

Trustee Powers



INTRODUCTION

The primary source of powers granted to the trustee of most trusts is the relevant trust deed. In each State and Territory in Australia there is also a statutory framework that confers particular powers on trustees. The statutory powers are generally subject to the terms of the trust deed, which can operate to expand, restrict or vary the powers granted by law. In particular cases, however, the statutory powers operate notwithstanding the terms of the trust deed. This article will outline the most useful and generally applicable of the powers conferred on trustees by statute. It will also, for convenience, focus on trustees of discretionary trusts, although many of the powers discussed will also be relevant to trustees of other commonly used trusts, such as unit trusts, hybrid trusts, and to some extent, superannuation funds.

Although trustees are generally not required to provide reasons to justify the manner in which they choose to exercise their powers, it is important to be aware that the powers are always subject to the duties of the trustees, particularly the duty to exercise their powers honestly and only for the purposes for which they were granted. The beneficiaries may take action for breach of trust if the powers of the trustee are not exercised properly. While the powers together may appear wide, each power only extends as far as is necessary to enable the trustees to perform their functions. If there is more than one trustee, they are required to act jointly in the exercise of their powers unless expressly authorised to do otherwise.

POWERS IN RELATION TO TRUST PROPERTY – GENERAL

Power of sale

The widest power of sale is granted to trustees in Queensland and Western Australia, where trustees have a general power to sell trust property or any part of it.¹ In New South Wales, Victoria, South Australia and the ACT, where trustees are authorised by the trust deed to pay or apply funds from trust capital for any purpose or in any manner, they are deemed by statute to have the power to raise those funds by the sale of all or any part of the trust property.² In Victoria and South Australia, the relevant section applies notwithstanding anything to the contrary in the trust deed.³ There is no general power of sale in Tasmania or the Northern Territory.

Power of investment

Until recent times, trustees were authorised by statute to invest trust funds only in investments chosen from a specific list. The legislation in each jurisdiction now confers a general power of investment, and trustees may, unless expressly prohibited by the trust deed, invest trust funds in any form of investment and vary the investments at any time.⁴ This general power of investment is always subject to the prudent person rule, which requires that if the trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons, the trustee must, in exercising powers of investment, exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment

would exercise in managing the affairs of other persons. If the trustee is not engaged in such a profession, business or employment, the rule requires the trustee to exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.⁵ The legislation in each jurisdiction sets out a list of matters to which trustees should have regard when exercising their power of investment,⁶ and provides that in any action for breach of trust in relation to investment, the court may consider whether the trustee considered these matters, whether the investments were made pursuant to an investment strategy, and whether the trustee acted on independent advice.⁷

Power to obtain audits and valuations

Trustees in New South Wales, Victoria, Queensland, the ACT and Western Australia are given absolute discretion to obtain audits of the accounts of the trust property, and to have properly qualified agents ascertain and fix the value of any trust property.⁸ There is no equivalent power in the Northern Territory, South Australia or Tasmania.

Power to carry on a business

At common law, trustees are not permitted to carry on a business without express authority from either the trust deed or the relevant court.⁹ In Queensland, this position has been altered by statute, and trustees are empowered to carry on a business for two years from the commencement of the trust or such period as may be necessary for the winding up of the business. In the exercise of the power, trustees

are authorised to take various actions including using, increasing or diminishing the trust property, purchasing goods such as stock and machinery, and employing workers.¹⁰ The same power applies in Western Australia in the case of trustees of deceased estates only.¹¹ There is no equivalent power in the other Australian jurisdictions.

POWERS IN RELATION TO TRUST PROPERTY – REAL PROPERTY

Power to lease

In several jurisdictions, trustees are given the power to grant leases over real property held on trust. In Queensland and Western Australia, the power is to grant leases “at a reasonable rent for any term not exceeding one year, or from year to year, or for a weekly, monthly or other like tenancy or at will”.¹² The length of time for which a lease may be granted in New South Wales, South Australia and the ACT depends on whether the trustee has a power of management or a duty to sell with an express power to postpone the sale.¹³ There is no general power to lease conferred by statute in Victoria, Tasmania or the Northern Territory.

Power to mortgage

In New South Wales, Queensland and the ACT, where a trustee is authorised by the trust deed or by law to pay or apply funds from trust capital for any purpose or in any manner, the trustee may mortgage the trust property.¹⁴ This is also the case in South Australia, Western Australia and Victoria, with the additional stipulation that this power applies notwithstanding anything to the contrary in the trust deed.¹⁵ No such power exists in Tasmania or the Northern Territory.

Power to repair and improve trust property using trust funds

Trustees in Queensland, South Australia, Western Australia and New South Wales are empowered to effect repairs and improvements to trust property using trust funds up to certain monetary limits.¹⁶ In New South Wales, the power only exists where its exercise would, in the opinion of the trustees, be in the interest of all persons beneficially interested in the land, and the expenditure must be from capital. The ACT provisions allow expenditure from capital or

income but apply only where a leasehold interest is vested in a trustee for a child or in trust for any person in succession.¹⁷ There is no equivalent power in Victoria, Tasmania or the Northern Territory.

Power to insure

In New South Wales, Victoria and the ACT, trustees may use income to insure against any risk or liability against which it would be prudent for persons to insure if they were acting for themselves, provided that the amount insured does not exceed the value of the property.¹⁸ Similar provisions apply in Western Australia, South Australia and the Northern Territory, where the maximum amount to be insured is replacement value.¹⁹ In Queensland, insurance may be funded from income or capital.²⁰ In Tasmania, trustees are empowered to use income to insure against the loss or damage by fire of any building or other insurable property, other than any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so, to any amount, including the amount of any insurance already on foot, not exceeding three quarters of the full value of such building or property.²¹

POWERS IN RELATION TO BENEFICIARIES

Power of maintenance (periodic payments)

Trustees in New South Wales, in their absolute discretion, have the power to apply income or capital for the maintenance, education and benefit of an infant beneficiary, provided that if capital is to be used for this purpose, the trust property or the share of the property to which the infant is entitled must not exceed \$4000.²² The position in the ACT is similar, except that the limit is half the value of the property or the relevant share of the property.²³ In Queensland, there is no monetary limit imposed upon the power.²⁴ There is similarly no limit in the Northern Territory, but maintenance payments may only be funded from income.²⁵ The South Australian, Western Australian and Victorian positions allow for the application of income or capital and the power is not restricted to infant beneficiaries.²⁶ In Western Australia, the power is not

subject to monetary limits. In Victoria, the application of capital for the maintenance of beneficiaries is limited to the greater of \$2000 or half the capital or relevant share of it, and in South Australia, to half the capital or relevant share.²⁷ Trustees in Queensland, Western Australia and the Northern Territory may impose conditions on the exercise of the power.²⁸ There is no power of maintenance in Tasmania.

Power of advancement (one-off outlay for a specific purpose)

In New South Wales, trustees may, in their absolute discretion, apply capital for the advancement or benefit of any beneficiary.²⁹ This power is limited in the Northern Territory to \$2000 or half the capital, whichever is greater, and in the ACT and Tasmania, to half the value of the property or the beneficiary’s share of the property.³⁰ In Victoria, South Australia, Western Australia and Queensland, trustees may apply income or capital for this purpose.³¹ The application of capital for the advancement of a beneficiary is limited in Victoria and Queensland to the greater of \$2000 or half the capital,³² and in South Australia to half the value of the property or the beneficiary’s share of it.³³ Trustees in Queensland, Western Australia and the Northern Territory may also impose conditions on the exercise of the power of advancement.³⁴

POWERS TO APPLY TO THE COURT

Power to apply to court for powers not otherwise granted

Where trustees wish to enter into a transaction in the best interest of the trust estate but lack the power to do so, one or more of them may apply to the court to enable them to enter the transaction. The power may be conferred unconditionally or subject to such conditions as the court sees fit.³⁵

Power to apply to court for variation of trust

In Queensland, South Australia, Western Australia, Tasmania and Victoria, trustees may apply to the court to vary or revoke the terms of the trust.³⁶ This power can be used where rectification of a trust deed is required. The power is not conferred on trustees in the other jurisdictions.

CONCLUSION

The analysis of powers outlined above is not exhaustive. There are various other powers conferred on trustees by statute in each jurisdiction which apply to a range of specific circumstances. In particular, the powers explored by this article are those that are most relevant to the operation of discretionary trusts, and different types of trusts will attract different powers.

It is important to remember that the statutory powers do not operate alone, and are, in almost all circumstances, subject to everything contained within the trust deed. The application of the statutory powers must always be interpreted with reference to the trust deed. While familiarity with the relevant statute can provide a useful starting point for understanding the general powers available to trustees, it is never possible to ascertain the full range of powers available to the trustees of a particular trust without a detailed analysis of the trust deed. There are many powers that do not appear in the statutory schemes but which are important for the effective operation of many trusts and so need to be included in trust deeds. These include a general power to delegate, a power to act notwithstanding personal interests, a power to give guarantees, a power to make in specie distributions, and a power to make elections for tax purposes. A properly drafted trust deed will contain a wide range of powers which should make the need to resort to the relevant statutory powers a rare case.

Anna Parker

Harwood Andrews Lawyers

Reference notes

- 1 *Trusts Act 1973 (Qld)* s. 32(1)(a); *Trustees Act 1962 (WA)* s. 27(1)(a)
- 2 *Trustee Act 1925 (NSW)* s. 38(1); *Trustee Act 1958 (Vic)* s. 20(1); *Trustee Act 1936 (SA)* s. 28B(1); *Trustee Act 1925 (ACT)* s. 38(1)
- 3 *Trustee Act 1958 (Vic)* s. 20(2); *Trustee Act 1936 (SA)* s. 28B(3)
- 4 *Trustee Act 1925 (ACT)* s. 14; *Trustee Act 1925 (NSW)* s. 14; *Trustee Act (NT)* s. 5; *Trusts Act 1973 (Qld)* s. 21; *Trustee Act 1936 (SA)* s. 6; *Trustee Act 1898 (Tas)* s. 6; *Trustee Act 1958 (Vic)* s. 5; *Trustees Act 1962 (WA)* s. 17
- 5 *Trustee Act 1958 (Vic)* s. 6(1); *Trustee Act 1925 (ACT)* s. 14A; *Trustee Act 1925 (NSW)* s. 14A; *Trustee Act (NT)* s. 6; *Trusts Act 1973 (Qld)* s. 22; *Trustee Act 1898 (Tas)* s. 7; *Trustees Act 1962 (WA)* s. 18; *Trustee Act 1936 (SA)* s. 7
- 6 *Trustee Act 1958 (Vic)* s. 8; *Trustees Act 1962 (WA)* s.20; *Trustee Act 1898 (Tas)* s. 8; *Trustee Act 1936 (SA)* s. 9; *Trusts Act 1973 (Qld)* s. 24; *Trustee Act (NT)* s. 8; *Trustee Act 1925 (NSW)* s. 14C; *Trustee Act 1925 (ACT)* s. 14C
- 7 *Trustee Act 1958 (Vic)* s. 12C; *Trustee Act 1925 (ACT)* s. 89; *Trustee Act 1925 (NSW)* s. 90; *Trustee Act (NT)* s.10E; *Trusts Act 1973 (Qld)* s. 30B; *Trustee Act 1936 (SA)* s. 13C; *Trustee Act 1898 (Tas)* s. 12D; *Trustees Act 1962 (WA)* s.26B
- 8 *Trustee Act 1925 (NSW)* ss. 51, 52; *Trustee Act 1958 (Vic)* ss. 26, 27; *Trusts Act 1973 (Qld)* ss. 51, 52; *Trustee Act 1925 (ACT)* ss. 51, 52; *Trustees Act 1962 (WA)* ss. 50, 51
- 9 *Kirkham v Booth (1848)* 11 Beav 273
- 10 *Trusts Act 1973 (Qld)* s. 57
- 11 *Trustees Act 1962 (WA)* s. 55
- 12 *Trusts Act 1973 (Qld)* s. 32(1)(d); *Trustees Act 1962 (WA)* s. 27(1)(d)
- 13 *Trustee Act 1925 (NSW)* s. 36(1); *Trustee Act 1936 (SA)* s. 25C(1); *Trustee Act 1925 (ACT)* s. 36(1)
- 14 *Trustee Act 1925 (NSW)* s. 38(1); *Trusts Act 1973 (Qld)* s. 45; *Trustee Act 1925 (ACT)* s. 38(1)
- 15 *Trustee Act 1936 (SA)* s. 28B; *Trustees Act 1962 (WA)* s. 43; *Trustee Act 1958 (Vic)* s. 20
- 16 *Trusts Act 1973 (Qld)* ss. 33(1)(a), 33(1)(b); *Trustee Act 1936 (SA)* ss. 25A(1)(a), 25C(1); *Trustees Act 1962 (WA)* s. 30; *Trustee Act 1925 (NSW)* ss. 82, 82A
- 17 *Trustee Act 1925 (ACT)* ss. 82, 83
- 18 *Trustee Act 1925 (NSW)* s. 41; *Trustee Act 1958 (Vic)* s. 23; *Trustee Act 1925 (ACT)* s. 41
- 19 *Trustees Act 1962 (WA)* s. 46; *Trustee Act 1936 (SA)* s. 25; *Trustee Act (NT)* s. 18A
- 20 *Trusts Act 1973 (Qld)* s. 47
- 21 *Trustee Act 1898 (Tas)* s. 21
- 22 *Trustee Act 1925 (NSW)* ss. 43, 44
- 23 *Trustee Act 1925 (ACT)* ss. 43, 44
- 24 *Trusts Act 1973 (Qld)* s. 61
- 25 *Trustee Act (NT)* s. 24
- 26 *Trustee Act 1936 (SA)* ss. 33, 33A; *Trustees Act 1962 (WA)* s. 58; *Trustee Act 1958 (Vic)* ss. 37, 38
- 27 *Trustee Act 1958 (Vic)* s. 38(1); *Trustee Act 1936 (SA)* s. 33A(1)
- 28 *Trusts Act 1973 (Qld)* s. 63; *Trustees Act 1962 (WA)* s. 60; *Trustee Act (NT)* s. 24
- 29 *Trustee Act 1925 (NSW)* s. 44
- 30 *Trustee Act (NT)* s. 24A; *Trustee Act 1925 (ACT)* s. 44; *Trustee Act 1898 (Tas)* s. 29
- 31 *Trustee Act 1958 (Vic)* ss. 37, 38; *Trustee Act 1936 (SA)* ss. 33, 33A; *Trustees Act 1962 (WA)* ss. 58, 59; *Trusts Act 1973 (Qld)* ss. 61, 62
- 32 *Trustee Act 1958 (Vic)* s. 38(1); *Trusts Act 1973 (Qld)* s. 62(1)
- 33 *Trustee Act 1936 (SA)* s. 33A(1)
- 34 *Trusts Act 1973 (Qld)* s. 63; *Trustees Act 1962 (WA)* s. 60; *Trustee Act (NT)* s. 24
- 35 *Trusts Act 1973 (Qld)* s. 94; *Trustees Act 1962 (WA)* s. 89; *Trustee Act 1936 (SA)* s. 59B; *Trustee Act 1898 (Tas)* s. 47; *Trustee Act 1958 (Vic)* s. 63; *Trustee Act 1925 (NSW)* s. 81; *Trustee Act 1925 (ACT)* s. 81; *Trustee Act (NT)* s. 50A
- 36 *Trusts Act 1973 (Qld)* s. 95; *Trustee Act 1936 (SA)* s. 59C; *Trustees Act 1962 (WA)* s. 90; *Variation of Trusts Act 1994 (Tas)* ss. 13-15; *Trustee Act 1958 (Vic)* s. 63A.

