

Part 51 – Trusts

Table of Contents

General Law.....	[51-0000]
Types of Trusts	
No Trust Deed	
Bare Trust.....	[51-0010]
Deceased Estate.....	[51-0020]
Vesting Order.....	[51-0030]
Resulting Trust.....	[51-0040]
Constructive Trust.....	[51-0050]
Established by Deed	
Discretionary Trust.....	[51-0060]
Unit Trust.....	[51-0070]
Property Trust.....	[51-0080]
Superannuation Fund.....	[51-0090]
Trusts Generally.....	[51-0100]
The Settlor.....	[51-0110]
The Trustee.....	[51-0120]
Trustee Corporation.....	[51-0130]
Trustee of a Settlement.....	[51-0140]
Trustee of a Deceased Trustee.....	[51-0150]
The Settlor as Trustee.....	[51-0160]
Statutory Trustee.....	[51-0170]
Custodian Trustee.....	[51-0180]
Local Government Trustee.....	[51-0190]
The Beneficiary.....	[51-0210]
Trustee's Powers.....	[51-0220]
Pre <i>Trusts Act 1973</i>	[51-0230]
Under the <i>Trusts Act 1973</i>	[51-0240]
Dealings that May Not Come Within the Scope of Trustees' Powers Under the <i>Trusts Act 1973</i>	[51-0245]
Purchase of Land.....	[51-0250]
Sale of Land.....	[51-0260]
Lease of Land.....	[51-0270]
Mortgage of Land	
As Mortgagor.....	[51-0280]
As Mortgagee.....	[51-0290]
Appropriation.....	[51-0300]
Death of Mortgagee Trustee.....	[51-0310]
Surrender of Onerous Lease or Land.....	[51-0320]
Schedule of Trusts.....	[51-0330]
Public Trustee under s 53A of <i>Public Curator Act 1915</i>	[51-0340]
Trustee Company.....	[51-0350]
<i>Associations Incorporation Act 1981</i>	[51-0370]
Legislation.....	[51-1000]
Practice	
Introduction.....	[51-2000]
Legislation Covering Trusts	
Primary.....	[51-2010]
Secondary.....	[51-2020]
Disclosure of Trust	
Transfer.....	[51-2022]
Request to Vest in Trustee under Order Made Under the <i>Trusts Act 1973</i> or Another Act.....	[51-2025]
Execution by an Attorney for an Undisclosed Trustee.....	[51-2027]
Transfer to Trustees.....	[51-2030]
Instrument Required to Record a Transfer to Trustees.....	[51-2040]
Deposit of Trust Document.....	[51-2043]
Vesting in Trustees.....	[51-2046]
Instrument Required to Record Vesting in Trustees.....	[51-2049]
Recording of New Trustees.....	[51-2050]
Instrument Required To Record New Trustee.....	[51-2060]

Retirement of Trustee Without a New Appointment.....	[51-2070]
Death of Sole Surviving Trustee	[51-2080]
Second Trustee Nominated to Take After Death of First	[51-2090]
Appointment by Person Not on Title	[51-2100]
Dealing by Trustee	
Dual Capacity.....	[51-2115]
As Mortgagor	[51-2130]
As Mortgagee	[51-2140]
Trustee Registered Under a Transmission by Death	
¹ Where Death Occurred Before 1 January 1982.....	[51-2150]
Where Death Occurred on or After 1 January 1982.....	[51-2160]
¹ Trust on Deed of Grant.....	[51-2200]
Incorporation of Association	
Change of Name of Incorporated Association.....	[51-2220]
Amalgamation of Two or More Incorporated Associations	[51-2230]
Incorporation of a Body Presently Holding Letters Patent under	
the <i>Religious Educational and Charitable Institutions Act 1861</i>	[51-2240]
Cancellation and Vesting of Property.....	[51-2250]
Property Held on Trust for Incorporated Association Prior to Incorporation.....	[51-2260]
Forms	
General Guide to Completion of Forms	[51-4000]
Guide to Completion of Form 14	
Item 1	[51-4010]
Item 2	[51-4020]
Item 3	[51-4030]
Item 4	[51-4040]
Item 5	[51-4050]
Item 6	[51-4060]
Item 7	[51-4070]
Case Law	
<i>Re Robinson's Trusts</i> [1974] Qd R 243	[51-7000]
Fees	[51-8000]
Cross References and Further Reading	
Notes in text	[51-9050]

Part 51 – Trusts

General Law

[51-0000]

A trust is a legally enforceable arrangement whereby a person (the trustee) holds the legal title in property (the trust property) for the benefit of another person (the beneficiary) or for the advancement of certain purposes. The key feature of any trust is the separation of the legal and beneficial ownership of the trust property. The trustee holds the legal title in the trust property, whilst the beneficiary has the beneficial ownership of the same trust property. In relation to the trust property, the trustee must act for the benefit of the beneficiary or for the specified purpose within the limits set by the rules governing the trust, which may be expressed or implied, and in any event are subject to, and in some cases supplemented by, the provisions of legislation affecting trusts, primarily the *Trusts Act 1973*.

Division 6 of Part 6 of the *Land Title Act 1994* deals with, among other things, the registration or otherwise of trusts in the registry. Broadly, the provisions of the Act attempt to limit the circumstances in which a trustee may be registered, and regulate how the trustee may be registered on the register. Essentially, the Registrar is concerned to ensure that the register shows the legal ownership of an interest in a lot. The Registrar is less concerned to ensure that the beneficial interests are shown, although the Registrar may be concerned that future dealings by the trustee are authorised.

Types of Trusts

No Trust Deed

Bare Trust

[51-0010]

A bare trust will arise where there is a trustee and a beneficiary, but there is no trust instrument setting out the terms of the trust. To ascertain the powers of the trustee, one should look to the *Trusts Act 1973*.

Deceased Estate

[51-0020]

The death of a person creates a trust in which the personal representative (that is, the executor, or if there is no will or no executor able and willing to act, the administrator) is charged with the administration of the deceased estate. In addition to the powers conferred by the *Trusts Act 1973*, additional powers may be given to the trustee by the will.

Vesting Order

[51-0030]

The Supreme Court has power, by virtue of s 82 of the *Trusts Act 1973*, to vest property in a trustee on trusts for specific purposes.

Resulting Trust

[51-0040]

This arises by operation of law where there is an incomplete disposition of the beneficial interest. For example, if property is settled on a trustee for the benefit of a life tenant and then for a remainderman, the legal estate will vest in the trustee with beneficial ownership in the life

tenant and remainderman. But if the remainderman disclaims his entitlement, the trustee will hold the property on a resulting trust for the settlor expectant on the death of the life tenant.

Constructive Trust

[51-0050]

This occurs where a trust is imposed upon a person who has control of property although there has been no actual trust intended by the parties (eg where a stranger has received trust property with knowledge that the trustee has acted improperly).

Established by Deed

Discretionary Trust

[51-0060]

The term ‘discretionary trust’ is applied to many types of trusts which may have varying objects and powers. However, the common element is that the trustee has a discretion to distribute either the income or capital (*corpus*) or both within a defined class of beneficiaries.

Unit Trust

[51-0070]

The beneficiaries of a unit trust (the unitholders) each hold a unit or units in the trust. The number and class of units held by a unitholder determines the extent of the entitlement of the unitholder to income and, on a winding up of the trust, to capital. As a simple example, assume a unit trust with ten unitholders each holding one unit. Each unitholder would be entitled to one-tenth of the income of the trust, and to one-tenth of the capital of the trust on winding up.

Property Trust

[51-0080]

Often the term ‘property trust’ is used to refer to a specialised form of unit trust set up specifically for the acquisition of property. More generally, it may refer to any trust set up to acquire and hold property.

Superannuation Fund

[51-0090]

Superannuation funds are trusts set up and regulated in accordance with Commonwealth legislation, primarily the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Income Tax Assessment Act 1936* (Cth). The trust deed for a superannuation fund prescribes the circumstances in which a benefit is payable to a beneficiary. Generally, the beneficiaries will be the members of the superannuation fund or the next of kin of a deceased member.

Trusts Generally

[51-0100]

The only instruments that may be registered to record trustees are:

- Form 5 or 5A – Transmissions by Death;
- Form 1 – Transfer to Trustees;
- Form 14 – General Request.

The Form 14 may record a transmission by bankruptcy or a vesting that gives effect to an order made under the *Trusts Act 1973* (or another Act).

Generally, there are three parties to any trust instrument. They are the settlor, the trustee and the beneficiary.

The settlor is the person who creates the trust. The trustee is the person in whom the legal estate vests. The beneficiary (also called the *cestui que trust*) is the person for whose benefit the trustee holds the property. The beneficiary holds the beneficial interest in the property.

The Settlor

[51-0110]

Most trust deeds contain a settlor. The settlor must be a competent person. He/she must be under no legal disability:

- (a) as to age (ie he/she must be over 18);
- (b) as to soundness of mind; or
- (c) which would prevent him/her from executing a legal document.

The Trustee

[51-0120]

A trustee likewise must be competent to perform the duties of his/her office and therefore cannot be under legal disability:

- (a) as to age (ie he/she must be over 18);
- (b) soundness of mind; or
- (c) which would prevent him/her from executing a legal document.

Whilst a minor could conceivably be a trustee, he/she would lack the legal capacity to execute any document pursuant to the trust. Generally speaking, any person who is capable of taking and holding a legal estate, and who is not under any disability at law, may act as trustee.

Trustee Corporation

[51-0130]

A trustee corporation, by virtue of the *Trustee Companies Act 1968*, can be a trustee of any kind (including an executor). Examples are the Trust Company Limited, Perpetual Trustees Queensland Limited, National Australia Trustees Ltd and ANZ Executors and Trustee Company Limited, all of whom are authorised under this Act.

The Public Trustee of Queensland is also a trustee corporation by virtue of the *Public Trustee Act 1978* and the definition of 'trustee corporation' in the *Trusts Act 1973*.

Any corporation capable of holding land can be a trustee by virtue of the *Trusts Act 1973*, but cannot be an executor unless it is a trustee company.

Trustee of a Settlement

[51-0140]

The trustee of a settlement (or the tenant for life thereunder, if such settlement was made under the repealed *Settled Land Act 1886*), is a trustee.

Trustee of a Deceased Trustee

[51-0150]

A personal representative under a will, a grant of probate or letters of administration may assume the trusts of a deceased trustee, thereby becoming a trustee in the place of the deceased trustee.

The Settlor as Trustee

[51-0160]

The settlor can appoint himself/herself as trustee (s 110(1) of the *Land Title Act 1994*), although for taxation purposes this is generally not the case. The person having power to appoint a new trustee may appoint himself/herself (s 12(1) of the *Trusts Act 1973*).

Statutory Trustee

[51-0170]

A statutory trustee is created by the *Trusts Act 1973* to cover the circumstances where a person carries out the functions of a trustee as permitted by s 31(3) of the *Trusts Act 1973*, without having actually been appointed by any instrument or any other Act to perform in that capacity. An example of this would be where land is devised to a deceased's widower/widow for his/her life, and then upon his/her death to his/her children, but without the actual appointment of a trustee. In this case, the widower/widow is a statutory trustee in accordance with the *Trusts Act 1973*, s 31(3) of which restricts the exercise of powers to those given by ss 32(1)(d) or 45 unless otherwise sanctioned by the court.

Custodian Trustee

[51-0180]

Custodian trustees were the creation of s 42 of the *Public Curator Act 1915* (since repealed), but have now been extended by s 19 of the *Trusts Act 1973*, which allows any corporation to hold land in Queensland as a custodian trustee.

Section 19(2) of the *Trusts Act 1973* provides that trust property will be vested in the custodian trustee as if such trustee were the sole trustee, but the management of the trust property, and the powers and discretions exercisable by the trustee under the trusts, are vested in managing trustees as fully effectual as if there were no custodian trustee.

A custodian trustee can be appointed either by a Form 1 – Transfer to Trustees by a settlor, by a Form 1– Recording of New Trustees by existing trustees, or by an order of the court. In any case, the custodian trustee must appear in the document and the names of the managing trustees in the Schedule of Trusts or in the body of the appointment.

Any document executed by a custodian trustee must contain the written direction of the managing trustees, or a majority of them (s 19(2)(d) of the *Trusts Act 1973*) and, if they have changed since the custodian trustee's appointment, a copy of the Appointment of New Managing Trustees must be lodged with the document as evidence.

Managing trustees have the power to appoint new managing trustees, but once appointed, a custodian trustee can only have his/her trusteeship terminated, or a new custodian trustee appointed in his/her place, by the court (s 19(3) of the *Trusts Act 1973*). This section is subject to the instrument creating the trust.

Local Government Trustee

[51-0190]

Section 116 of the *Trusts Act 1973* provides that a local government may be appointed a trustee of real or personal property, either as sole trustee or as a trustee with others and may accept and hold trust property for any charitable or public purpose, or for any purpose of recreation or other leisure-time use or occupation. The local government may act in the administration of the trust property for the purpose of and according to the trust, notwithstanding that the purpose is not a function of local government, save where, in the case of an existing trust, a contrary intention appears from the instrument creating the trust.

Section 117 of the *Trusts Act 1973* requires that any land transferred to a local government as a sole transferee, if transferred by way of a Form 1 – Transfer, should be accompanied by a declaration by the transferor/s, or failing them an appropriate employee of the transferee, that the land is not being transferred to the local authority as a sole trustee.

¶[51-0200] deleted

The Beneficiary

[51-0210]

The beneficiary under a trust (also called the *cestui que trust*) is the person for whose benefit the trustee holds the legal estate. The beneficiary can be a minor, an adult, an organisation such as a sporting body or a corporation.

If the beneficiary is a minor, the date of birth should be shown in the Schedule of Trusts.

There can be several beneficiaries at once, either as joint tenants or as tenants in common, but if they are created by separate deeds of settlement, Items in the Form 1 – Transfer to Trustees must identify the trust instruments by name or reference. A trustee may also be one of the beneficiaries, but not the **sole** beneficiary. If he/she is the sole beneficiary, there is no trust, because there is no separation of the legal and equitable interests. If the trustee becomes the sole beneficiary of a trust, then the legal and equitable interests merge, the trust no longer exists, and the beneficiary holds the property absolutely.

The beneficiary does not have an immediate right in relation to the property (except in the case referred to in the preceding paragraph) although he/she may have rights as against the trustee.

Trustee's Powers

[51-0220]

The *Trusts Act 1973* gives wide powers to a trustee in dealing with trust property and whilst, on the face of it, there appears to be little restriction placed upon a trustee in this regard, there are nevertheless certain areas in which a trustee is not as unfettered as would appear on the surface.

The general powers of trustees in Part 4 of the *Trusts Act 1973* are minimum and cannot be reduced or diminished by the trust deed (see s 31 of the *Trusts Act 1973*).

Pre *Trusts Act 1973*

[51-0230]

The Act came into operation on 1 July 1973. Despite the fact that the Act did not operate before this date:

- (a) where a trustee purports to sell land which was 'settled land' before the commencement of the *Trusts Act 1973*, the sale must be consented to by the tenant for life (see *Re Robinson's Trusts* [1974] Qd R 243); and

- (b) where a sole trustee died before the commencement of the *Trusts Act 1973*, a renunciation of the Public Trustee of Queensland in favour of the personal representative of the deceased was required (s 12 of the *Public Trustees and Executors Act 1897* (now repealed)).

Under the *Trusts Act 1973*

[51-0240]

The *Trusts Act 1973* empowers a trustee to:

- sell the trust property or any part thereof (s 32(1)(a));
- exchange the trust property for other property (s 32(1)(b));
- lease the trust property (but not for a term exceeding that stated in s 32(1)(e));
- give an option of renewal of a lease, but only if the aggregate terms of the original and renewed leases do not exceed the maximum term allowed (s 32(3)(a));
- mortgage trust property, but only to raise money for the repair, upkeep, maintenance or renovation of same or for the improvement or development of the property (ss 33(1)(a) and (b) and see the limitation in s 33(1)(b));
- agree to any amendment of such a mortgage (s 33(1)(i));
- take a first mortgage back on selling trust property for the balance of purchase money not exceeding two thirds of the purchase price (s 36);
- ²subdivide land (s 33(1)(e));
- appropriate any part of the property towards satisfaction of any legacy payable (s 33(1)(l));
- surrender onerous leases and, in certain circumstances, surrender onerous land to the Crown (s 38); and
- ²grant easements (s 33(1)(h)).

The general powers given by ss 32 and 33 are the minimum and apply even if lesser powers are expressed in the instrument creating the trust, having regard to the following exceptions:

- (a) If all the beneficiaries, not under a disability, direct the trustee in writing not to exercise a specified power, his/her authority to do so is revoked (s 31(2) of the *Trusts Act 1973*).
- (b) Larger or additional powers can be conferred by a settlor (ss 4(2) and (3) of the *Trusts Act 1973*).
- (c) A statutory trustee must obtain the consent of the court before exercising any of the powers given to a trustee under s 32 of the *Trusts Act 1973*, except those conferred by s 32(1)(d), which relate to the letting of trust property (s 31(3) of the *Trusts Act 1973*).

Dealings that May Not Come Within the Scope of Trustees' Powers Under the *Trusts Act 1973*

[51-0245]

The Registrar of Titles takes a non-intrusive approach to trusts. It is considered it is the responsibility of the trustee and their legal representative to decide that a deed of trust authorises

a dealing which may not come within the scope of the trustee's powers under the *Trust Act* 1973, and inform the Registrar of Titles of such authority.

Where a dealing relies on the trustee's powers in the deed of trust document, rather than authority under the *Trusts Act* 1973, and the dealing is not accompanied by the consent of the beneficiaries or authorising court order, a letter on the trustee's lawyer's letterhead indicating the authority must be deposited with the dealing. The letter must state the clause number being relied upon, and clearly assert that the clause provides authority for the trustee to enter into the transaction.

Once a letter meeting the above requirements has been received and the Registrar is satisfied that the clause could provide authority, no further scrutiny of the deed of trust is undertaken on the part of the Registrar.

The following are some examples of transactions that would not be considered to come within the scope of the trustee's powers under the *Trusts Act* 1973:

- a trustee transferring trust property to themselves in a personal capacity
- a trustee transferring trust property to a person in their personal capacity, where the consideration is a gift or a nominal amount (e.g. \$1)
- a trustee purchasing property held by themselves in a personal capacity
- a request pursuant to a deed of retirement, to remove one of two trustees who are registered proprietors of trust property
- a trustee transferring trust property to themselves as a trustee for another trust
- a trustee granting a lease of trust property for a period of more than 21 years
- a trustee granting a lease of trust property to themselves in a personal capacity
- a trustee being granted a lease by themselves in a personal capacity
- a trustee entering into a mortgage as either mortgagor or mortgagee with themselves in a personal capacity.

Purchase of Land

[51-0250]

Section 21 of the *Trusts Act* 1973 authorises a trustee to invest trust funds in the purchase of land. The purchase would be by way of a Form 1 – Transfer to Trustees with the will, instrument of trust or a Schedule of Trusts.

Sale of Land

[51-0260]

Any transfer by a trustee under ss 31 and 32 of the *Trusts Act* 1973 does **not** need to include, in the operative clause, a statement that it is being made pursuant to these sections. It is accepted that the power is not restricted except as provided in the following paragraphs.

The consent of a life tenant is required to a sale by a trustee, even where the land was 'settled land' before 1 July 1973.

Since the *Succession Act 1981*, which repealed the *Intestacy Act 1877*, any administrator can sell land without the consent of the beneficiaries. A personal representative under letters of administration is deemed to be a trustee by the *Succession Act 1981* and can exercise all the powers of a trustee under the *Trusts Act 1973*.

A trustee **cannot** sell trust land to himself/herself, except in the following circumstances:

- 1 where the trustee is so authorised by the instrument of trust; or
- 2 where the trustee is so authorised by the consent of the court, or
- 3 where all beneficiaries, being *sui juris*, consent in writing.

The Court has the power to appoint a trustee for the purpose of selling property pursuant to s 38 of the *Property Law Act 1974*.

Lease of Land

[51-0270]

Unless a greater term is authorised by the trust instrument, any lease granted by a trustee must not exceed 21 years (s 32(1)(e) of the *Trusts Act 1973*).

Unless authorised by the trust instrument, any lease containing an option to renew must not have an aggregate duration that exceeds the maximum term mentioned above (s 32(3)(a) of the *Trusts Act 1973*). Similarly, any amendment that extends the term must not result in an aggregate that exceeds the maximum allowed.

A lease to a trustee is recorded with a reference to the trust and the instrument of trust must be deposited or exhibited with the lease.

Mortgage of Land

As Mortgagor

[51-0280]

See part 2 – Mortgage, esp ¶[2-0060].

As Mortgagee

[51-0290]

See part 2 – Mortgage, esp ¶[2-0110].

Appropriation

[51-0300]

An appropriation made under s 33(1)(l) of the *Trusts Act 1973* must be accompanied by a statutory declaration from the trustee stating:

- an appropriation has occurred in the course of administering the estate; and
- the provisions of s 33(1)(l) of the *Trusts Act 1973* have been complied with (i.e. all persons interested in the appropriation have been notified); and
- a search of court records reveals no application has been made to the court to vary the appropriation.

An appropriation which is the subject of the service of notices is not effectual until the expiry of one month after service or such extended time as is allowed by the court.

Death of Mortgagee Trustee

[51-0310]

The correct procedure to be followed on the death of a mortgagee who holds as sole trustee as disclosed by the mortgage document is set out in ¶[51-2080].

Surrender of Onerous Lease or Land

[51-0320]

Any surrender of an onerous lease or onerous land must include a statement that it is being done in accordance with s 38 of the *Trusts Act 1973*.

Schedule of Trusts

[51-0330]

It should be noted that the Schedule of Trusts is not an ‘instrument’. The registrable ‘instrument’ is the Form 1 – Transfer to Trustees.

In the case of land to be held under a Form 1 – Transfer to Trustees for any unincorporated body or club, if the Schedule of Trusts sets out the powers given to the trustee without reference to the rules of the club, there is no necessity to lodge a certified copy of such rules. However, if the Schedule of Trusts simply states that the trustee is to hold in accordance with the rules of the club, then a certified copy of the rules should be produced.

Public Trustee under s 53A of *Public Curator Act 1915*

[51-0340]

Both s 53A and s 53B of the *Public Curator Act 1915* have been repealed. However, if any are encountered in the register, the matters set out below will apply.

When the Public Trustee of Queensland is registered as ‘Trustee under s 53A of the *Public Curator Act 1915*’, the Public Trustee is administering the estate in one of the following circumstances:

- (a) the land is devised to a person but the just debts, funeral and testamentary expenses could not be satisfied without recourse to the land; or
- (b) the land is devised to a minor, an alien or a person whose whereabouts are unknown or it is not known whether he/she is alive or dead; or
- (c) having devised the land, the testator then sold it and the purchase price is unpaid.

The Public Trustee may claim transmission as trustee under s 53A on a certificate under s 53B. He/she has power to sell, mortgage or lease the land to discharge any debts or liabilities charged upon the testator’s estate. He/she can also invoke any of the powers of a trustee under the *Trusts Act 1973*.

Trustee Company

[51-0350]

By the *Trustee Companies Act 1968* those companies listed in part 1 of schedule 2 of the Act have been given some of the powers previously reserved solely to the Public Trustee of Queensland, in addition to the powers already exercised by them under their respective Acts.

Individuals may join with a trustee company to apply for a grant of representation or may authorise a trustee company to apply for letters of administration with the will annexed (s 6 of the *Trustee Companies Act 1968*).

Similarly, in intestate estates, an individual entitled to a grant of representation may join with a trustee company to apply for representation, or may authorise the trustee company to apply for representation in its own name (s 7 of the *Trustee Companies Act 1968*).

In any estate where the gross value does not exceed \$100,000 and no person has applied for administration in Queensland, the trustee company may file in the court an election to administer the estate. The trustee company is then deemed to be the executor of the will or administrator of the estate (s 12 of the *Trustee Companies Act 1968*).

Where an administrator dies leaving part of the estate unadministered and the value does not exceed \$100,000, a trustee company may file an election to administer the property left unadministered, in lieu of applying for letters of administration *de bonis non*. It is then deemed the administrator of the estate left unadministered (s 13 of the *Trustee Companies Act 1968*).

Section 20 of the *Trustee Companies Act 1968* permits any executor or administrator with the consent of the court to appoint a trustee company as executor or administrator in his/her place.

Legacies in favour of minors may be paid to a trustee company (s 26 of the *Trustee Companies Act 1968*). Where land is devised to a person and the debts, liabilities, funeral or administration expenses of the testator cannot be satisfied without recourse to the land or where the land is devised to a minor, the trustee company administering the estate is entitled to have transmission entered up to it as 'trustee', and has power to mortgage the land, sell the land at public auction or for the best price obtainable thereafter, or lease the land (s 30 of the *Trustee Companies Act 1968*). Whenever a trustee company is administering an estate, production of a certificate of appointment is all that is required as evidence of its authority (s 39 of the *Trustee Companies Act 1968*).

A trustee company, by s 28 of the *Trustee Companies Act 1968*, has power to sell trust land at public auction, by private contract if not sold after being offered at public auction or with the beneficiaries' consents in writing. It can also purchase land, subdivide land for the purpose of sale, exchange trust property and make appropriations.

In general, the powers in the *Trustee Companies Act 1968* approximate those in the *Public Trustee Act 1978*, and the *Trusts Act 1973* fills in any gaps.

¶[51-0360] deleted

Associations Incorporation Act 1981

[51-0370]

The *Associations Incorporation Act 1981* permits the incorporation of certain associations, provided the requirements of the Act are satisfied. The Act defines an association as an association, society, or body that is formed or carried on for a lawful purpose. It excludes:

- an association with fewer than seven individual members;
- a corporation;
- a partnership within the meaning of the *Partnership Act 1891*;
- an industrial organisation within the meaning of the *Industrial Relations Act 1990*;

- a parents and citizens association formed under the *Education (General Provisions) Act* 1989;
- an association formed or carried on for the purpose of providing financial gain for its members;
- an association which is provided for in a special Act that:
 - incorporates:
 - (a) the association’s governing body; or
 - (b) the trustees holding property for the association; or
 - provides that the association may sue or be sued, or hold property, in the name of the association or an officer of the association; or
 - otherwise specially regulates the affairs of the association;
- an association, the main purpose of which is the holding of property:
 - in which the members have a disposable interest; or
 - that the members have a right to divide between all or some of them; or
 - for use by some or all of its members or among persons claiming through, or nominated by, some or all of its members; or
 - for distribution of that property, or of the income from the property, among some or all of its members or among persons claiming through, or nominated by, some or all of its members; and
- an association which has an object of raising a fund by subscription of its members to make loans to them.

Once an application for incorporation has been granted, a certificate of incorporation is issued by the Chief Executive, Department of Consumer Affairs and the association thereupon becomes a body corporate having the name shown. The association is then able to hold property in its own name.

Legislation

[51-1000]

Application of the *Land Title Act* 1994 to the *Water Act* 2000

Under the provisions of ss 150(1) and 151 of the *Water Act* 2000, subject to the exceptions provided in ss 150(2), 151(1) and (5) of the *Water Act* 2000, the *Land Title Act* 1994 applies to the registration of an interest or dealings for a water allocation on the water allocations register.

Under s 151(3) of the *Water Act* 2000 an interest or dealing mentioned in s 150 may be registered in a way mentioned in the *Land Title Act* 1994 and the Registrar of Water Allocations may exercise a power or perform an obligation of the Registrar of Titles under the *Land Title Act* 1994:

- (a) as if a reference to the Registrar of Titles were a reference to the Registrar appointed under Chapter 2 Part 4 Division 6 of the *Water Act* 2000; and

- (b) as if a reference to the freehold land register were a reference to the water allocations register; and
- (c) as if a reference to freehold land or land were a reference to a water allocation; and
- (d) as if a reference to a lot were a reference to a water allocation; and
- (e) as if a reference to an indefeasible title were a reference to a title; and
- (f) with any other necessary changes.

Practice

Introduction

[51-2000]

Generally, a trust arises when, by virtue of a deed, will or other instrument, the legal owner (the trustee) is bound to hold the property for the benefit of a beneficiary (often for a stated purpose).

Legislation Covering Trusts

Primary

[51-2010]

- *Trusts Act 1973*
- *Land Title Act 1994*
- *Public Trustee Act 1978*
- *Trustee Companies Act 1968*
- *Succession Act 1981*
- *Partnership Act 1891*

Secondary

[51-2020]

- *Local Government Act 1993*
- *Ambulance Service Act 1991*
- *Associations Incorporation Act 1981*
- *The United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942*
- *Returned & Services League of Australia (Queensland Branch) Act 1956*

Disclosure of Trust

Transfer

[51-2022]

It is not compulsory for a trust to be disclosed on the register. However, where a trust is to be disclosed and the transferee recorded on the register in the capacity of trustee, 'as trustee' must appear in Item 5 – Transferee of Form 1 – Transfer and the deed of trust (which could be a schedule of trusts) must be deposited or referred to as being deposited with another instrument.

Where a deed of trust is deposited and 'as trustee' does not appear in Item 5, or where 'as trustee' appears in item 5 but the deed of trust has not been deposited, the dealing will be requisitioned for clarification and amendment.

Where a trust has not previously been disclosed to the land registry and a lodged transfer shows Item 4 – Consideration stating 'pursuant to a deed of retirement and appointment' or 'pursuant to a deed of removal and appointment' but the words 'as trustee' do not appear in item 5 and a deed of trust is not deposited—the transferee will be recorded without reference to the trust capacity.

Request to Vest in Trustee Under Order Made Under the *Trusts Act* 1973 or Another Act

[51-2025]

Section 90 of the *Trusts Act* 1973 states the effect of a vesting order and specifies in subsection (1A) that 'such property shall vest in the persons named as trustees or otherwise as appears from the order'. Consequently, the court order is paramount when determining the capacity in which the property is to be held. The incoming registered owner must appear on title in the capacity specified in the order, e.g. 'as trustee' or 'as statutory trustee for sale'.

If the request specifies the capacity of the incoming registered owner in the same terms as the court order then it is capable of registration, subject to the usual examination procedures.

Execution by an Attorney for an Undisclosed Trustee

[51-2027]

Where an attorney executes a land registry instrument on behalf of a party who appears (from the face of the instrument or accompanying instrument) to be an undisclosed trustee, the power of attorney must be granted by the donor in their capacity as trustee. The dealing must be accompanied by a letter from the party (donor) or their solicitor stating to the effect:

'the instrument is being executed by the attorney under the authority of the donor acting in the donor's capacity as trustee of the undisclosed trust'.

Transfer to Trustees

[51-2030]

For the purpose of registering a trust in the registry, a trust must generally be created in writing. However, in some instances, eg bare trusts, deceased estates and trusts created by court order, the writing that creates the trust will be a Form 1 – Transfer to Trustees, an original will and a Supreme Court order, respectively.

There must be a plain intention to vest the trust property in the trustee. There must also be a beneficiary and it must be certain who the beneficiary is. This is generally apparent in the trust deed, the will or the schedule of trustees to the Form 1 – Transfer to Trustees.

Instrument Required to Record a Transfer to Trustees

[51-2040]

Where a trust which relates to land is created by virtue of a deed or other instrument (other than a will), the documents to be lodged to vest the land in the name of the trustee are those set out in part 1 at ¶[1-2380] for transfers with a schedule of trusts and at ¶[1-2390] for transfers with the deed of trust being deposited. The trust deed is separate from the transfer instrument and does not form part of the Register.

Deposit of Trust Document

[51-2043]

The document(s) that specify the details or create the trust, including any variation, must be deposited with a Form 1 – Transfer to Trustees. For further information about options for depositing a trust document see [60-1030].

Some trust documents deposited with a lodged dealing require a Queensland duty endorsement.

The following table has been prepared in conjunction with the Office of State Revenue.

Land registry requirements for duty endorsement on trust documents

Description of trust document etc.	Land registry requirements
Trust documents evidencing the creation of a trust or superannuation fund that commenced before 1 March 2002 (i.e. subject to the repealed <i>Stamp Act</i> 1894)	A lodged dealing will be registered only if trust document has a duty endorsement
Trust document (including a superannuation fund deed and a constitution of a responsible entity for a managed investment scheme registered with the Australian Securities & Investment Commission) evidencing the creation of a trust that commenced on or after 1 March 2002	*A lodged dealing will be registered whether or not trust document/deed/constitution has a duty endorsement
An associated document (e.g. deed of variation) varying the terms of a trust document (including a superannuation fund deed and a constitution of a responsible entity)	*A lodged dealing will be registered whether or not associated document has a duty endorsement. Note: Date of variation does not affect duty endorsement requirements
Deed of removal/retirement and appointment of trustee(s)	A lodged dealing will be registered only if deed has a duty endorsement

*Visit the Office of State Revenue website for further information that can help you determine whether the document requires an endorsement.

If the original trust document has been lost or destroyed and a photocopy of sufficient quality to allow imaging is available, it may be sufficient to satisfy the responsibilities of the Registrar. The photocopy should be submitted with a declaration by the trustee that details the circumstances of the loss of the original and any stamped duplicates, the searches undertaken to locate them and states that there have been no amendments or variations for consideration.

Vesting in Trustees

[51-2046]

A person may be registered as trustee of an interest in a lot by way of a Form 14 – Request to Vest that gives effect to an order made under the *Trusts Act 1973* or another Act.

Instrument Required to Record Vesting in Trustees

[51-2049]

A Request to Vest must be in a Form 14. The vesting order made under the *Trusts Act 1973* and all documents that state the detail of the trust upon which the interest is vested must be deposited. For further information about options for depositing supporting documentation see [60-1030].

²A request to vest an interest in a person as trustee of a State leasehold tenure may only be registered if the person is eligible to hold the land in trust under the *Land Act 1994*.

See part 14, esp ¶[14-2335].

Recording of New Trustees

[51-2050]

Section 12 of the *Trusts Act 1973* deals with the appointment of a new trustee in circumstances where a trustee (whether original, substituted, appointed by the court or otherwise):

- (a) is dead; or
- (b) remains out of the State for more than one year without having properly delegated the execution of the trust; or
- (c) seeks to be discharged from all or any of the trusts or powers reposed in or conferred on him/her; or
- (d) refuses to act therein; or
- (e) is unfit to act therein; or
- (f) is incapable of acting therein; or
- (g) is a minor; or
- (h) being a corporation, has ceased to carry on business, is under official management, is in liquidation or has been dissolved.

That is, in circumstances where a trust over the property concerned (whether registered or not) is already in existence.

Instrument Required To Record New Trustee

[51-2060]

When a new trustee is appointed because a trustee:

- is dead (whether or not the sole surviving trustee);
- remains out of the State;

- seeks to be discharged;
- is unfit or incapable of acting; or
- is a company that:
 - has ceased to carry on business;
 - is in liquidation:
 - under official management; or
 - is dissolved, and

the trust instrument nominates a person for the purpose of appointing a new trustee, the instrument applicable is a Form 1 – Transfer, together with the deposit of relevant evidence.

See part 1, esp ¶[1-2400] to ¶[1-2430].

If it is only intended to record the removal of a trustee (without the replacement of that trustee by another trustee) in any of the above circumstances, the instrument applicable is:

- to record the death of the trustee (if not the last surviving trustee), a Form 4 – Request to Record Death, which may include the recording of the deaths of several trustees if applicable; or
- in all other instances which do not involve a sole trustee, a Form 14 – General Request.

In the circumstances listed above, the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustee or trustees for the time being, or the personal representative of the last surviving or continuing trustee, may by writing appoint a person or persons (whether or not being the person or persons exercising the power) to be a trustee or trustees in the place of the trustee first mentioned (s 12(1) of the *Trusts Act* 1973).

If the death of the last surviving trustee was before 1 July 1973, s 12 of the *Trustees and Executors Act* 1897 applies, and the renunciation of the Public Trustee under that Act should be obtained.

Retirement of Trustee Without a New Appointment

[51-2070]

Section 14 of the *Trusts Act* 1973 allows a trustee to retire without the necessity to replace himself/herself if there remains at least two individuals or a trustee corporation to act as trustee/s.

The document required is a Form 14 – General Request to record retirement of trustee, signed by the retiring trustee (or a declaration in writing that he/she is desirous of being discharged) and consented to by the remaining trustee/s or other applicable person, (ie a director of the corporate trustee).

Death of Sole Surviving Trustee

[51-2080]

Upon the death of a sole surviving trustee, whether or not the trust is recorded in the Register, the trust property automatically vests in the Public Trustee of Queensland (s 16(2) of the *Trusts Act 1973*).

The personal representative of the last surviving trustee can request that he/she be recorded as trustee upon deposit of evidence that he/she has notified the Public Trustee in writing in accordance with s 16(2)(b) of the *Trusts Act 1973*. The land then vests in him/her as trustee upon the trusts recited (s 15 of the *Trusts Act 1973*).

The documentation required is a Form 1 – Transfer, together with supporting evidence (see part 1, esp ¶[1-2400] to ¶[1-2430]).

However, where the property has vested in the Public Trustee of Queensland under s 16(2) of the *Trusts Act 1973* and there is no one willing or able to appoint a new trustee, the Public Trustee may request to be recorded as trustee in the land registry. In this instance a Form 14 – General Request to vest is required to be registered. Evidence of death of the trustee must be deposited.

²The certificate of title, if it exists, is required to be deposited.

Lodgement fees are applicable and a duty notation is required.

Second Trustee Nominated to Take After Death of First

[51-2090]

A testator may appoint a trustee of his/her will, and specify that on the death of that trustee another person will assume the office of trustee. If the Form 5 or 5A – Transmission by Death to the first trustee is recorded in the Register and the first trustee dies, a Form 14 – General Request requesting registration of the second trustee should be lodged. Evidence of the death of the first trustee should be annexed to a declaration identifying the applicant with the second trustee named under the will deposited with the Form 5 or 5A – Transmission by Death.

There is no divesting from the Public Trustee required in this case as the deceased trustee was not the last sole surviving trustee.

Appointment by Person Not on Title

[51-2100]

If a trust document nominates a person for the purpose of appointing new trustees, and that person is not one of the registered trustees, the Form 1 – Transfer will be executed by the surviving trustees and evidence of the appointment by the person so nominated should be produced.

¶[51-2110] deleted

Dealing by Trustee

[51-2115]

Dual Capacity

A person who holds an interest in a lot in his/her own right and who is also a trustee of an interest in another lot cannot transfer or otherwise deal with both interests in one form. Dealings must be by way of a separate form for each estate.

However, one Form 1 – Transfer is acceptable where a person in their own right purchases a share in a lot and also purchases another share as trustee, in the same lot.

¶[51-2120] deleted

As Mortgagor

[51-2130]

See part 2 – Mortgage, esp ¶[2-0060].

As Mortgagee

[51-2140]

See part 2 – Mortgage, esp ¶[2-0110].

Trustee Registered Under a Transmission by Death

¹Where Death Occurred Before 1 January 1982

[51-2150]

Previously, where the death occurred before 1 January 1982 (the date of promulgation of the *Succession Act* 1981), trustees were registered under ‘old style transmissions’ with certain limitations after the designation ‘trustee’. For example, as ‘devisee in trust’, ‘devisee in trust with power of sale’, ‘trustee’, ‘trustee by implication’ or ‘trustee for the purpose of carrying out the terms of a contract of sale’.

In addition, the Public Curator (as he then was) was registered as ‘trustee under s 53A of the *Public Curator Act* 1915’. Since the *Public Trustee Act* 1978 repealed this section, no further cases of this kind will occur unless they were executed during the currency of the former Act and have not yet been lodged.

Occasionally a will may neglect to appoint an executor as trustee or, if there is an appointment as trustee, it may neglect to direct the legal estate to the trustee, and yet the will then proceeds to give powers and set out duties to be performed by a trustee. In such cases, the trustee would have been registered as ‘trustee by implication’. An entry on the Register of ‘trustee by implication’ must be examined in conjunction with the will.

In the case of an ‘old style transmission’, where the trustee is registered as ‘trustee for the purpose of carrying out the terms of a contract of sale’, the trustee can only execute a Form 1 – Transfer to the purchaser named in the contract. If the contract is rescinded, a new transmission in favour of the person entitled under the will should be lodged with evidence of the rescission of the contract of sale.

Where Death Occurred on or After 1 January 1982

[51-2160]

In deaths occurring on or after 1 January 1982, the ‘old style’ limitations on the designation ‘trustee’ are no longer used and the trustee is now recorded by the Form 5 or 5A – Transmission by Death as ‘personal representative’.

¶[51-2170] to [51-2190] deleted

¹Trust on Deed of Grant

[51-2200]

When a deed of grant issues to grantees as trustees, a declaration of trust is received with the deed of grant. This is given a Dealing number after the deed of grant issues and the trustee is

recorded in the Register. No fees apply. Any changes in the composition of the named trustees should be by a Form 1 – Recording of New Trustees, accompanied by a copy of the Order in Council authorising the change.

When a deed of grant issues to trustees generally, and not individually, for public purposes and no other purpose whatsoever under s 35 of the *Land Act* 1994, no declaration of trust is required to be lodged. An endorsement is entered in the Register, eg ‘held upon trust, [etc]’. The Minister’s written approval authorising an action must be deposited with the dealing for any dealings with the land.

Incorporation of Association

[51-2210]

The various circumstances leading to registration of an incorporated association in the registry and the necessary documentation in relation thereto are set out below.

Change of Name of Incorporated Association

[51-2220]

A Form 14 – Request to Change Name must be made by the secretary of the association and lodged with a certified copy of the certificate of registration of change of name.

Amalgamation of Two or More Incorporated Associations

[51-2230]

A Form 14 – Request to Vest in the name of the new association consequent upon amalgamation, signed by the secretary, must be made. A certified copy of the certificate of the amalgamated association is required. The Request is exempt from transfer duty, however lodgement fees are payable.

Incorporation of a Body Presently Holding Letters Patent under the *Religious Educational and Charitable Institutions Act* 1861

[51-2240]

A Form 14 – Request to Vest must be made by the secretary of the association. A certified copy of the certificate of incorporation is required as evidence. The Request is exempt from transfer duty, however lodgement fees are payable.

Cancellation and Vesting of Property

[51-2250]

Provision is also made for the cancellation of the incorporation of an association. On cancellation, the property of the association vests in the Public Trustee of Queensland on the trusts and for the purposes it was held prior to the vesting. The appropriate instrument would be a Form 14 – Request to Vest with a copy of the Order in Council vesting the property in the Public Trustee.

The Governor in Council may, by Order in Council, vary the trusts or purposes and/or vest the property of the association, or part thereof, in persons or other incorporated associations. A Form 14 – Request to Vest and a copy of the Order in Council is appropriate.

²**Note:** Forms under the *Associations Incorporation Act* 1981 cannot be used to incorporate a trustee who holds a deed of grant in trust for a specific purpose. An Order in Council is required.

Property Held on Trust for Incorporated Association Prior to Incorporation

[51-2260]

The *Associations Incorporation Amendment Act* 1995 was proclaimed to commence on 8 September 1995. Amongst the provisions proclaimed, the Act repealed Forms 7 and 8 (previously Forms 5A and 5B of the *Associations Incorporations Act* 1981). Those forms and a certified copy of the certificate of incorporation were previously required to record interests already held on trust for an association in the name of the association once it became incorporated.

To satisfy the requirements of the Registrar in maintaining the register as referred to in s 24(4) of the *Associations Incorporation Act* 1981, a Form 14 – General Request for recording is required to be lodged. An example of a completed request for a fictitious association is provided under the heading ‘Forms’.

The Request attracts normal lodgement fees and is exempt from transfer duty. Evidence of the incorporation must be deposited with the request. Acceptable evidence is either a certified copy of the certificate of incorporation issued by the Office of Fair Trading or the original certificate of incorporation and a photocopy (which will be compared with the original and noted by the Receiving Officer as being a true copy, the noted copy being retained and the original being returned to the lodger).

Forms

General Guide to Completion of Forms

[51-4000]

For general requirements for completion of forms see part 59 – Forms, esp ¶[59-2000].

Dealing Number



OFFICE USE ONLY

Privacy Statement

Collection of this information is authorised by the Land Title Act 1994 the Land Act 1994 and the Water Act 2000 and is used to maintain the publicly searchable registers in the land registry and the water register. For more information about privacy see the department's website.

1. Nature of request

RECORDING UNDER THE ASSOCIATIONS
INCORPORATION ACT 1981

Lodger (Name, address, E-mail & phone number)

JOHN WATERHEAD
24 FLATHEAD STREET
SURFHAVEN QLD 4999
(07) 3456 2354

**Lodger
Code**

2. Lot on Plan Description

LOT 999 ON RP901999

County

COAST

Parish

BEACH

Title Reference

500887766

3. Registered Proprietor/State Lessee

WILIAM SNADMAN and NORMAN BEACHCOMBER AS TRUSTEES OF THE COASTAL GOLF CLUB UNDER
NOMINATION OF TRUSTEES 610655433

4. Interest

FEE SIMPLE

5. Applicant

COASTAL GOLF CLUB INCORPORATED

ADDRESS FOR SERVICE OF NOTICES TO APPLICANT: 22 REAL STREET, ASHGROVE QLD 4060

6. Request

I hereby request that: the Registrar of Titles record the interest of the above registered proprietor in the name of the applicant in accordance with s 24 of the *Associations Incorporation Act 1981* and certify that the applicant is incorporated as evidenced by the certificate of incorporation deposited.

7. Execution by applicant

J D Surfboard

JOHN DAVID SURFBOARD
Secretary, Coastal Golf Club Incorporated

31/10/2007

Execution Date

.....
Applicant's or Solicitor's Signature

Note: A Solicitor is required to print full name if signing on behalf of the Applicant

Guide to Completion of Form 14

Item 1

[51-4010]

Insert the name of the Request, ie a recording under the *Associations Incorporation Act 1981*.

Item 2

[51-4020]

²Freehold Description

The description of the relevant lot/s should always read ‘Lot [no.] on [plan reference]’. Plan references must contain the appropriate prefix (eg ‘SP’ for a survey plan, ‘RP’ for a registered plan, ‘BUP’ for a building units plan, ‘GTP’ for a group titles plan or the relevant letters for Crown plans). The area of the lot/s is not shown.

The entire panel of Item 2 must be completed. All information needed to complete Item 2 will appear on a search of the title.

eg	Lot on Plan Description	County	Parish	Title reference
	Lot 27 on RP 204939	Stanley	South Brisbane	11223078

Water Allocation Description

A water allocation should be identified as ‘Water Allocation’, ‘Allocation’ or ‘WA’. A water allocation has no reference to County or Parish, hence these fields are not completed. All plans referring to water allocations are Administrative Plans. Administrative Plan is abbreviated to AP as the prefix of the plan identifier.

All information needed to complete Item 2 will appear on a search of the water allocation title.

eg	Lot on Plan Description	County	Parish	Title reference
	WA 27 on AP 7900			46012345

Item 3

[51-4030]

The registered proprietor, water allocation holder or State lessee should be as shown on the current title or lease.

Item 4

[51-4040]

Insert the relevant interest, eg ‘fee simple’.

Item 5

[51-4050]

The applicant is the incorporated association.

Item 6

[51-4060]

The Request should be substantially as shown in the example.

Item 7**[51-4070]**

Execution of the Form must be by the secretary of the association (s 24 of the *Associations Incorporation Act 1981*).

The Request is exempt from transfer duty, but normal lodgement fees apply.

¶[51-6000] deleted

Case Law***Re Robinson's Trusts* [1974] Qd R 243****[51-7000]**

In this case it was held that a tenant for life must consent to the sale of 'settled land' by trustee (pre operation of the *Trusts Act 1973*).

Fees**[51-8000]**

Fees payable to the land registry are subject to an annual review. See the current:

- ²*Land Title Regulation 2005* – Schedule 2, item numbers 1, 2(a)(i), 2(a)(ii), 2(h) and 3; and
- *Water Regulation 2002* – Schedule 16, item numbers 7, 11 and 15.

Cross References and Further Reading**[51-9000]**

Part 1 – Transfer, esp ¶[1-2380] to ¶[1-2430]

Part 4 – Request to Record Death

Part 5, 5A, 6 – Transmission Applications

Part 14 – General Request, esp ¶[14-2360] to ¶[14-2370] and ¶[14-2380]

Ford & Lee, *Principles of the Law of Trusts*, 3rd edn, Law Book Co. Ltd (loose-leaf service)

Lee, *Manual of Succession Law*, 3rd edn, Law Book Co. Ltd, 1991

Cooper (editor), *Trusts in Action*, Blackstone Press, 1995

Notes in text**[51-9050]**

Note ¹ – This numbered section is not applicable to water allocations or the Water Allocations Register.

Note ² – This paragraph or statement is not applicable to water allocations or the Water Allocations Register.