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	<ul style="list-style-type: none"> • If the whole interest is transferred and the trustee only has passive duties, the original beneficiary is effectively replaced, and s 53(1)(c) applies. • If the trustee has passive duties but the original beneficiary retains some interest, s 53(1)(c) may not apply. <p>Land & Subsisting Equitable Interests (SEQ):</p> <ul style="list-style-type: none"> • Must be manifested and proved in writing and signed by an authorized person. s 53(1)(c) may apply in these cases (PLA ss 53(1)(b), (c)). <p>Neither (Non-Land & Non-SEI Trusts):</p> <ul style="list-style-type: none"> • Not subject to any formal requirements (Paul). <p>Fraud:</p> <ul style="list-style-type: none"> • Lack of proper writing cannot be used to facilitate fraud. Look for an agreement or reliance (Last). <p>Wills:</p> <ul style="list-style-type: none"> • Trusts created through a will need only comply with the formal requirements of the Wills Act 1958 (Vic). 				
2 – Certainty of Intention	<p>The court must establish that the settlor had a clear intention—either express or implied—for the property to be held on trust (Paul). This means there must be an intention to impose an obligation on the property owner to apply the property for the benefit of identified beneficiaries or for recognized charitable purposes (BVT).</p> <p>The intention is determined objectively based on the facts. The question is whether a reasonable person would conclude, in all the circumstances, that the settlor intended to create a trust (Byrnes).</p> <table border="1"> <tr> <td>A – Unambiguous Trust Deed or Will?</td><td> <p>If there is an unambiguous written declaration of a trust, this will generally satisfy the requirement for certainty of intention, provided no vitiating factors are present (Byrnes). A clear declaration of trust is sufficient, even if the settlor had secret intentions contrary to the written declaration (Byrnes).</p> <p>Look For:</p> <ul style="list-style-type: none"> • Vitiating factors: Such as undue influence, duress, mistake, or non est factum. • Sham trusts: If the trust is set up to defraud third parties (e.g., tax authorities, Centrelink), it may be considered a sham (Wyatt). </td></tr> <tr> <td>B – No Trust Deed or Will?</td><td> <p>In the absence of a written trust deed or will, the court will assess the words and conduct of the parties, considering the context of the transaction (Paul).</p> <p>Language:</p> <ul style="list-style-type: none"> • No requisite form: There are no specific terms required to show an intention to create a trust (Paul). • Imperative words: Words expressing a clear command or obligation are generally sufficient to indicate trust intention. • Precatory words: Words that express hope, wish, or suggestion without a clear command are insufficient to create a trust (Re Williams). • Immediate operation: The trust must take effect immediately, not be contingent on future events (e.g., deferred beneficiary interest is acceptable, but the trust must exist now) (Harpur v Levy). <p>Conduct:</p> <ul style="list-style-type: none"> • Conduct that, to a reasonable person, indicates an intention to create a trust will support the finding of certainty of intention (Paul). • Examples include joint use of accounts, authorising notes, or repeated phrases like "as much yours as it is mine." <p>Context:</p> <ul style="list-style-type: none"> • Consider how the trust fund is being managed and whether there is repeated expression of trust. One off-hand statement is less </td></tr> </table>	A – Unambiguous Trust Deed or Will?	<p>If there is an unambiguous written declaration of a trust, this will generally satisfy the requirement for certainty of intention, provided no vitiating factors are present (Byrnes). A clear declaration of trust is sufficient, even if the settlor had secret intentions contrary to the written declaration (Byrnes).</p> <p>Look For:</p> <ul style="list-style-type: none"> • Vitiating factors: Such as undue influence, duress, mistake, or non est factum. • Sham trusts: If the trust is set up to defraud third parties (e.g., tax authorities, Centrelink), it may be considered a sham (Wyatt). 	B – No Trust Deed or Will?	<p>In the absence of a written trust deed or will, the court will assess the words and conduct of the parties, considering the context of the transaction (Paul).</p> <p>Language:</p> <ul style="list-style-type: none"> • No requisite form: There are no specific terms required to show an intention to create a trust (Paul). • Imperative words: Words expressing a clear command or obligation are generally sufficient to indicate trust intention. • Precatory words: Words that express hope, wish, or suggestion without a clear command are insufficient to create a trust (Re Williams). • Immediate operation: The trust must take effect immediately, not be contingent on future events (e.g., deferred beneficiary interest is acceptable, but the trust must exist now) (Harpur v Levy). <p>Conduct:</p> <ul style="list-style-type: none"> • Conduct that, to a reasonable person, indicates an intention to create a trust will support the finding of certainty of intention (Paul). • Examples include joint use of accounts, authorising notes, or repeated phrases like "as much yours as it is mine." <p>Context:</p> <ul style="list-style-type: none"> • Consider how the trust fund is being managed and whether there is repeated expression of trust. One off-hand statement is less
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		<p>convincing than consistent conduct or repeated assertions indicating trust creation.</p> <ul style="list-style-type: none">The sophistication of the parties and their relationship may also be relevant (Paul).
3 – CERTAINTY OF SUBJECT MATTER	<p>The subject matter of the trust must be legally recognized property, with a clearly defined quantum that specifies the beneficiaries' entitlements.</p> <p>Legal Property:</p> <ul style="list-style-type: none">Includes land (James), shares (White), and intellectual property (Green).Reversionary interests and residuary estates can also be held on trust (BVT).Not expectancies: An expectation of future property (e.g., a beneficiary under a will) cannot be held on trust (Re Rule's Sett). <p>Quantum:</p> <ul style="list-style-type: none">Trustees must be able to precisely identify the entitlement of each beneficiary. Vague terms like "bulk" are insufficient (Palmer).Familiar standards: A term provides sufficient certainty if it can be interpreted with an objective standard, such as "reasonable" (Re Golay's). However, terms like "reasonable" may still be too vague in some cases, as certainty is key for trustees to ascertain their duties. For example, "bulk" was held uncertain in Palmer, and "reasonable" may also be insufficiently precise here. <p>(Non-) Fungible Property:</p> <ul style="list-style-type: none">Non-fungibles: Subject matter must be segregated from the rest of the property (Re Goldcorp).Fungibles: Segregation is not necessary for fungible property (e.g., shares in the same class and company) (Moss, White).White analysis: If only a portion of a mass (e.g., shares) is declared, the settlor becomes trustee for the entire mass, holding a portion for the beneficiary and the remainder for themselves. The trustee then transfers the appropriate portion to fulfil their obligations (White).	
4 – CERTAINTY OF OBJECTS	<p>A trust must be for specific legal persons who can be sufficiently clearly identified to ensure conceptual certainty.</p> <ul style="list-style-type: none">Multiple People: If a description could refer to more than one person, this may create uncertainty unless additional evidence is provided to clarify the identity of the beneficiaries (Re Gulbenkian, Upjohn LJ).Court Resolution: The court has the discretion to resolve conceptual uncertainty, but they will only find sufficient certainty if familiar and clear terms are used (Kinsela).Third Party Resolution: A third party can be appointed to resolve conceptual uncertainty, but they must have the necessary qualifications to do so (Re Tuck's).	
	<p>A – Fixed Trusts: List Certainty Test</p>	<p>For a fixed trust, the court applies the list certainty test, which is satisfied if a full list of beneficiaries can be made at the time of distribution (IRC v Broadway, Kinsela).</p> <ul style="list-style-type: none">Timing: The test is applied at the point when the beneficiaries are entitled to the estate, not when the trust is created.In West v Weston (Young J), the list certainty test might be satisfied if a substantial majority of the beneficiaries are identified and no reasonable inquiries could further improve the identification. However, this is contrary to IRC and Kinsela, making it unlikely to be followed. <p>Examples:</p> <ul style="list-style-type: none">Not acceptable: Terms like "all employees, ex-employees, or their dependents" (McPhail).

		<ul style="list-style-type: none"> • Not acceptable: "Relatives," if interpreted broadly as descendants of a common ancestor (Re Baden). • Possibly acceptable: "Relatives," if interpreted more narrowly as next of kin (Re Baden).
	B – Mere Powers: Criterion Certainty Test	<p>For mere powers, the court applies the criterion certainty test, which is satisfied if the class of beneficiaries is sufficiently identified to allow the court to determine whether a specific person is or is not within that class. Unlike fixed trusts, mere powers give the trustee discretion to distribute or not, making it permissive.</p> <p>Key Case: Apply Re Gulbenkian.</p> <p>Examples:</p> <ul style="list-style-type: none"> • "Dependents of former employees" – Sufficiently certain (Re Baden (No 2)). • "Relatives" – Sufficiently certain, though could be further determined by DNA test (Re Baden (No 2)). • "Organisations formed for the elimination of war" – Controversial but arguably sufficient (Re Blyth). • Clear terms: Phrases like "residing," "persons with whom," "in whose company," or "under whose care" are acceptable. However, vague terms like "my old friends" are insufficient (Re Gulbenkian).
	C – Discretionary Trusts: Criterion Certainty + Administrative Unworkability	<p>In discretionary trusts, the criterion certainty test applies, similar to mere powers. This test is satisfied if it can be determined with certainty whether any given individual is or is not a member of the beneficiary class. State courts have followed McPhail, although the High Court has not directly ruled on its applicability.</p> <p>A trust power requires the trustee to distribute to beneficiaries they choose, and the distribution must be done according to the settlor's instructions (McPhail, Horan v James).</p> <p>Key Points:</p> <ul style="list-style-type: none"> • Not Severable: All sub-classes of beneficiaries must satisfy the criterion certainty test. If one sub-class fails, the entire clause is invalid (Tatham v Huxtable). • Severing in Australia: In Re Blyth, a trust for organisations improving living standards was severed from the invalid object—elimination of war—but this decision contradicts previous and subsequent authority (Re Blyth, Thomas J). <p>Administrative Unworkability:</p> <p>A discretionary trust can be invalidated if the class of beneficiaries is so broad that it does not form a coherent class. This is known as administrative unworkability:</p> <ul style="list-style-type: none"> • Example: "Residents of Greater London" was deemed to fail the administrative unworkability test in obiter comments (McPhail). • Example: A trust for 2.5 million residents of West Yorkshire was found void due to administrative unworkability (Ex Parte West). <p>Capriciousness:</p> <p>A trust may also fail if the class of beneficiaries was selected capriciously by the settlor, rendering the trust uncertain.</p>

Formality Requirement for express trusts

Inter vivos trusts (created by self-declaration or transfer)

- Trusts by self-declaration – where the Settlor declares themselves the trustee of property for B
 - Real property (i.e. land) – requires statutory requirements to be satisfied to enforce the trust
 - Declaration of trust must be manifested by the settlors writing and signature (s53(1)(b) PLA)
- Trusts by transfer – where the settlor transfers property to the trustee to hold on trust for B
 - Real property (i.e. land) – need to satisfy Torrens Statute requirement including registrations (NB: no need to mention this because already dealt with in property)
 - Transfer of trust must be manifested by settlor's writing and signature (s53(1)(b) PLA)
- NOTE – don't need to conform to formalities requirement for personal property, oral declaration is sufficient.

Secretary, Department of Social Security v James

Facts	<ul style="list-style-type: none"> - James ('J') purchased a home unit to accommodate her daughter and granddaughter. - In her pension application (and correspondence between them and the appeal), she stated that the title to the unit was retained in her name for her daughter's protection and that under her will, the unit would go to her daughter. - The Department of Social Security ('DSS') determined that the value of the unit was to be included as part of the value of her assets under s8 of the Social Security Act 1947 (Cth). - On review, AAT found that the respondent had declared an intention to hold the unit on trust for her daughter, and that the writing requirements were satisfied.
Held	Held: Court upheld the AATs finding that James declared a trust of the unit for her daughter and granddaughter. As such, James was entitled to the pension since the unit didn't beneficially belong to James and thus should not be counted as part of her assets.
Judgement	<p>Lee J – requirement in s53(1)(b) satisfied</p> <ul style="list-style-type: none"> - Focus of the inquiry for intention is on substance, not form (recall the equitable maxim of substance over form) - No need for technical language (eg 'trusts') - 'Writing requirement may be satisfied by a combination of multiple documents capable of being read together. Any informal writing may stand as evidence of the existence of a trust' (BS 15.2b) - The date the writing was created is immaterial. It may come into existence after the declaration of the trust (ie later writing suffices).
Principle	<ul style="list-style-type: none"> - Focus on substance over form when determining whether formalities are met - Don't need to technical writing - Can satisfy writing requirement with a combination of documents - The date writing is created is immaterial, may come into existence after declaration of trust.

Formalities requirement for Beneficiaries

Equitable Interest is a property interest.

- **Disposition of an equitable interest** – where beneficiaries direct the trustee to hold their interest in property for C (essentially disposing of their interest)
 - S53(1)(c) – writing and signature required for both PERSONAL AND REAL (Land)
- **Creation of a sub-trust** – Beneficiaries declare themselves to the Trustee of their own interest under the trust in favour of C (essentially creating a subtrust)