

**Other transactions a trustee may allow****[58.1]**

**58.(1)** A trustee lessee may transfer, mortgage or sublease a trustee lease if the trustee lessee first obtains—

- (a) the trustee’s written approval to the transaction; and
- (b) if the trustee does not have a written authority under section 64—the Minister’s written approval to the transaction.

**(2)** The Minister and the trustee’s written approvals may include conditions.

**(3)** If the Minister refuses to approve the transfer, mortgage or sublease, written notice of the Minister’s decision and the reasons for the decision must be given to the trustee lessee.

**(4)** A trustee lessee may appeal against the Minister’s decision.

**(5)** Each transaction must be registered in the appropriate register.

**The nature of a trustee lessee’s power to deal with his or her interest****[58.2]**

Section 58 confers a power on a trustee lessee to transfer, mortgage or sublease a trustee lease. Like s 57,<sup>1</sup> the provision is facultative.<sup>2</sup> It does not assume the trustee lessee has a general law power to enter into transactions mentioned in s 58(1) subject to the trustee’s and the Minister’s (if appropriate) approval. In *American Dairy Queen Pty Ltd v Blue Rio Pty Ltd*,<sup>3</sup> the High Court considered s 347(1) of the *Land Act 1962*. That provision relevantly provided —

“A lessee shall not transfer, mortgage or sublet a lease to which this Division applies unless the lessee has first obtained the written approval of the Minister and the trustees of the land granted in trust or as the case may be, of the reserve.”

A sublessee of a trustee lease in respect of a reserve purportedly assigned its lease to the appellant. The Full Court of Queensland had held that, since no power was given expressly by part 11 of the *Land Act 1962* to the sublessee to transfer or otherwise deal with its interest, the sublessee of a reserve was not permitted to do so. The High Court reversed the Full Court’s decision. Mason J said<sup>4</sup> —

“It is to be observed that s 347(1) does not empower a lessee to transfer, mortgage or sublet a lease with the written approval of the Minister and the trustees. What it does is to prohibit those dealings without the written approval. Instead of authorizing a lessee to transfer, mortgage or sublet, it relies on the lessee’s right of disposition at common law and restricts or qualifies it in the manner indicated.”

The language of s 58 of the *Land Act 1994* may be distinguished from the language of s 347 of the *Land Act 1962*. It operates on the footing that the trustee lessee does not have a power to deal with his or her interest otherwise than pursuant to the section.

Both the trustee’s and the Minister’s approval may contain conditions.<sup>5</sup>

The Minister may only approve a transaction under s 58 if s 59 is complied with.<sup>6</sup>

<sup>1</sup> See paragraph [57.2].

<sup>2</sup> Note, however, unlike s 57 there is no “in principle” approval of a transaction under s 58.

<sup>3</sup> (1981) 147 CLR 677.

<sup>4</sup> Gibbs CJ, Murphy and Aickin JJ agreed with Mason J. Brennan J also agreed with Mason J but added his own observations.

<sup>5</sup> Section 58(2).

<sup>6</sup> See paragraph [59.1].

Pursuant to s 64, the Minister may provide a trustee with written authority dispensing with the need to obtain the Minister's approval for the granting of trustee leases.<sup>7</sup> Where such an authority has been given, the trustee has sole responsibility for determining whether transactions under s 58(1) may proceed.

### **Reasons for Minister's decision and appeals against decision — s 58(3) and (4) [58.3]**

If the Minister refuses to approve a transaction referred to in s 58(1), the Minister must provide the trustee lessee with written notice of the refusal and the reasons for the refusal.<sup>8</sup> A trustee lessee may appeal against the Minister's decision.<sup>9</sup> The appeal process is governed by chapter 7, part 3.<sup>10</sup>

A decision of a trustee to refuse a transfer, mortgage or sublease of a trustee lease is not subject to appeal.

### **Transaction to be recorded in the appropriate register — s 58(5) [58.4]**

Each approved transfer, mortgage or sublease of a trustee lease must be registered in the appropriate register. The appropriate register is, for land in a reserve, the register of reserves and trustees of trust land, and for land in a DOGIT, the freehold land register.<sup>11</sup>

### **When does a transaction under s 58 take effect? [58.5]**

Section 58(5) provides that an approved transaction must be registered. The Act does not say that the trustee's and the Minister's approval (if required) lapses after a certain time if the transaction is not lodged for registration,<sup>12</sup> although a condition may be attached to the Minister's approval in this regard. While this might suggest, when considered with the requirement under subsection (5) and s 302, that there is not a period during which an (equitable) interest arises pending registration, where the approval has been obtained there is, according to s 295, a right to have the relevant dealing registered. There is, therefore, at least a statutory right to registration which may be said to be complemented by an equitable interest in the land. If the Minister requires the dealing to be lodged for registration within a specified time (say 6 months), a failure to do so may result in the lapsing of the approval and render the dealing ineffective.

### **Forms [58.6]**

A transfer of a trustee lease is prepared in a Form 1.<sup>13</sup> A mortgage of a trustee lease is prepared in a Form 2.<sup>14</sup> A sublease of a trustee lease is prepared in a Form 7.<sup>15</sup>

### **The transfer of a trustee lease [58.7]**

A trustee lease may not authorise the transfer of a trustee lease in terms contrary to s 58. However, it would appear a trustee may restrict or qualify its seemingly wide discretion under s 58(1)(a)<sup>16</sup> according to the terms of the trustee lease in relation to transfer of a trustee lease.<sup>17</sup>

<sup>7</sup> See paragraph [64.1].

<sup>8</sup> Section 58(3).

<sup>9</sup> Section 58(4).

<sup>10</sup> See paragraphs [424.1] to [431.1].

<sup>11</sup> See definition of "appropriate register" in sch 6 (paragraph [533.4]).

<sup>12</sup> Compare s 332(4) in relation to a sublease of a State lease (paragraph [332.1]).

<sup>13</sup> See paragraph [535.1].

<sup>14</sup> See paragraph [535.2].

<sup>15</sup> See paragraph [535.8].

<sup>16</sup> And under s 64. See paragraph [64.1].

<sup>17</sup> The trustee lease may say that the trustee will not unreasonably withhold its consent to a transfer of the lease. It is suggested a trustee should only permit a covenant to be included in the lease which is consistent with s 58.

**Nature of a sublease of a trustee lease****[58.8]**

A sublease of a trustee lease will generally be in the nature of a sublease of a lease under the general law. That is, a right to exclusive possession will be conferred on the sublessee. It has been suggested elsewhere,<sup>18</sup> however, that a “trustee lease” under s 57 may include a right which is in the nature of a licence under the general law. If that is the case and on the basis a lessee may not pass to another a right greater than that which he or she possesses, “sublease” under s 58 may include a right in the nature of a “sublicence”. That right might, in appropriate cases, be enforced by injunction.

A trustee lease may not authorise the subleasing of a trustee lease in terms contrary to s 58. However, it would appear a trustee may restrict or qualify its seemingly wide discretion under s 58(1)(a)<sup>19</sup> according to the terms of the trustee lease in relation to subleasing.<sup>20</sup>

*Holding over under a sublease*

May a sublessee of a trustee lease “hold over” after the expiration of the sublease with the trustee lessee’s consent? Under the general law, if a headlease remains on foot and a sublessee holds over with the sublessor’s consent a new sublease arises according to any terms dealing with the matter in the expired sublease or pursuant to s 129 of the *Property Law Act 1974*. It is common (subject to the terms of the trustee lease) for the Minister to approve a holding over by a sublessee of a trustee lease after the expiration of the sublease for a period not exceeding 3 months. If the sublessee remains in occupation and pays rent after this period there can be no sublease (even pursuant to s 129 of the *Property Law Act 1974*). This is because the Minister has not approved a sublease after the end of the holding over period.<sup>21</sup>

*Sub-sublease, transfer of a sublease and cancellation of a sublease*

According to schedule 6, “sublease” includes a “sub-sublease”.<sup>22</sup> Despite this, there is no provision which says that a trustee sublessee may sublease his or her interest. Nor is there any provision for a trustee sublessee to transfer his or her interest. The general regulatory scheme contained in chapter 3, part 1, division 7 of the *Land Act 1994* suggests that only those dealings which are expressly mentioned therein are permitted.<sup>23</sup> However, is the Act a code as to *all* dealings in (as opposed to the creation of) a trustee sublease? It is arguable it is not. The Act makes no reference to the cancellation (or forfeiture)<sup>24</sup> or surrender of a trustee sublease. This might suggest that a cancellation or surrender may be effected, but without reference to any provision in the *Land Act 1994*. With respect to a cancellation it might be argued that s 124 of the *Property Law Act 1974* applies.<sup>25</sup> With respect to a surrender, although the parties may expressly agree to surrender a trustee sublease, there is no form under which the surrender may be registered.

It is clear that the draftsman has failed to consider these issues. On authority of Mason J’s reasoning in *American Dairy Queen Pty Ltd v Blue Rio Pty Ltd*<sup>26</sup> the language of s 58(1) is to be interpreted in a

<sup>18</sup> See paragraph [57.4].

<sup>19</sup> And under s 64. See paragraph [64.1].

<sup>20</sup> The trustee lease may say that the trustee will not unreasonably withhold its consent to a subleasing of the lease. It is suggested a trustee should only permit a covenant to be included in the lease which is consistent with s 58.

<sup>21</sup> It is unclear whether the Minister’s authorisation of the holding over period in an initial trustee lease satisfies the requirement under s 57(3) that the new lease which arises by virtue of the holding over be registered.

A query arises whether a trustee, pursuant to a general authority under s 64, may approve an “indefinite” holding over. Although s 61 implies a trustee lease must be for a term, it is not sufficiently clear to suggest that a periodical tenancy or a tenancy at will may not arise.

<sup>22</sup> See paragraph [533.101].

<sup>23</sup> See generally paragraph [57.2].

<sup>24</sup> Section 65 refers only to the cancellation of a trustee lease and a trustee permit. See paragraph [65.1].

<sup>25</sup> However, even this is doubtful.

<sup>26</sup> (1981) 147 CLR 677.

different manner to s 347(1) of the *Land Act 1962*. On this basis there can be no authority for reading the 1994 Act as authorising the *creation* of further interests in trust land. It is arguable, however, that where a dealing or action does not purport to create a further interest (such as a cancellation or surrender) the dealing or action may be permitted. However, it is unclear how such dealings might be effected.

### **The exercise of the power of approval**

[58.9]

Section 23(1) of the *Acts Interpretation Act 1954* provides that a power may be exercised as occasion requires. There is no requirement therefore that a trustee or the Minister approve a transaction under s 58 even if s 59 is satisfied.

#### *The repealing of the trustee's or the Minister's approval*

Section 24AA(a) of the *Acts Interpretation Act 1954* provides that the power to make a decision includes the power to amend or repeal the decision. In appropriate circumstances, the trustee or the Minister may be estopped from resiling from a representation that approval has been given.<sup>27</sup>

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<sup>27</sup> This may arise when there is some delay between the approval and the registration of the transaction.

### *Division 2—Closing roads*

#### **Closure of road by gazette notice**

[98.1]

**98.(1)** If, after inquiry and notice the Minister considers appropriate, the Minister is satisfied a road is not needed, the Minister may, by gazette notice, permanently or temporarily close the road.

**(2)** The Minister may close the road without receiving an application under section 99.

**(3)** The road is closed from the day the gazette notice is published.

A road that is dedicated and opened may be permanently or temporarily<sup>1</sup> closed. A temporarily closed road is governed by chapter 3, part 3, division<sup>2</sup> 3A. A permanently closed road is governed by chapter 3, part 3, division<sup>4</sup>. The Minister does not have the power to close a road outside s 98.

The gazette notice which closes a road is<sup>3</sup> legally known as a “Closing of Road Notice”.

The land within a temporarily closed road remains land dedicated as a road for public<sup>5</sup> use. Within a permanently closed road may be dealt with as unallocated State land or sold or leased to one or more adjoining landowners or lessees, depending on the circumstances.<sup>6</sup>

The Minister’s decision under s 98(1) is purely discretionary.<sup>7</sup>

#### **Temporary v permanent closure**

[98.2]

According to the Explanatory Notes

“[t]he concept of a temporary closure is to enable land to be used when not needed as road, but to be able to be retrieved quickly and at minimum expense when required again<sup>8</sup> as road.”

If a road is temporarily closed, the Minister may issue a road licence under s 103 to an adjoining landowner to enable him or her to use the road. (A road licence may also be issued to another person in certain circumstances<sup>9</sup>). A temporary closure of a road may be permitted in areas where the road is rarely or never used by the public because of its location. However, for example, further allocation of land adjoining the road is anticipated in the future, it may be necessary to reopen the road for public use when the allocation is made in order to provide access to the land. In the interim, however, as there is no use for the road, it may be closed.

A road may be permanently closed where the land in the road is no longer needed as a road. This may arise in a number of circumstances, including where other land has been dedicated as a road nearby and is intended<sup>10</sup> to be used by the public instead of the road to be closed.

<sup>1</sup> A road which is not open obviously cannot be closed.

<sup>2</sup> See paragraphs [106-1]07.1].

<sup>3</sup> See paragraphs [108-1]08.3].

<sup>4</sup> See *Re Woollerina Improvements* (1903) 2 CLLR 57.

<sup>5</sup> Section 106. See paragraph [106.1].

<sup>6</sup> Section 108. See paragraph [108.1].

<sup>7</sup> See *Newcastle Guarantee Corporation Pty Ltd v Brisbane City Council* [1996] QPELR 176.

<sup>8</sup> At page 1067.

<sup>9</sup> See s 103 (paragraph [103.1]).

<sup>10</sup> As to dealings with a permanently closed road see s 108 (paragraph [108.1]).











