Trust overview

View Legal

A TRUST IS, IN EFFECT, SIMPLY A LEGAL RELATIONSHIP WHERE THERE IS

A LEGAL OWNER OF PROPERTY (THE 'TRUSTEE')
WHO HOLDS THE PROPERTY ('TRUST PROPERTY')
FOR THE BENEFIT OF OTHERS (THE 'BENEFICIARIES')
PURSUANT TO CERTAIN TERMS OR RULES ('TRUST DEED')

Diagrammatically, the structure of a trust is represented below

TRUSTEE	TRUST PROPERTY	THE BENEFICIARIES	TRUST DEED
Controller	Assets held in trust by trustee for beneficiaries	Potential to benefit	Rules

TRUSTEE

The trustee is the legal owner of the property. The trustee will therefore have the ultimate control over the assets of the trust.

The trustee can be a company or one or more individuals. Where the trustee is a company, the directors of the company will have the day-to-day control of the trust.

As the shareholders of the company appoint the directors, the shareholders will have the ultimate control over the trust.

Despite this ultimate control, the shares in the trustee company will normally only be worth a nominal amount, regardless of the value of the assets in the trust that the trustee company controls.

The Office of State Revenue, in both Western Australia and Queensland, has the ability to attribute far greater value to the shares in the trustee company - based on the value of trust assets, rather than the value of the shares themselves. Therefore, in relation to shares in trustee companies for trusts in those states, care needs to be taken, from a stamp duty perspective.

Although the trustee is responsible for the day-to-day running of the trust, many trusts also have a 'principal' (also commonly known as an appointor, guardian or nominator) who retains ultimate control over the trust. The principal has the ability to appoint and remove the trustee at any time, and its consent may be required to make any amendments to the trust deed.

If the trust deed or will does not name a principal, the existing trustee will usually have the power to appoint a new trustee.

BENEFICIARIES

The discretionary trust structure enables income that is earned by the trust to be distributed to the beneficiaries of the trust in such proportions as the trustee decides.

Normally, there are numerous beneficiaries set out - for example:, a mother and father; children and grandchildren; any brothers or sisters of any one mentioned before; any other trust in which any of these people are potential beneficiaries; any company in which any of these people hold any interest. These people are normally referred to as 'discretionary beneficiaries'. The main reason for including a large number of discretionary beneficiaries is to allow the trustee maximum flexibility when distributing income.

The trustee is able to decide the proportions in which the income of the trust is distributed among these potential beneficiaries, on the basis of what would be appropriate, given the needs of the beneficiaries, and what is most tax effective in any given year.

One common strategy is to include a company as a potential beneficiary of the trust. As companies are currently taxed at a flat rate of 30% it can be an effective strategy to distribute income from the trust to the company so as to limit the overall tax paid by a family group.

Normally there will be one or two people who have an expectation of receiving income from the trust. These people are commonly referred to as the 'primary beneficiaries'.

Most trusts set out who is to be entitled to the income of the trust if the trustee does not exercise its discretion to decide how to distribute the income. These are known as the 'default beneficiaries'. Most trusts separately set out who are the default beneficiaries for any income that has not been distributed at the end of each year, and who are the default beneficiaries for capital upon the winding up of the trust. The default beneficiaries are often the same people as the primary beneficiaries.

TRUST DEED

Every trust is governed by a trust deed. This sets out how the trust must be run, what the trustees can do in running the trust and who the beneficiaries are. Discretionary trusts have been used as tax effective asset owning vehicles for a long time. Consequently, there are large numbers of trusts, governed by trust deeds that were drafted when the tax and trust laws were significantly different.

Testamentary trusts are normally a form of discretionary trust established under a will, with the rules of the trust normally set out in the will itself.

It is necessary to review a trust deed periodically to ensure that it allows the trustees to operate the trust in the most tax effective way.

It is also important to review the terms of the trust deed carefully, with particular reference to issues such as:

a. the vesting day (or ending day) of the trust. In all Australian states, except South Australia, a trust can last for a maximum period of 80 years
b. whether there is a 'principal'. As mentioned above, this person or entity has the ability to remove and appoint trustees at their total discretion
c. the powers the trustee has in relation to administering the trust. For example, trustees might not always be able to grant options in relation to trust property
d. what provisions apply in the event a trustee fails to make a distribution.