



TRUSTS

What is a trust?

A trust is an arrangement which lets a person or company hold property or assets for the benefit of others. The person holding the asset or property is known as the trustee. The people or even companies for whose benefit it is held are known as the beneficiaries.

Unlike a company, a trust is not a separate legal entity, although it is treated as a separate entity when it comes to paying tax. That means the trustee is liable for any of the trust's debts, which is why many people choose to have a company as trustee.

Trusts can be set up by deed during a person's lifetime, or by will to take effect after the person's death. Trusts established by will are known as testamentary trusts.

Why set up a trust?

There are many reasons someone would choose to set up a trust. These include:

- To separate the owner of the asset (the beneficiary) and control over that asset (the trustee), eg where the beneficiary is under age or suffers from a disability that affects their decision making.
- To provide greater flexibility in tax planning and other tax benefits
- To protect assets from financial claims made against the beneficiary
- To use as a business entity either for investing (for example, to purchase real estate or a share portfolio) or for trading

What does a trust need?

Any trust needs a number of elements before it can start operating:

The settlor: The settlor is the person responsible for setting up the trust and naming the beneficiaries, the trustee and, if there is one, the appointor. For tax reasons, the settlor should not be a beneficiary under the Trust.

The trustee: The trustee (or trustees) administers the trust. The trustee owes a duty directly to the beneficiaries and must always take into account their best interests in anything they do. All transactions for the trust are carried out by and in the name of the trustee.

The beneficiary or beneficiaries: The beneficiaries are the people or companies for whose benefit the trust is set up. Beneficiaries can be either primary beneficiaries (who are named in the trust deed) or general beneficiaries (who often are not named individually). General beneficiaries are usually existing or future children, grandchildren and relatives of the primary beneficiaries.

The trust deed: The trust deed (or, in the case of a testamentary trust, the will) is the formal document which sets out how the trust will run and what the trustee is allowed to do. It is very important that the trust deed or will is drafted by a solicitor.

The appointor: Many, but not all, trusts also have an appointor. The appointor is very important as they have ultimate control over the trust. The appointor has the power to appoint and remove the trustee. For this reason, you should always carefully consider who you name as appointor.



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What different kinds of trusts are there?

There are many different kinds of trust. As well as the types of trust described below, trusts include superannuation funds, charitable trusts and special disability.

The three main types of trusts which are used in business and by individuals are:

Discretionary (or family) trust

A discretionary trust or family trust is the most common form used by families. The beneficiaries of the trust have no defined entitlement to the income or the assets of the trust. Each year, the trustee decides which beneficiaries are entitled to receive the income and how much they should get. For this reason, discretionary trusts have become popular in family tax planning.

Fixed or unit trust

Unlike a discretionary trust, the beneficiaries of a fixed trust have a defined entitlement under the trust, similar to a shareholder in a company. This is usually done by dividing the trust into units in much the same way a company is divided into shares. The trustee doesn't have any discretion as to how they distribute the trust's capital and income. A fixed or unit trust is often used for joint venture arrangements – for example, two families want to own an asset together.

Hybrid trusts

A hybrid trust gets its name because it combines the features of both a fixed and discretionary trust, compelling the trustee to provide a fixed amount but also allowing them some scope to make distributions.

How long does a trust last?

In NSW, a private trust can last for up to 80 years. The trust deed will set out how long it should last and can specify a shorter term – often based on a specific event happening, such as someone dying or reaching a certain age. The date when a trust reaches the end of its term is known as the 'vesting date'.

What happens on the vesting date?

When a trust vests the beneficiaries become absolutely entitled to all of its assets and income. The trustee must distribute all assets and income to them in line with the trust deed. A trust deed will usually have a set of rules the trustee must follow when doing this.

Does a trust pay tax?

A trust has its own tax file number and is required to lodge tax returns annually. However, the trust generally is not subject to tax if all its income is distributed to beneficiaries, but instead has its income taxed in the hands of the beneficiaries based on their marginal rate of tax. Where the trust conducts a business enterprise it can register for both an ABN and GST.

How can a solicitor help?

If you're considering setting up a trust or already have a trust, a solicitor can help in many ways, including:

- Advising you on whether a trust suits your goals or objectives
- Advising you on which sort of trust is right for your needs
- Explaining how the trust works and ensuring that you have taken account of all aspects of how your trust will be governed
- Helping you identify the appropriate trustee and appointor
- Explaining the implications of trusts in your estate planning, family law issues and asset protection requirements
- Working with your accountant (where applicable).

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