

Trusts Bill 2024

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21 June 2024

Committee Secretary
Housing, Big Build and Manufacturing Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Committee Members

Thank you for the opportunity for the Public Trustee to provide a submission on the Trusts Bill 2024.

I kindly ask the Committee to consider what appears to be an unintended consequence of the current drafting of Part 3 Division 8 of the Trusts Bill 2024 (which I will refer to as the Impaired Capacity Division).

The Impaired Capacity Division speaks to the vesting of trust property in the Public Trustee upon a decision being made that the last continuing trustee of a trust has impaired capacity for all financial matters or for administering the trust. This is a completely new Division and is generally based on section 16 in the *Trusts Act 1973*, which is intended to be carried over into Part 3 Division 7 of the Trusts Bill 2024.

Whereas the existing section 16 in the *Trusts Act 1973* only refers to the vesting of trust property on the death of the last continuing trustee, the new provisions expand the circumstances when trust property is vested in the Public Trustee.

The problem that the Public Trustee has identified in relation to the current drafting of the Impaired Capacity Division is that there is insufficient clarity as to what is to occur should the person with impaired capacity regain capacity to act as Trustee.

Whilst the drafting of the Impaired Capacity Division has been based on the provision relating to the death of the last continuing trustee, the significant difference in practical terms is that whereas death cannot be reversed, a finding of incapacity can be revoked.

Clause 44 (1) of the Trusts Bill 2024 outlines the events that must occur before the vesting of the trust property in the Public Trustee. This section commences with the words “This division applies if...” .

Clause 45 (3) provides that the trust property remains vested in the Public Trustee “until it is divested from the public trustee under section 47”.

Clause 47 makes no provision for the trust property to revert to the person with impaired capacity upon that person regaining control of their affairs. It is the Public Trustee’s view that upon the Public Trustee receiving evidence that one of the entities listed in Clause 44 (1)(b) has made a decision to the effect that the last continuing trustee has regained capacity for administering the trust, then the trust property should immediately be divested from the Public Trustee and again vested in the last continuing trustee.

The Public Trustee expects that this was the intention of the legislature on the basis that:

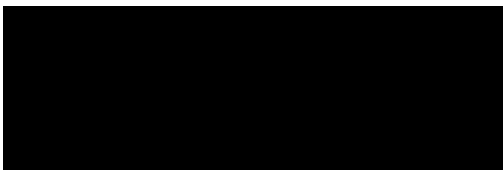
- clause 47 (1) (a) assumes it is the Public Trustee that it is making the appointment of the new trustee; and
- pursuant to Clause 47 (1) (a) the Public Trustee can only appoint a new trustee “to replace the last continuing trustee”. This means that even if the Public Trustee was to formally retire as trustee and reappoint the last continuing trustee by way of a Deed of Retirement and Appointment of New Trustee (i.e. if the last continuing trustee was to regain capacity), the trust property would not vest in the last continuing trustee, but remain vested in the Public Trustee.

The Public Trustee requests that the Committee consider recommending changes to the drafting of the Impaired Capacity Division to ensure that there is clarity as to when and how the last continuing trustee can again act as trustee upon the person regaining capacity.

The Public Trustee suggests the inclusion of another subclause in Clause 47 to allow for the seamless divestment of the trust property from the Public Trustee and the vesting of the trust property back to the last continuing trustee who has regained capacity. This would assist members of the community by efficiently and effectively returning to them the legal status they had before the finding of incapacity.

If the Committee has any questions in relation to this submission, they are invited to contact Ms Kathryn Williams, Official Solicitor, Corporate Legal Services on [REDACTED] or email to [REDACTED]

Yours sincerely



Samay Zhouand
Public Trustee of Queensland and CEO