

## Ordering a Discretionary Trust – Things to Consider

<p><b>What is a Discretionary Trust?</b></p>	<p>A discretionary trust is not a separate legal entity in the way that individuals or companies are. Rather it is a relationship where a person (the trustee) holds property for the benefit of others (the beneficiaries). A <u>discretionary</u> trust allows the trustee the discretion to decide who among the beneficiaries will receive income each year from the trust and capital from the trust from time to time.</p>
<p><b>Why use a Discretionary Trust?</b></p>	<p>By being able to spread income among the beneficiaries the Discretionary Trust allows the flexibility to ensure the full marginal tax rates of various beneficiaries are utilised. Fixed entitlement structures like companies and unit trusts do not necessarily offer this flexibility. Discretionary Trusts also allow their potential beneficiaries to <u>control</u> assets without actually <u>owning</u> the assets – very useful for asset protection purposes.</p>
<p><b>The Settlor</b></p>	<p>The settlor should be a family friend or a relative who is not intended to benefit from the trust. The settlor is excluded by the trust deed from benefiting from the trust to avoid any issues under s 102 of the ITAA 1936. Professional advisers should not be settlors unless they have a personal relationship with the client and a real interest in the client's family. The settlor will settle the initial trust sum by gifting it to the trustee. The settlor must not be reimbursed for this gift. Once the document is signed the settlor has no further obligation in respect of the trust.</p>
<p><b>The Trustee</b></p>	<p>The trustee can be one or more individuals or a company. It is recommended that it be a company to avoid issues arising out of the death of an individual trustee. A trustee company should do nothing else other than administer the trust, to avoid confusion regarding on whose account the company is acting at any time. The trustee company's actions are controlled by its directors and ultimately by its shareholders. The trustee conducts the day to day affairs of the trust. The trust should not normally be mentioned in those dealings and the trustee should behave as if it were the absolute owner. It should however keep good internal records evidencing that it is acting at the relevant time for the trust. Recent cases have cast doubt on the asset protection qualities of a trust where the trustee is controlled by the key beneficiaries. Consideration should therefore be given to removing that control by appointing independent directors to the board of the trustee company.</p>

<p><b>The Beneficiaries</b></p>	<p>The beneficiaries are the people who benefit from the trust. Before deciding who are to be the beneficiaries it is critical to consider why the trust is being set up. Is it for income levelling? business operation? asset protection? succession? estate planning? child maintenance? Once that issue is resolved the decision can be made as to who should be the beneficiaries of the trust. Generally a different trust should be used for the different purposes in order to ensure that assets and rights are not detrimentally affected or diluted by cross liabilities.</p>
<p><b>The Key Person</b></p>	<p>The most important beneficiary in the trust is the 'key person'. The other beneficiaries are identified by reference to the key person or key persons, such as their children, grandchildren, parents, grandparents and so on. The key person can be a single person or it can be a married couple. Family law considerations impact on the choice of the key person.</p>
<p><b>Taker-in-Default</b></p>	<p>Sometimes called the 'default beneficiary'. This is the beneficiary who takes the income if the trustee fails to make a determination either by 30 June each year or on the vesting or winding up of the trust. If there is no default beneficiary then the trustee will be taxed on trust income potentially at very high rates. The taker-in-default can be, and most usually is, the key person, but can also be any other person or company appointed in the deed. Care should be taken on the selection as the taker-in-default may well pay tax on the default amount that is automatically allocated to them as a result of the trustee's failure to make a determination.</p>
<p><b>The Appointor</b></p>	<p>This is the person who can replace the trustee and appoint another and so is the person with indirect ultimate control of the trust. The appointor could be one or more individuals or a company. As the appointor does not hold property, it is not so crucial to have a company appointed to the role to avoid the problems associated with the death of the appointor. Recent cases have cast doubt on the asset protection qualities of a trust where the appointor is, or is controlled by, the key beneficiaries. Consideration should therefore be given to removing that control by appointing several people to jointly carry out the role of appointor, with the majority of those appointed being independent of the key beneficiaries.</p>
<p><b>The Initial Sum</b></p>	<p>This is the amount the settlor gifts to the trustee to start the trust. It is normally a nominal amount but some commentators believe if it is too small the integrity of the trust could be in question. Although the Australian Taxation Office has never argued the issue, it is recommended that the initial sum be <u>not less than \$100</u>.</p>

<b>More Information</b>	If you have any enquiries or require any assistance, please do not hesitate to contact us.
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**STAMP DUTY ON DISCRETIONARY TRUSTS**

State	Name of Act	Section Number	Amount of Duty (+ each Counterpart)	Lodgement Necessary?
NSW	Duties Act 1997	Section 58	\$500 (+ \$10)	Yes
VIC	Duties Act 2000	Section 37	\$200 (+ no charge)	Yes
QLD *	Duties Act 2001	N/A	N/A	No
WA	Duties Act 2008	N/A	N/A	No
SA	Stamp Duties Act 1923	N/A	N/A	No
TAS	Duties Act 2001	Section 42	\$20 (+ no charge)	Yes
ACT	Duties Act 1999	N/A	N/A	No
NT	Stamp Duty Act	Schedule 1, Section 2	\$20 (+ \$5)	Yes

N/A = no duty on establishing a discretionary trust / duty abolished

\* In Queensland, creation of a trust of dutiable property is liable for duty, but a trust created by declaration or settlement of cash only is not liable for duty.

## Instructions to Establish Discretionary Trust

### YOUR DETAILS

Date	
Name	
Company Name	
Street Address	
Billing Address (if different)	
Telephone	
Fax	
Email	

Authorised by: \_\_\_\_\_ Signature: \_\_\_\_\_

### THE APPLICABLE LAW OF THE TRUST

This is the law of the State or Territory where the key person resides. Ideally it should also be the State or Territory where the majority of the trust's assets are located.

Applicable Law of the Trust (tick one):

- |                              |                              |
|------------------------------|------------------------------|
| <input type="checkbox"/> NSW | <input type="checkbox"/> SA  |
| <input type="checkbox"/> VIC | <input type="checkbox"/> TAS |
| <input type="checkbox"/> QLD | <input type="checkbox"/> ACT |
| <input type="checkbox"/> WA  | <input type="checkbox"/> NT  |

### NAME OF TRUST

Because discretionary trusts do not trade in their own name, the name of the trust is not particularly important. It is unwise to use a trading name in case the trading name is later sold. As with enterprise names generally, the trust's name should not be misleading, offensive, obscene or defamatory.

The

### NAME AND ADDRESS OF SETTLOR

This is the person who establishes the trust. The settlor should be a friend or relative who will not benefit from the trust.


**NAME OF TRUSTEE**

It is wise to have a separate company as the trustee of the trust. That company should do nothing but run the trust. If you already have a company that can do this then insert details here. If not then contact us about establishing a new company for you on 02 8296 6222. Recent cases have suggested that the trust is less likely to be successfully attacked by creditors if the trustee is wholly or partially independent of the beneficiaries. It would be advantageous if at least some of the board of directors were independent persons.

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**REGISTERED ADDRESS OF CORPORATE TRUSTEE OR RESIDENTIAL ADDRESS OF  
INDIVIDUAL TRUSTEES**


**ACN OF TRUSTEE**

(Not applicable if trustee is a person)

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**NAME AND ADDRESS OF DIRECTORS OF TRUSTEE COMPANY**

Insert the names of the directors of the trustee company. (Not applicable if trustee is a person)



**We will provide resolutions for the Corporate Trustee**

S 248A of the Corporations Act permits directors to pass resolutions by signing a statement that they are in favour of the resolution. The section applies unless the company's constitution states otherwise. S 248B of the Corporations Act applies with the same effect if the company has a single shareholder/sole director.

**NAME AND ADDRESS OF THE KEY PERSON**

This is the person whose family are the beneficiaries. The beneficiaries may include all of the key person's family and all of their spouse's family (if any) as well as spouses of children and grandchildren. Family law considerations should be applied in deciding whether the key person's spouse is to be a key person and whether the spouses of children are to be included.


**BENEFICIARIES**

Please tick those you specifically wish to be included:

- |  |  |
|--|--|
| <input type="checkbox"/> Spouse                  | <input type="checkbox"/> Spouse's Children             |
| <input type="checkbox"/> Children                | <input type="checkbox"/> Spouse's Grandchildren        |
| <input type="checkbox"/> Grandchildren           | <input type="checkbox"/> Spouse's Brothers and Sisters |
| <input type="checkbox"/> Brothers and Sisters    | <input type="checkbox"/> Spouse's Parents              |
| <input type="checkbox"/> Parents                 | <input type="checkbox"/> Spouse's Grandparents         |
| <input type="checkbox"/> Grandparents            |  |
| <input type="checkbox"/> <b>ALL OF THE ABOVE</b> |  |

Please advise name and address of any other specific person to be included.

Please advise name and address of any other specific person to be excluded.

**NAME AND ADDRESS OF 'TAKER-IN-DEFAULT'**

This is the beneficiary who takes the income if the trustee fails to make a determination. If there is no default beneficiary the trustee will be taxed on the income potentially at excessively high rates.

**NAME AND ADDRESS OF APPOINTORS**

The appointor is the person with the de facto control of the trust because they can appoint and remove the trustee at any time. The appointor can be the key person and/or their spouse – either jointly or separately. Recent cases suggest that greater asset protection is available where the trust is not controlled by the key persons. Consideration should be given to appointing independent appointors either instead of or in addition to the key persons.

**THE INITIAL SUM**

Insert settlement sum if other than \$100.

I confirm that the persons/corporations named above have consented to act in the capacity shown.

Signature	Print Name	Date:
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**PAYMENT DETAILS**

We will contact you when the work is complete and will forward the documents upon payment of our fee of \$385.00 (including GST).

Please make payment to: **TOWNSENDS BUSINESS & CORPORATE LAWYERS**

**Cheque**

Cheque enclosed for \$385.00

**Credit Card**

Please charge \$385.00

Visa / Master Card (please circle one)

--	--	--	--

Expiry Date:   /

Cardholder's name:

Address

  

**Authorised Cardholder's Signatory**

Please **SCAN / EMAIL** or **FAX** signed order form to:

**TOWNSENDS BUSINESS & CORPORATE LAWYERS**

Level 9, 65 York Street, Sydney NSW 2000

Phone: (02) 8296 6222

Fax: (02) 8296 6200

Email: [info@townsendslaw.com.au](mailto:info@townsendslaw.com.au)

Thank you for your order. We will contact you shortly. If you require any further information or assistance in the interim please do not hesitate to contact us.