

DISCRETIONARY TRUSTS

A QUICK GUIDE

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01



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The beneficiaries are the persons for whose benefit the trustee holds the trust property.

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02



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DISCRETIONARY TRUSTS



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IN A DISCRETIONARY TRUST, IT IS THE TRUSTEES JOB TO DECIDE THE NET INCOME AND CAPITAL WHICH WILL BE DISTRIBUTED TO THE BENEFICIARIES NAMED IN THE TRUST.



What is a discretionary trust? A discretionary trust addresses the relationship in which one person legally owns an asset for the benefit of another person or set of persons. The person who legally owns the asset is called the trustee, and the person or persons for whose benefit the asset is held is called a beneficiary.

A discretionary trust is also known as a family trust. This is significant because the beneficiaries are all, or predominantly, members of the same family.

The name 'discretionary trust' is derived from the role performed by the trustee. In a discretionary trust, it is the trustees job to decide the net income and capital which will be distributed to the beneficiaries named in the trust. This is done at his/her discretion. Thus the name, discretionary trust.

The income tax, capital gains tax and asset protection advantages attached to a discretionary trust means that they are often the preferred method of structuring a business or investment activity, even when the business or investment is only of modest size.

Some of the advantages of using a discretionary trust.

- A discretionary trust is a great tool for managing family wealth.
- A discretionary trust can be used to protect the assets of a family.
- A discretionary trust offers tax benefits.
- A discretionary trust can be used for estate planning purposes.
- A discretionary trust provides a secure environment in which assets can be held for future generations of the same family.
- Using a discretionary trust helps to streamline tax affairs and allocate family resources where best needed.
- Using a discretionary trust enables income to be distributed to companies and trusts associated with family members.

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Some of the advantages of using a discretionary trust (continued...)

A discretionary trust enables income with different tax characteristics to be streamed to family members individually. The structure can also be applied to non-family beneficiaries.

Discretionary trusts are relatively cheap. Their simple structure makes them a popular choice for structuring business or investment activity.

Disadvantage

The major disadvantage of a trust is that it cannot distribute capital or revenue losses to its beneficiaries. As a result, should a trust incur a net loss its beneficiaries will not be able to offset that loss against any other assessable income that they may derive.

Expert advice should be sought if it is expected that a trust may make a revenue loss or a capital loss for taxation purposes.



KEY ROLES IN A DISCRETIONARY TRUST

The appointer

The trustee is appointed by a person called the "appointor" (or in some older deeds "the guardian"). The appointor is usually nominated in the schedule to trust deed and is typically the person (or persons) who decides to set the trust up in the first place.

The appointor controls the trust, since if the trustee did not follow the appointor's directions, the appointor would simply sack the trustee and appoint a more compliant trustee in its place.



The Trustee

It is the trustee's job to decide the net income and capital which will be distributed to the beneficiaries named in the trust. The trustee has legal ownership but not beneficial ownership of these assets, and is required to hold them for the benefit of the family members who are specified in the trust deed to be the beneficiaries of the trust. The trustee can be either an individual or company (corporate).

A corporate trustee is a company owned by the client, set up specifically to act as trustee of the trust. The shareholders and directors control the trustee. The trustee legally owns the trust property but does not beneficially own the trust property. Beneficial ownership of the trust property lies with the beneficiaries.

The trustee can also be any competent person over the age of 18 (individual) who is not bankrupt or under some other legal disability.

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Most of the advantages of family trusts stem from the trustee's discretion over which beneficiary receives net income distributions or capital distributions from the trust each year.



The beneficiaries

The beneficiaries are the persons for whose benefit the trustee holds the trust property.

In most trust deeds the “primary beneficiaries” will be specified, and will usually be the people setting up the trust, and perhaps their children or other close relatives. The “general beneficiaries” will be defined by reference to the primary beneficiaries. For example, the class of persons who are general beneficiaries will usually be the parents, grandparents, brothers, sisters, children, grandchildren, aunts, uncles, nephews, and nieces of the primary beneficiaries.

Primary beneficiaries do not have any greater rights over the trust property than general beneficiaries. In fact, as indicated above, they do not have any rights at all: they only have an

expectation that the trustee may exercise its discretion in their favour.

Most of the advantages of family trusts stem from the trustee's discretion over which beneficiary receives net income distributions or capital distributions from the trust each year, or on the vesting of the trust. Because of this discretion, the law does not recognise any property right in a beneficiary over the assets owned by the trust. This is because no single beneficiary owns the assets held in the trust.

As a group the beneficiaries own the assets, but no one beneficiary owns them, or part of them. This means it is usually not possible for a beneficiary to unilaterally do something that places the trust's assets at risk.

PRIMARY BENEFICIARIES DO NOT HAVE ANY GREATER RIGHTS OVER TRUST PROPERTY THAN GENERAL BENEFICIARIES. HOWEVER, THERE IS AN EXPECTATION THAT THE TRUSTEE MAY EXERCISE ITS DISCRETION IN THEIR FAVOUR.

Therefore, if the beneficiary becomes bankrupt there is usually nothing the trustee in bankruptcy can do to get his hands on the trust's assets (unless of course the trust has mortgaged the assets or guaranteed the performance of the beneficiary's debts, or otherwise involved itself in the bankrupt beneficiary's affairs).



The Settlor

The settlor (or, sometimes, the grantor) is the person who the law treats as establishing the trust. This is really a legal fiction: the settlor is usually someone connected to the trustee and the beneficiaries such as a friend or an accountant who pays a nominal sum, say \$10, to the trustee to formally establish the trust. Obviously the bulk of the trust's initial assets will be contributed later by the client and related persons, not the settlor.

Most modern trust deeds will contain a clause saying that the settlor is not able to benefit under the trust deed. This is because of a tax rule that may create a tax charge for the trust if such a clause is not included in the deed.

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The Settlor (continued...)

Sometimes clients are concerned that the name of a person such as their accountant appears in the trust deed, and query whether this creates rights in favour of that person. It does not. The role of the settlor is a mere formality. Once the trust starts, the settlor has no rights whatsoever in respect to the trust. Inserting the accountant's name in the deed as the settlor is a convenient convention and is a simple way of settling the trust up.

THE SETTLOR CANNOT DERIVE ANY BENEFIT FROM THE TRUST. ITS COMMON FOR AN ACCOUNTANT OR FINANCIAL PLANNER TO ACT AS SETTLOR. THEY ARE AN UNRELATED PARTY.

QUICK SUMMARY

The Trustee

The trustee has legal ownership but not beneficial ownership of the assets in the trust and it is their job to decide the net income and capital which will be distributed to the beneficiaries named in the trust.

The Appointer

The Appointer appoints the trustee is typically the person (or persons) who decides to set the trust up in the first place.

Beneficiaries

The beneficiaries are the persons for whose benefit the trustee holds the trust property.

The Settlor

The settlor is an unrelated person, generally an accountant or financial adviser. The settlor cannot derive any benefit from the trust.

ESTABLISHING THE TRUST

Individual or corporate trustee?

The advantages of using a corporate trustee are as follows:

- having legal ownership of the trust's assets in the name of the company makes it very clear that they do not belong to the individuals, and this means they are less at risk, particularly if the individual is in a risky business or profession;
- the company may stay in existence virtually forever, and will not die or become unable to manage its own affairs. This means things are simpler and there is less bother with changing trustees and re-registering ownership with authorities such as the various state Titles Offices;
- the directors or other persons who control the company can exercise defacto control without being personally involved in the trust.

The disadvantages of using a company as trustee are largely the extra cost of setting up and running a company each year.

THE TRUSTEE HAS LEGAL OWNERSHIP BUT NOT BENEFICIAL OWNERSHIP OF THE ASSETS IN THE TRUST.

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The trustee is the legal owner of the trust's property. The trustee's name should appear on all ownership documents such as shares in private companies and title deeds.



In whose name should assets be held?

The trustee is the legal owner of the trust's property. This means the trustee's name should appear on all ownership documents, such as shares in private companies, units in private trusts, or title deeds for land ownership.

You may add the tag "... as trustee for the (name) family trust" if you wish, and this has the advantage of informing or reminding all concerned that the asset is held on trust and does not belong to the trustee personally. However, in some cases this will not be possible. For example, most Title Offices will only register a title in the name of the trustee, i.e. the legal owner, and will not allow the tag "... as trustee for the (name) family trust" to be used.

CHECKLIST / SUMMARY FOR ESTABLISHING A DISCRETIONARY TRUST

Sign the documents



The documents must be signed by the trustee(s) and the settlor. All signatures need to be witnessed.

Apply for a TFN



Once the trust has been established a TFN application should be lodged with the ATO. If the trust is running a business then it will also need an ABN. These applications can often take up to 28 days to be processed.

Stamping



Stamp duty may be payable on the trust deed. Please contact the State Revenue Office in your state to enquire about the stamping requirements. Each state has different rules and charges for stamping deeds.

Open the bank account



When the trust deed has been stamped then a bank account should be opened for the trust in the name of the trustee as trustee for the trust. The bank may require the trust TFN before it will open the account.

When the bank account has been opened, the first deposit should be the settlement sum.

Discretionary Trust is operational



When all of these steps have been followed, the discretionary trust is operational and is able to accept contributions.



Sign



ABN/TFN application



Stamping at SRO



Bank account

DISCRETIONARY TRUSTS



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State Revenue Offices

Every state in Australia has its own revenue office. Their job is to collect revenues, administer grants and recover debts.

See contact details below:



NORTHERN TERRITORY.

Treasury Revenue Office

Telephone: 1300 305 353
www.treasury.nt.gov.au/dtf/revenue

QUEENSLAND

Queensland Treasury

Telephone: 1300 360 044
www.treasury.qld.gov.au

NEW SOUTH WALES.

NSW Revenue

Telephone: 1300 139 814 | 02 9685 2146
www.revenue.nsw.gov.au

ACT

ACT Revenue Office

Telephone: (02) 6207 0028
www.revenue.act.gov.au

VICTORIA

State Revenue Office Victoria

Telephone: 132161
www.sro.vic.gov.au



WESTERN AUSTRALIA

State Revenue Office Department of Finance

Telephone: 08 9262 1400
Rural callers: 1300 368 364
www.finance.wa.gov.au

SOUTH AUSTRALIA

Revenue SA

Telephone: (08) 8226 3750
1800 637 778
www.revenuesa.sa.gov.au

TASMANIA

State Revenue Office of Tasmania

Telephone: (03) 6166 4400
1800 001 388
www.publictrustee.tas.gov.au





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