26.2	FMA
Occupational Registration Fund	<i>Agents Act 2003</i>	This accumulated fund, was established under Part 11 of the Act (section 162), and comprises the interest from agents' trust accounts (mainly from real estate agents) and agent licence and registration fees (including real estate, employment and travel agents).	14.1	FMA
Consumer Compensation Fund	<i>Agents Act 2003</i>	The trust fund was established under Division 10.1 of the Act (section 144) to pay for compensation claimed by a person who suffers financial loss due to negligence caused by a licensed agent. The amount of the compensation fund is determined by the Minister pursuant to section 162(2) of the Act.	2.2	FMA
TOTAL			42.5	
Source: Agency's audited financial statements 2004-2005 (Note 33).				

ACT Health

3.12 Audit reviewed all trust moneys and third party moneys held in trust reported by ACT Health in its 2004-2005 financial statements, except the Mental Health Trust Account (which had a balance of \$6,000 at 30 June 2005). Table 3.4 summarises the nature and balances of the trust funds managed by ACT Health that were subject to Audit's testing.

Table 3.4: ACT Health reported trust funds

Name of trust fund	Applicable legislation	Nature of trust	Balance at 30/6/2005 (\$ million)	Classification of trust
Health Professional Registration Boards Fund	<i>Health Professionals Act 2004</i> and another nine repealed acts, e.g. the <i>Pharmacy Act 1931</i> . ⁹	Eleven Health Professional Registration Boards are responsible for regulating the health professions. Section 33 of the <i>Health Professionals Act</i> allows the Boards to operate at least one bank account. ACT Health maintains a departmental trust banking account. All moneys received by the Boards from registration fees are used to fund the cost of administering the Boards.	1.9	FMA
Health Ethics Committee Trust	Not applicable	A departmental trust banking account was established in 1997 to facilitate the collection of a levy from submissions of applications for approval of research. Moneys collected are used by the Ethics Committee to fund its resource development and educational activities.	0.3	FMA
TOTAL			2.1	

Source: Agency's audited financial statements 2004-2005 (Note No 39).

3.13 Audit considers that the Health Professional Registration Boards Fund (the Professional Registration Fund) and the Health Ethics Committee Trust are 'trust moneys' within the FMA's 'trust money' definition, which include 'money that belongs to or is owing to any person and is collected by the Territory because of an agreement between the Territory and that person'.

3.14 Audit noted the legislation governing the operations of the Professional Registration Fund (*Health Professionals Act 2004*) does not specify that the Fund be operated as a trust account, or specify how the moneys in the Fund can be spent since section 33 of the *Health Professionals Act 2004* generally states that the Boards can decide how to disburse the moneys in the Fund, unlike similar trust funds (for example the Rental Bonds Trust held by JACS). Although Audit considers the Fund falls within the definition of 'trust money' in the FMA, this is by no means clear. Notwithstanding the guidance available, classification of trust moneys is not always straightforward. Given that the legal status of the Fund has an effect on management

⁹ Part 15 of the *Health Professionals Act 2004* specifies the transitional provisions of the repealed Acts, which will expire two years after 7 July 2005.

and accountability requirements, Audit considers the Department should seek legal advice to determine the nature of the funds.

3.15 Audit understands that the Professional Registration Fund and Health Ethics Committee Trust, which have been operated by the Department for many years, have not been subject to internal audit review in the recent years. Without any notable management review, the Department missed the opportunity, when the *Health Professionals Act 2004* was introduced on 23 February 2006 to replace various Acts in the management of the Professional Registration Fund, to review the status of these funds to ensure that they are correctly treated as trust moneys, and managed in accordance with relevant legislation.

3.16 ACT Health also manages funds ‘held in trust’ relating to the activities of Salaried Specialists and Visiting Medical Officers (the Medical Professions). Table 3.5 outlines the nature and balances of these funds at 30 June 2005.

Table 3.5: ACT Health reported trust funds

Name of trust fund	Applicable legislation	Nature of trust	Balance at 30/6/2005 (\$ million)	Classification of trust
Private Practice Election or Official Account	Private Practice Agreements with Medical Professions	The Medical Professions are allowed to have private practices pursuant to section 244 of the <i>Public Sector Management Act 1994</i> . ACT Health has entered into different agreements with various Medical Profession groups to remunerate these medical professions in lieu of other payment to which the Medical Professions might otherwise have been entitled from their private practices. Moneys collected by ACT Health on behalf of the Medical Professions from their private practices are either deposited in the Private Practice Election or Official Account. Individual Medical Professions will be reimbursed with additional income from the Election or Official Account in accordance with the terms and conditions specified in their individual agreement.	1.2	FMA

Name of trust fund	Applicable legislation	Nature of trust	Balance at 30/6/2005 (\$ million)	Classification of trust
Private Practice Hospital Account	As above	The Medical Professions may donate their income standing to their credit in the Election / Official Account to the Hospital Account. Also, any funds remaining in the Official Account at the end of the financial year are treated as donations by the Medical Professions to the Hospital Account. Interest received on the funds in the Hospital Account is only used to fund medical staff for specific purposes approved by the Private Practice Administrative Committee, such as professional development, conference and seminars, and medical research projects.	10.1	Third Party Money <u>not</u> held in trust but managed by ACT Health as an agent for the Medical Professions
TOTAL			11.3	
Source: Agency's audited financial statements 2004-2005 (Note No 39).				

3.17 A legal opinion obtained by ACT Health indicated that:¹⁰

- moneys held in the Official Account are trust moneys for purposes of the FMA;
- moneys paid into the Hospital Account are more likely to be public moneys under the FMA;
- the Territory is contractually bound to ensure that the Hospital Account is accounted for separately from other public moneys and is used only in accordance with the private practice agreements; and
- the Medical Professions may be entitled to take legal action against the Territory if the Territory fails to comply with the above obligations.

3.18 Although the legal opinion suggested that moneys held in the Hospital Account may be public moneys and the Territory therefore would be able to treat the moneys as Territory moneys, there are restrictions on the Territory's use of the funds held. In accordance with the existing private practice agreements, the funds held in the Hospital Account must be used for specific purposes.

3.19 All expenditure from the Hospital Account must be approved by a majority of the Private Practice Administrative Committee, which comprises three elected Medical Professions and a nominee of ACT Health administration.

¹⁰ Based on advice from the GSO, dated 4 June 2004.

3.20 Although moneys held in the Hospital Account do not generally satisfy the essential requirements as a legal trust or the definition of ‘trust money’ in the FMA, Audit considers that it would also be restrictive for the Department to recognise the funds in the Hospital Account as Territory moneys. This is because it is unlikely that the Department has ‘control’ over the funds so that the Department has the capacity to benefit from the funds in the pursuit of their objective and to deny or regulate the access of others to that benefit.¹¹

3.21 In view of the above, Audit considers that it is not unreasonable for the Department to report the funds held in the Hospital Account as third party money in the notes to the financial statements. However, it may be confusing to refer to these funds as ‘held in trust’ or in a ‘trustee capacity’ when, in a legal sense, a binding trust or ‘trust money’ as defined in the FMA does not exist. This will be further discussed in chapter 4.

Department of Urban Services (DUS)

3.22 DUS maintains one departmental banking trust account to hold moneys collected on behalf of third parties, primarily for the National Roads and Motorists Association and the Commonwealth. The closing balance of the trust account was \$2.3 million at 30 June 2005.

3.23 Audit considers that moneys collected on behalf of other parties under arrangements are ‘trust moneys’ within paragraph (c) of the FMA’s ‘trust money’ definition.

ACT Planning and Land Authority (ACTPLA)

3.24 ACTPLA reported in its 2004-2005 financial statements (Note 27) that it held moneys to pay outstanding warranty claims resulting from the collapse of HIH Insurance with total balance of \$0.5 million as at 30 June 2005. As the funds will be transferred back to the Territory at the end of the 2005-2006 financial year, no assessment of the legal status of the funds was made.

3.25 ACTPLA also maintained a departmental trust banking account to hold the deposits collected from the lessees and developers as the security bonds. Security bonds are held in relation to the specified works of construction projects that must be completed by the developers before a compliance certificate can be issued. ACTPLA also holds deeds of unconditional undertakings, issued by lessees and developers banks or other financial institutions, which are lodged with ACTPLA in lieu of cash security bonds. The security bonds or the bank undertakings are released upon satisfactory completion of the specified works. ACTPLA advised that interest received from the departmental trust banking account is treated as the Authority’s revenue.

¹¹ ‘Control of an asset’, as defined in Australian Accounting Standard 29 ‘Financial Reporting by Government Departments’, means the capacity of the entity to benefit from the asset in the pursuit of the entity’s objective and to deny or regulate the access of others to that benefit.

3.26 As at November 2005, total security bonds and unconditional bank undertakings held by ACTPLA amounted to \$3.1 million and \$6.3 million respectively. These amounts have not been reported in ACTPLA's financial statements since its establishment in 2003-2004.

3.27 ACTPLA sought a legal opinion regarding the status of these funds, which suggested that:¹²

- a security deposit for works required under a Crown lease or deed of development is trust money as defined in the FMA;
- a deed of unconditional bank undertaking is not 'trust money' as the definition of 'trust money' applies only to 'money';
- the lessee or developer is entitled to any interest that has accrued in relation to their security deposits, upon repayment of a security deposit to the lessee or developer; and
- ACTPLA is responsible for any reporting that is required in relation to security deposits it holds.

Canberra Institute of Technology (CIT)

3.28 CIT was established by the *Canberra Institute of Technology Act 1987* (the CIT Act) and is defined as a Territory authority in accordance with section 54 of the FMA. Section 9 of the CIT Act outlines the functions and powers of the Institute, including the power of 'accepting gifts, grants, devises and bequests, whether on trust or otherwise, and acting as trustee of property vested in it on trust'.¹³ Further, section 58 of the CIT Act requires the Institute to pay all trust moneys it receives into an account maintained under section 57 of the FMA,¹⁴ and manage and invest the trust money and trust property in accordance with terms of the trust and its powers and duties as trustee.

3.29 In view of the above, the CIT has the legislative authority to operate a trust account or hold trust money, as well as to act as a trustee. However, CIT does not have to comply with the FMA in the identification and administration of trust money.

3.30 CIT is required to prepare and report its annual financial statements by the end of December each year. In Note 33 to its financial statements at 31 December 2005, CIT disclosed six major categories of third party moneys with total value of \$0.4 million.

3.31 Audit noted that these third party moneys, which comprised more than 40 projects, may have not been classified and treated as 'trusts' or 'moneys held in trust'. Instead CIT advised that it holds these funds as an agent for the third parties.

¹² Based on advice from the GSO dated 1 May 2006.

¹³ Section 9(d) of the CIT Act.

¹⁴ Section 57 of the FMA allows an authority to open one or more banking accounts for the purposes of the authority and must at all times keep at least one banking account.

However, Audit reviewed a number of the projects and noted that some project funds are, in legal sense or in substance, ‘trust-like funds’ or ‘managed trusts’. Audit considered that the funds held in the following major projects selected for testing could be defined as ‘trust moneys’:

- student accommodation bonds;
- contractors’ deposits; and
- overseas student health cover funds.

3.32 Although there was no trust deed or agreement for these projects, moneys held in these projects could constitute ‘trust moneys’ because of the existence of a trustee-beneficiary relationship. Further, these project funds meet the essential criteria and certainties for being classified as the valid trusts. For example, the student accommodation bonds are cash deposits (the property) held in trust by the CIT (a trustee), which has the obligation binding on the Institute to deal with the bond moneys for the benefit of the beneficiaries (the students who rent the CIT’s residential property). Upon termination of the tenancy agreement, CIT is required to repay the bond moneys back to the students. Other project funds administered by the CIT are of similar nature as the student accommodation bonds.

3.33 CIT has sought a legal opinion from the GSO on the status of its third party moneys. At the time of preparing this Report, CIT has not yet received the advice.

Recommendation 2

Where uncertainty exists under the FMA, agencies should seek legal advice to ensure that the third party moneys held by agencies are classified, accounted for, and reported correctly.

TRUST SURVEY

3.34 Audit conducted a survey of 36 Territory agencies and the results from the agencies’ responses were analysed. Audit noted that several accounts or transactions disclosed in the agencies’ responses, which currently are not treated as trust moneys, could possibly constitute legal trusts or trust moneys as defined in the FMA. In view of this uncertainty, Audit suggested that the agencies seek legal advice on the status of these accounts or transactions.

3.35 For instance, one of the accounts in question is the Whole-of-Government Salaries/Payroll Account (the Payroll Account) managed by InTACT, which provides a bureau service for payroll processing on behalf of the Government. InTACT, being a department for the purpose of the FMA, reported the Payroll Account as third party moneys in its note to the financial statements prior to 2004-2005.

3.36 During 2004-2005, InTACT changed its accounting treatment of the Payroll Account to be a ‘holding/clearing’ account for salary money of all salaried public servants of the ACT Government following advice received from Treasury. The fortnightly salary payment of agencies’ employees (amounting to \$43 million) is

deposited by agencies in the Payroll Account on Tuesday every fortnight. On the following day (Wednesday), InTACT deposits each employee's fortnightly salary into the employee's nominated bank account.

3.37 InTACT reported the balance of the Payroll Account (\$1.2 million) as Cash and the same amount as Other Liabilities as at 30 June 2005.¹⁵

3.38 InTACT sought legal advice as to whether moneys held in the Payroll Account should be treated as non-trust money. The legal advice indicated that:¹⁶

- the salary moneys a Territory authority or a Territory-owned corporation deposits into the Payroll Account for fortnightly salary payments of its employees fall within the definition of 'trust money'. Therefore, that money must be treated as trust money (by InTACT) in accordance with Part 7 of the FMA; and
- the salary moneys that the Territory, represented by agencies which are neither territory authorities nor territory-owned corporations, deposits into the Payroll Account for fortnightly salary payment of its employees are not 'trust money' under the FMA.

3.39 To be consistent with the above legal opinion, InTACT would need to recognise moneys deposited by the Territory authorities as trust moneys.¹⁷ InTACT advised that the separation of the fortnightly salary payments between departments and authorities would cause unnecessary administrative burden, and would be an impractical approach in processing the Whole-of-Government payroll transactions. The average fortnightly payments deposited by authorities in the Payroll Account total about \$6.1 million.

3.40 Audit acknowledges that a requirement for InTACT to hold Territory authorities' payroll moneys as trust moneys would complicate a simple and practical administrative practice currently adopted by InTACT in processing the fortnightly salary payments through the Payroll Account. It would be impractical and ineffective to establish a separate trust account to hold and process authorities' moneys separately. Audit believes that the administrative dilemma that InTACT currently encounters would be resolved by amendments to the FMA as suggested in Recommendation 1 previously.

3.41 Treasury commented that:

"The Report states that moneys received by InTACT from Territory authorities for fortnightly salary payments would need to be recognised as trust moneys to be consistent with the legal advice received by InTACT. Treasury does not agree with this opinion, and is concerned it could provide an incorrect impression that there may have some deficiencies in the management of these moneys."

¹⁵ InTACT's 2004-05 financial statements refer Notes 17, 26 and 33.

¹⁶ Based on advice from the GSO dated 21 April 2006.

¹⁷ The Payroll Account does not include any money from Territory-owned corporations.

InTACT receives money each fortnight from Territory authorities through the salaries clearing account for the payment of related salaries. The provisions of the FMA for trusts are designed to address moneys held by a Territory entity, received from a third party external to the Territory. Moneys held by InTACT in the salary clearing account all relate to moneys from Territory entities.

The FMA was written envisaging that agencies would hold only public moneys or trust moneys. As the definition of ‘public moneys’ excludes money held relating to a Territory authority, then by default, a narrow interpretation might conclude that the moneys received by InTACT from Territory authorities could only be trust moneys. However, these moneys are not true trust moneys, but are rather moneys belonging to another Territory entity.

Consequently, there is no breach of the FMA provisions. The management of payroll by InTACT on behalf of Territory authorities is a practical administrative process. Even if it was agreed that there was a technical breach of the FMA, it is considered there would not be any benefit in attempting to apply the trust provisions to this situation.”

CLASSIFICATION OF TRUST MONEYS

3.42 Individual agencies are responsible for complying with the Territory’s financial management framework legislated in the FMA. Agencies should ensure that an adequate accountability and governance framework and related controls are in place to manage public and other non-public moneys, including trust moneys.

3.43 When any fund or money held by an agency is not correctly classified as a legal trust or trust money as defined in the FMA, the agency has not fulfilled its fiduciary obligations and other legislative obligations as a trustee. A trustee is bound by the applicable trustee legislation of the Territory (the Trustee Act) and by the requirements of general trust law. There are a number of requirements of general trust law that must be considered by a trustee and the details are outlined in the following chapter.

3.44 Similarly, when a department has not classified and managed moneys as trusts or moneys held in trust correctly, the department has also not complied with the provisions of the FMA to manage the trust money. Part 7 of the FMA requires that all trust money managed by departments should:

- be accounted for separately from public money,
- be banked in a separate bank account;
- not mix with other non-trust money; and
- be invested with the Public Trustee.

3.45 In addition, an agency that has not correctly classified and managed moneys as ‘trusts’ or ‘moneys held in trust’ may not have appropriately and correctly reported details of trust moneys in its annual financial statements, in accordance with Territory’s reporting requirements.

CONCLUSION

3.46 Overall, Audit found that all audited agencies had the legislative authority to accept and manage trust money. Most of the third party moneys held in trust and reported by the audited agencies constituted either legal trusts or trust moneys as defined in the FMA.

3.47 However, the Canberra Institute of Technology and InTACT have not classified some of its third party moneys as trust moneys in accordance with trust law or the FMA. As a result, these third party moneys have not been managed, accounted for and reported in accordance with their proper legal status.

4. ACCOUNTABILITY FRAMEWORK FOR MANAGING TRUSTS

INTRODUCTION

4.1 This chapter discusses whether agencies' current accountability and governance arrangements encourage efficient and effective management of trust accounts and moneys held in trust.

KEY FINDINGS

- Generally, agencies have adequate controls in place to ensure trust transactions are conducted in accordance with the FMA and relevant legislation.
- Guidance papers issued by the Department of Treasury to assist departments to understand and comply with the FMA in the management of trust moneys and unclaimed moneys are only relevant to the departments. Further policy papers may be useful to provide guidance to all Territory agencies, including Territory authorities, in the classification and management of legal trusts and trust moneys.
- Not all of the audited agencies have issued agency-wide policies and procedures in relation to the management of trust moneys. The instructions provided in the agencies' Chief Executive Financial Instructions are either very brief or inadequate.
- Agencies had generally complied with ACT Government policy in reporting their trust moneys and assets in their annual financial statements. However, ACTPLA did not disclose the security bonds (\$3.1 million) and the unconditional bank undertakings (\$6.3 million) collected from lessees and developers at the time of the audit.

EFFECTIVE ADMINISTRATIVE FRAMEWORK FOR MANAGING TRUST MONEYS

4.2 For the effective management of trust moneys and achievement of better practice, agencies require a robust and effective accountability and administrative framework. The framework for the management of trust moneys consists of the following major elements:

- policies and procedures;
- internal control environment and systems; and
- accounting and reporting.

4.3 Trust moneys must also be managed with regard to the general principles of trust law. These principles impose a fiduciary relationship that requires trustees to act in the best interests of the beneficiary and not to use their position to make unauthorised profits. Trustees have an obligation to act honestly, responsibly and to retain the confidence of the beneficiary. They cannot, therefore, act to their own advantage. Also, trustees have to exercise their power and duties with due care. The fiduciary relationship gives a special duty to the trustee not to use or abuse the trust property for the benefit of anyone other than the beneficiary.

4.4 Because of these responsibilities, the administration and management of trust accounts or moneys held in trust may be considered a high-risk activity for Territory agencies.

4.5 The fiduciary and personal nature of trusteeship is further discussed at Appendix B.

ASSESSMENT OF AGENCIES' ADMINISTRATIVE FRAMEWORK

Policies and procedures

ACT Government policy

4.6 Treasury has the functional responsibility to administer the FMA and is responsible for providing policies and guidance to Territory agencies in the understanding of and compliance with the FMA. Audit noted that Treasury has provided a FMA Guidance Paper explaining the application of Part 7 of the FMA in relation to Trust Money.¹⁸ Treasury has also recently issued a Finance Memorandum in respect of the requirements of the unclaimed trust moneys provision in the FMA.¹⁹ These policies and guidance are only applicable to the departments (i.e. they do not apply to Territory authorities and TOCs).

4.7 To assist agencies in complying with the financial reporting policies for third party moneys (trust moneys), Treasury has issued the Model Financial Reports for Department and Territory Authority.

4.8 The Accounting Policy Manual (APM) issued by Treasury before 1 July 2005 provided brief guidance on trust accounts.²⁰ The APM advised agencies to consider the substance of the trust over the form and noted that simply labelling moneys as 'held in trust' does not mean that those moneys are trust moneys. As from July 2005, Treasury has replaced the APM by a number of accounting policy papers. However, there is currently no specific policy paper on trust moneys.

¹⁸ Explanatory Notes of Part 7 of the FMA issued by Treasury in September 2004 refer Treasury website on www.treasury.act.gov.au

¹⁹ Treasury Finance Memo 2006/07, titled 'Unclaimed Trust Moneys under section 53(A, B, and C) of the FMA' issued in April 2006.

²⁰ Paragraph 4.21 of the ACT Accounting Policy Manual issued before July 2005.

4.9 Due to a lack of applicable policy and guidelines to the Territory authorities, authorities have adopted inconsistent practices in the management of trust moneys.

4.10 Currently, there is no applicable Australian Equivalent to International Financial Reporting Standard (AIFRS) regarding trusts. The accounting for and reporting of trusts is therefore subject to each individual jurisdiction's own legislative and reporting requirements. In the absence of applicable AIFRS, Audit believes that agencies will benefit from further policy and guidance papers from Treasury on the classification, and management of trusts (including legal trusts and trust moneys as defined in the FMA).

4.11 The policy paper could include specific guidance to the authorities to define and manage their trust moneys. Audit noted that other jurisdictions (for example, the Treasury of New Zealand)²¹ have issued instructions to assist agencies in classifying, accounting, managing, and reporting trust money.

Recommendation 3

The Department of Treasury should issue policies and guidance to assist agencies, in particular the Territory authorities, in the classification and management of trust money.

Agencies' internal policies and procedures

4.12 At the agency level, the existence of appropriate, up-to-date policies and procedures is a key element for reinforcing an effective control framework and promoting sound management practices. To enable a consistent approach to the management of trust moneys, it is essential to have comprehensive policies and procedures regarding the treatment and recording of trust moneys. These documented policies and procedures should be effectively communicated to relevant staff.

4.13 Inquiries were carried out in all of the audited agencies to ascertain whether there were internal policies and guidelines to assist staff in administering trust moneys. Audit noted that the Registrar-General's Office and the Office of Fair Trading of JACS have issued internal policies and procedures on administration of the Rental Bonds Trust and the Occupational Registration Fund and Consumer Compensation Fund respectively. ACT Health has policies and a procedures manual to manage the Canberra Hospital's Private Practice Funds (which was issued in March 2002). However, not all agencies have issued agency-wide policies and procedures in respect of management of trust moneys.

4.14 Audit reviewed each agency's Chief Executive Financial Instructions (CEFIs) and found that detailed accounting policy and procedures in relation to trust money were not included in the agency's CEFIs. Most agencies only briefly mention,

²¹ New Zealand Treasury Instructions 2005. The definition of 'Trust Money' in section 66 of the *Public Finance Act 1989* (NZ) is similar to the definition in the FMA (ACT).

under the Cash Management Section of the CEFIs, a requirement to safeguard moneys held in trust or under trust arrangements.

4.15 ACT Health commented that:

“While it is correct that ACT Health does not have a Chief Executive Financial Instructions (CEFI) specifically for Trust Moneys, the CEFI on Cash Management applies to both public moneys and private moneys held under trust arrangements. This CEFI covers the aspects of cash management including bank accounts, receipts, deposits, electronic funds transfers and cheques.”

4.16 In view of the complex and high-risk nature of trust management, agencies should develop agency-wide policies and procedures to assist staff in understanding their legislative requirements and trustees’ responsibilities, and the day-to-day administration of trusts. These policies and procedures should incorporate a requirement for the agency to conduct a considered assessment, prior to accepting a position as trustee, regarding whether the agency has the legislative authority to act as trustee, and whether the relevant risks associated with administering and accounting for trust moneys and property can be adequately managed.

Recommendation 4

Agencies should issue agency-specific policies and guidelines to assist staff in administering trust moneys and property. The policies and guidelines should:

- a) clearly define legislative requirements and the trustee’s obligations; and
- b) include a requirement for the agency to conduct an assessment of the financial management risks (particularly regarding administration and accountability) in accepting and managing trust moneys and property.

Internal control environment and systems

4.17 It is important that agencies have effective management controls and practices to ensure the validity, accuracy, and completeness of receipts and payment transactions for trust moneys. In addition to the same controls that apply to the management of any other moneys (public moneys), agencies acting as trustees must have specific controls operating to ensure that the primary duties of trustees and the specific provisions of the FMA relating to trust moneys are fulfilled.

4.18 Audit expected agencies to have specific controls in place to enable the obligations of trustees to be effectively discharged. As a minimum, these would include controls for:

- separation of trust moneys from other moneys;
- clear segregation of duties for administration and reporting;
- receipting and disbursement of trust moneys;
- regular reconciliation of trust accounts with accounting records;
- maintenance of appropriate accounting records; and

- meeting legislative requirements in reporting and managing unclaimed trust moneys.

Audit findings and comments

4.19 Audit found that all audited agencies' trust moneys have been accounted for separately and maintained in a separate trust banking account with an authorised deposit-taking institution in accordance with sections 49 and 52 of the FMA.

4.20 A clear segregation of duties among staff undertaking the trust account function was noted. Agencies have applied the same controls that apply to operate their non-trust moneys to manage their trust moneys.

4.21 Audit found that, generally, the administration of trust moneys in terms of the accuracy and validity of receipts and payment of transactions was sound.

4.22 However, several instances were noted in one agency where disbursement of trust moneys was not authorised by appropriate delegated officers. Audit understands that these exceptions occurred because staff considered that trust transactions would be less risky compared to the management of public moneys. Audit considers this could be caused by a lack of understanding by staff regarding trust management, partly because of the lack of documented policy and procedures within the agency. This illustrates the importance of having documented procedures for the administration of trust, as recommended above.

4.23 Audit reviewed reconciliations of trust banking accounts conducted by audited agencies, with satisfactory results. All agencies regularly reconcile their bank accounts, subject the reconciliation to review by a second officer and agree the total of the ledger with the total of individual account balances.

4.24 The accounting records maintained by audited agencies in their Financial Systems were found to be adequate and correct.

4.25 Unclaimed moneys are defined in section 53A of the FMA as trust moneys held for a period of not less than six years after becoming payable with no approved claim made on the moneys held for this period. For departmental trust moneys, departments are required to comply with the provisions of the FMA to report and manage the unclaimed moneys.²²

4.26 Audit noted that not all of the audited agencies would have unclaimed moneys since most of the trust funds managed by the agencies were primarily used to fund the operations of the specific legislation and the relevant committee or tribunal. The Rental Bonds Trust managed by JACS had reported unclaimed moneys in

²² Section 53(A, B and C) of the FMA. Reference is also made to Treasury's Finance Memorandum 2006/07 issued in April 2006.

January 2006 and the Department followed the applicable procedures in reporting and managing the unclaimed moneys.

Accounting and reporting

4.27 As mentioned previously, Treasury has issued guidance to agencies in respect of the financial reporting requirements for third party moneys and property held in trust, where agencies do not have control of those moneys and assets. The Government Policy, as stated in the annual Model Financial Reports, requires agencies to include a note to the financial statements providing information of third party moneys held.²³ The information should include moneys held at the end of the reporting period and the purpose for which the moneys are held.

4.28 When a trust has assets and liabilities (other than cash), the financial report should include an accrual presentation of that trust's activities during the year and the financial position at the reporting date. If a trust has no assets or liabilities apart from cash, the financial report need only provide cash disclosure of the trust's activities during the year, and the financial position at the reporting date.

4.29 Audit reviewed the disclosure of trust moneys and property reported by the audited agencies and considered that the disclosure in the notes to the financial statements was adequate.

4.30 However, as discussed in chapter 3, Audit found that:

- the Private Practice Hospital Account reported by ACT Health as moneys 'held in trust' may be confusing since the legal advice suggested that moneys held in the Account are more likely to be the public moneys under the FMA. Audit noted that, based on the provisions of the existing agreements with the Medical Professions, ACT Health manages the fund as an agent for the Medical Professions, not in a 'trustee capacity'.²⁴ Audit considers that the current disclosure in the note to the financial statements can be improved by not referring to the funds in the Hospital Account as 'held in trust';
- ACTPLA did not disclose the security bonds and the deeds of unconditional bank undertakings in its financial statements. Total security bonds and unconditional bank undertakings amounted to \$3.1 million and \$6.3 million respectively in November 2005. Legal advice indicates that a deed of unconditional undertakings is not 'money' and cannot be defined as 'trust money' under the FMA. However, for financial reporting purposes and in line with better practices, the details of the deeds of unconditional undertakings are still required to be disclosed in the notes to the financial statements;

²³ Refer Note 43 and Note 42 of 2006 Model Financial Report for department and authority respectively on Treasury website www.treasury.act.gov.au

²⁴ There are similarities and considerable differences between an agent and a trustee as discussed in Philip H Pettit 1984, *Equity and the Law of Trusts*, 5th Edn, Butterworths London, p 24-25.

- some of the CIT's third party moneys reported in the notes to the financial statements may have not been reported correctly as moneys 'held in trust'; and
- the salary moneys deposited by the Territory authorities held by InTACT were not classified and reported as 'trust moneys'.

4.31 Audit has recommended earlier in the Report that agencies should, where there is uncertainty regarding the legal status of third part moneys, obtain legal advice to ensure that those moneys are classified, accounted for, and reported correctly. Based on Audit's analysis, there is also a need for ACTPLA, CIT, and ACT Health to review and improve the disclosure of third party moneys.

CONCLUSION

4.32 Generally, agencies had adequate controls in place to ensure that trust transactions were conducted accurately and correctly. However, Audit considers that the management of trust moneys and property could be improved with further policies and guidance issued by Treasury. Also, agencies should issue written policy and procedural documents to provide clear guidance to staff in their strategic management and day-to-day administration of trust moneys.

Recommendation 5

ACT Health should improve the current 'third party moneys' disclosure in its notes to the financial statements regarding the Private Practice Hospital Account.

Recommendation 6

ACT Planning and Land Authority should ensure security bonds and the deeds of unconditional bank undertakings received from lessees and developers are appropriately disclosed in its financial statements.

Recommendation 7

The Canberra Institute of Technology should improve its disclosure of 'third party moneys' in its notes to the financial statements.

5. INVESTMENT OF TRUST MONEYS

INTRODUCTION

5.1 This chapter discusses whether audited agencies have fulfilled their trustees' obligations to invest their trust moneys in accordance with relevant statutory and legislative requirements, such as trust agreements, the Trustee Act, and the provisions of the FMA.

KEY FINDINGS

- Most of the audited agencies have complied with the requirement in the FMA to invest their trust moneys with the Public Trustee.
- The security bonds held by ACTPLA and moneys in the Health Ethics Committee Fund maintained by ACT Health were not invested with the Public Trustee.
- Surplus funds held in the Department of Justice and Community Safety's trust account were not invested with the Public Trustee on a regular basis. As a result, the Department has not fully complied with the Treasurer's instruction in the investment of trust moneys.

INVESTMENT OF TRUST MONEYS

Duty to invest

5.2 Under trust law, trustees have a duty to invest trust funds. In exercising the power of investment, a trustee must exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons. The same principles also apply to the investment of the Territory's trust moneys in accordance with section 53 of the FMA.

Power of trustee to invest

5.3 The powers of a trustee come from the provisions in the trust instrument creating the trust that is binding on the trustee and requires the obtaining of a consent or approval or compliance with the direction for trust investment. When there is no specific direction provided in the trust instrument, or the trust instrument does not exclude the trustee's powers, the trustee may do such things as are necessary for the execution of the trust in accordance with the Trustee Act.

5.4 A trustee may, unless expressly forbidden by the instrument creating the trust:

- invest trust funds in any form of investment; and

- at any time, vary an investment or realise an investment of trust funds, and reinvest an amount resulting from the realisation in any form of investment.

5.5 However, in accordance with the Trustee Act, any law imposing a duty on a trustee exercising a power of investment continues to apply except so far as it is inconsistent with the Trustee Act or any other Act, or the instrument creating the trust.²⁵

5.6 A duty as mentioned above includes the following:²⁶

- a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust; and
- a duty to invest trust funds in investments that are not speculative and hazardous; and
- a duty to act impartially towards beneficiaries and between different classes of beneficiaries; and
- a duty to obtain advice.

5.7 If a trustee is under a duty to obtain advice, the reasonable cost of obtain the advice is payable out of the trust funds.

Prudent Person Principles

5.8 Traditionally, trustees were given limited investment powers that would allow them to invest with reference to a Statutory List of Investments. A ‘Prudent Person Rule’ for investing trust funds has now been introduced in all jurisdictions to replace the old legislation with a more liberal and less restricted power of investment. Trustees now have a greater freedom to determine appropriate trust investments but greater responsibilities in doing so.

5.9 When acting as trustees, Territory agencies are required to invest their trust moneys in accordance with the ‘Prudent Person Principles’. They must exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.²⁷ The intention of this provision is to protect the ‘other persons’ (the beneficiaries) whose money is invested.

5.10 The ‘Prudent Person Principles’ are discussed further at Appendix B.

Requirements for investment of public trust moneys

5.11 In addition to complying with the provisions contained in the instrument or agreement creating the trust, Territory departments must comply with Part 7 of the

²⁵ Section 14B(1) of the Trustee Act.

²⁶ Section 14B(2) of the Trustee Act.

²⁷ Section 14A(2)(b) of the Trustee Act.

FMA in managing their trust moneys.²⁸ Departments are also required to invest their trust moneys in accordance with the ‘Prudent Person Principles’.

5.12 Departments must invest trust money in accordance with section 53 of the FMA, which states:

The Treasurer may invest trust money as if the Treasurer were a trustee under the *Trustee Act 1925*.

5.13 The Treasurer delegates this responsibility to relevant officers within the Public Trustee. For investment purposes, the current policy is that departmental trust moneys can only be invested by the Public Trustee.²⁹

AUDIT FINDINGS AND COMMENTS

5.14 Audit reviewed several trust funds managed by the Public Trustee on behalf of departments and the Workers’ Compensation Supplementation Fund (WCSF).³⁰

5.15 When considering the investment policy for each trust under administration, Audit noted that the Public Trustee is required to have regard to the ‘Prudent Person Principles’ involving the nature of the trust, the circumstances of the beneficiaries and the appropriateness of investments. For complex trusts, such as the WCSF, an independent advisor was engaged to provide advice on the appropriate investment strategies and structures.

5.16 The Public Trustee advised that, in view of the nature of the Government trust moneys and specific instructions from agencies, a conservative approach is adopted in the investment of funds to ensure steady returns with no risk to the capital. Funds are primarily invested in the cash managed accounts.

5.17 Audit considered that the Public Trustee has complied with the ‘Prudent Person Principles’ in managing Government trust funds.

Trustee’s obligation to invest

5.18 Audit noted, however, that not all departmental trust moneys were invested with the Public Trustee in accordance with the FMA. As discussed in chapter 3, security bonds held in a separate trust banking account by ACTPLA (\$3.1 million) were not invested with the Public Trustee pursuant to section 53 of the FMA. Audit also found that the moneys held in ACT Health’s Health Ethics Committee Trust

²⁸ Part 7 of the FMA is only relevant to Territory departments based on the legal advices of 22 March 2006, and 21 April 2006 respectively.

²⁹ Explanatory Notes of Part 7 of the FMA issued by Treasury in September 2004, page 8.

³⁰ ACT Workers’ Compensation Supplementation Fund is established pursuant to the *Workers’ Compensation Supplementation Fund Act 1980*. The Fund accepts responsibility for the payment of workers’ compensation and settlements in the event that an insurance company fails or is unable to meet its liabilities and to achieve the best possible return from the liquidation process.

Account with current balance of \$0.25 million were not invested with the Public Trustee.

5.19 Audit was advised that some agencies considered the requirement to invest trust moneys was ‘discretionary’ because the word ‘may’ in section 53 of the FMA means that agencies do not have to invest their trust money, and if invested, there is no obligation to invest with the Public Trustee.

5.20 Audit understands that section 53 of the FMA requires all Territory trust moneys be invested with the Public Trustee unless expressly forbidden by the trust instrument or agreement. Under the Trustee Act, trustees may have discretionary power not to invest if the trust instrument or agreement expressly says so. The investment requirement of the Territory’s trust moneys with the Public Trustee was specified in Treasury’s Finance Memorandum in May 2001. The Finance Memorandum 2001/10 titled ‘Investment of Trust Moneys’ issued in May 2001, which is still current, states that:

6. In order to comply with the new legislative requirements, the Public Trustee Office for the ACT (PTO) will take over responsibility for the investment of all ACT Government Trust Account moneys, thus centralising this function.

...

8. Each department will continue to maintain trust accounts under part 7 of the FMA and will transfer investment funds to the PTO for investment purposes.

...

13. Agencies are requested to identify all moneys that can be properly regarded as trust account moneys. Agencies should arrange for those trust moneys that are required to be invested, to be paid, on 18 May 2001, to the Department of Justice and Community Safety Trust Investment Account with the Commonwealth Bank for investment by the PTO. The PTO will require details of the trust money transferred for investment including, full name of the trust, details of the draw requirements, frequency of withdrawals, bank account details, purpose of the trust and investment options, if specific under a trust deed.

5.21 In respect of investment of trust money under section 53 of the FMA, the Explained Notes to Part 7 of the FMA issued by Treasury states that:

Section 53 allows the Treasurer (or delegate) to invest trust money as though he were a trustee under the *Trustee Act 1925*.

The Trustee Act requires a trustee investing money on behalf of other persons to “exercise the care and diligence and skill that a prudent person would exercise in managing the affairs of other persons.” The intention of this section is to protect the “other person” whose money is being invested.

In practice

The Treasurer delegates this responsibility to relevant officers within the Office of the Public Trustee.

5.22 In view of confusion by some agencies in the interpretation of section 53 of the FMA, Treasury should issue further guidance and directions on the requirements for investing trust moneys with the Public Trustee.

5.23 In exercising a power to invest, the Treasurer, being a trustee under the Trustee Act, is required to invest trust money in accordance with the 'Prudent Person Principles'. To meet these criteria, the Treasurer has delegated this responsibility to the Public Trustee. As there was no specific direction in the relevant legislation or trust instrument regarding investment of the security bonds held by ACTPLA or the funds held in the Health Ethics Committee Trust maintained by ACTH, the failure of the agencies to invest their trust moneys with the Public Trustee creates a potential breach of section 53 of the FMA.

Effective cash management policy

5.24 Agency's Chief Executive Financial Instructions have cash management policies which outline agency's responsibility to safeguard public moneys and private moneys held under trust arrangements. Generally, sound cash management is the series of processes used by an agency to obtain the maximum benefits from its flows of cash funds. The underlying objective of cash management is having enough cash available as and when it is needed and investing surplus funds to achieve the best possible net return on the agency's cash resources. In managing trust funds, agency should regularly review its cash levels to ensure that any surplus funds (those not required for immediate operational needs) will be invested with the Public Trustee.

5.25 The departmental trust banking account maintained by JACS included trust moneys from various sources, including those collected by the Occupation Registration Fund under the *Agents Act 2003*. The departmental trust account does not include moneys collected by the Office of Rental Bonds, which maintains a separate banking account and transfers any surplus fund to the Public Trustee on a regular basis.

5.26 Audit noted that JACS had maintained a significant balance (\$3.1 million) in its departmental trust account as at 31 March 2006, of which about \$0.8 million related to moneys collected by the Occupation Registration Fund. As at July 2005, the balance of moneys held in the departmental trust account amounted to \$4 million. The Department had made only one investment transaction of \$3.5 million with the Public Trustee since July 2005, in January 2006.

5.27 Audit understood that the decision to invest with the Public Trustee was made on ad-hoc basis, on the basis that there has historically been very little difference in the rate of return obtained from the banking account and the rate of return obtained from the Public Trustee.

5.28 Notwithstanding that there was little material difference in the rate of return from the investment of trust moneys with the bank and the Public Trustee, Audit considers the decision not to invest with the Public Trustee on a regular basis may be in breach of the Treasurer's instruction and the provision of the FMA in relation to the investment of the Territory trust moneys. This decision also suggests that there is a need for the Department to review its cash management policy and practice to ensure surplus funds in the trust account that may not be required for immediate use is invested with the Public Trustee.

Recommendation 8

Agencies should regularly review their trust accounts and ensure that any surplus moneys held in their trust account that may not be required for immediate use be invested with the Public Trustee.

CONCLUSION

5.29 Most of the audited agencies have complied with the Treasurer's direction to invest their trust moneys with the Public Trustee. The investment of the Government trust moneys by the Public Trustee was generally effective. However, there is a need for some agencies to improve their cash management policy and practice to be in line with better practice.

APPENDIX A – AUDIT CRITERIA AND APPROACH

Audit criteria

The following were the main criteria used to guide the conduct of the audit and to enable the objectives of the audit to be achieved:

1. Compliance with relevant legal requirements

- Agencies have the legislative authority to accept and manage trusts.
- The reported trusts are legal trusts and contain the essential elements of a trust.

2. The trust moneys are accounted for accurately and transparently and in accordance with better practice principles.

- Department of Treasury's guidance material should assist agencies in managing their trust moneys in accordance with better practice principles.
- Agencies have effective internal controls and an administrative framework for the effective management of trust moneys, including:
 - risk assessment;
 - comprehensive policies and procedures, including procedures to ensure that any other funds held by agencies which may constitute trust moneys in accordance with the FMA have been properly accounted for;
 - effective administrative framework to ensure that the legal responsibilities relating to acting as trustee (the primary duties of trustees) particularly to the duty to invest and the duty not to mix trust moneys;
 - adequate internal control and review procedures to provide assurance that trust moneys are managed in accordance with the trust instrument, trust law and organisational requirements; and
 - accurate and up-to-date accounting records relating to the trust, which should be available for public inspection on request.
- Trust moneys held by agencies have been reported accurately and completely in accordance with the statutory and financial statement reporting requirements.

3. The trust moneys are managed to adequately protect the rights of beneficiaries

- Unclaimed trust moneys have been accounted for in the manner required by the legislation (refer the *Unclaimed Money Act 1950*).
- Agencies have appropriate investment strategies, which are consistent with the ‘Prudent Person Principle’ required under the *Trustee Act 1925*, to invest trust moneys.

Audit approach

The audit approach consisted of:

- reviewing relevant literature and work undertaken on this subject by other jurisdictions with the intention of finding better practices;
- conducting a survey of 36 agencies on the details of the trust accounts or moneys held by the agencies. The responses from the agencies were then collated and analysed, and follow up discussions were held with some agencies;
- identifying those documents that set out the policies and procedures to be followed when assessing trust money activity and processes. This involved identifying the legislative framework and related policy and procedures, researching documents and discussion with the relevant agency staff;
- identifying procedures and controls used to give effect to the legislation and to ensure compliance;
- developing a normative test program covering the management and operations of trust fund or money held in trusts by agencies;
- determining whether all the relevant legislative and administrative requirements, policies and guidelines, including the legal responsibilities of being a trustee, had been adequately fulfilled;
- obtaining legal advice on the legal status of trust moneys;
- briefings, interviews, and correspondence with relevant agency staff; and
- preparation and finalisation of a report to the ACT Legislative Assembly and to specific agencies (as required).

Methodology and sampling

During the preliminary planning stage of the audit, a survey of 36 agencies was conducted. The purpose of the surveys was to collect information regarding the details of all the trust accounts held within each agency and the relevant trust deed/agreement being applied for each trust account.

A representative sample of receipts and expenditure in relation to a number of trust funds held by each agency for the first seven months of 2005-06 was selected for detailed examination using the audit’s test program.

Appendix B – The fiduciary and personal nature of trusteeship

THE PRIMARY DUTIES OF TRUSTEES

Fundamental to the concept of all forms of trusts, is the fiduciary relationship that requires the trustees to act in the best interests of the beneficiary and not to use their position to make unauthorised profits. Trustees have an obligation to act honestly, responsibly and to retain the confidence of the beneficiary. They cannot, therefore, act to their own advantage. Also, trustees have to exercise their power and duties with due care. The fiduciary relationship gives a special duty to the trustee not to use or abuse the trust property for the benefit of anyone other than the beneficiary.

The primary duties of trustees are to:

- (a) acquaint themselves with the terms of the trust, and to get in and protect trust assets;
- (b) obey the terms of the trust;
- (c) not to impeach the validity of the trust instrument or the title of the beneficiaries;
- (d) act impartially between or among the beneficiaries;
- (e) invest trust funds properly;
- (f) keep and render proper accounts and to give accurate and full information when required;
- (g) exercise due care and act diligently;
- (h) not to delegate duties or powers except where delegation is permitted by the trust deeds or by statute;
- (i) pay beneficiary correctly in accordance with the terms of the trust;
- (j) act without remuneration, except where the trust instrument expressly provides for the payment of remuneration; and
- (k) not to profit from the trust.

PRUDENT PERSON PRINCIPLES

Traditionally, trustees were given limited investment powers that would allow them to invest with reference to a Statutory List of Investments. A ‘Prudent Person Rule’ for investing trust funds has now been introduced in all jurisdictions to replace the old legislation with a more liberal and less restricted power of investment. Trustees now have a greater freedom to determine appropriate trust investments but greater responsibilities in doing so.

The fifteen ‘Prudent Person Principles’ that a trustee shall have regard to when creating or reviewing investment portfolio are:³¹

- (a) the purposes of the trust and the needs and circumstances of the beneficiaries;
- (b) the desirability of diversifying trust investment;
- (c) the nature of, and the risk associated with, existing trust investment and other trust property;
- (d) the need to maintain the real value of the capital or income of the trust;
- (e) the risk of capital or income loss or depreciation;
- (f) the potential for capital appreciation;
- (g) the likely income return and the timing of income return;
- (h) the length of the term of the proposed investment;
- (i) the probable duration of the trust;
- (j) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment;
- (k) the aggregate value of the trust estate;
- (l) the effect of the proposed investment in relation to the tax liability of the trust;
- (m) the likelihood of inflation affecting the value of the proposed investment or other trust property;
- (n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment;
- (o) the results of the review of existing investment.

It should be noted that ‘prudence’ is a test of conduct, and not performance. The Courts will judge a trustee on the basis of the strategy and process that was undertaken rather than the actual performance of the investment.

³¹ Section 14C of the Trustee Act.

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