



Chat Legal Pty Ltd

*Let's chat*

# WHAT'S IN A TRUST DEED?

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# Overview

- ◆ What makes a trust?
- ◆ Trust distributions clauses
- ◆ Trust vesting clauses
- ◆ Trustee powers
- ◆ Trustee liability and indemnity
- ◆ Change of trustee/controller clauses
- ◆ Variation clause
- ◆ Trustee administrative clauses

Explains why clauses are how they are

# What's makes a trust?

- ◆ Not a legal entity
- ◆ Fiduciary relationship
- ◆ Creation of 'equity' – which was developed to combat the 'inability' for certain people to claim justice through the legal system (due to there being no recognised cause of action under the law)
- ◆ For example, cases of fraud, mistake or breach of confidence had no remedy in the old times.
- ◆ *'When a "[common law]" judgment is obtained by oppression, wrong and a hard conscience, the chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party' – Earl of Oxford's case (1616) 1 Ch Rep 1*

# What's makes a trust?

- ◆ Sayings arose due to the creation of equity:
  - ◆ Equity follows the law
  - ◆ He who seeks equity must do equity
  - ◆ He who comes to equity must come with clean hands
  - ◆ Equity regards that as done which ought to be done

# What's makes a trust?

- ◆ History lesson
- ◆ Land could not be specifically gifted under Will
- ◆ A solution was for a landowner to give land to a group of trusted friends for the use and benefit of the landowner during his lifetime, and then for the benefit of other people on the death of the landowner
- ◆ If the group of trusted friends did not follow through, then 'equity' would be called upon to force the trusted friends to follow through
- ◆ Fun fact – transaction avoided death duty for a period of time
- ◆ Trusts would eventually merge

# What's makes a trust?

- ◆ Take out no. 1 – the concept of a trust arose due to ‘fairness’ and being just. Although discretionary trusts have blurred what is ‘fair’, it is useful to appreciate that there can be avenues to achieve ‘fairness’ (although legal costs will not be cheap given the complexity)
  - ◆ Resulting/constructive trusts
  - ◆ Bare trusts
- ◆ Take out no. 2 – Three certainties (intention to create trust and certainty of terms; certainty as to the property subject to the trust; certainty as to the purpose of the trust or who are to benefit)
  - ◆ Life beneficiary and remainder beneficiary

# Things to appreciate

- ◆ Trustee is legally the owner of the assets of the trust
- ◆ Subject to the type of trust, however, the beneficiary may have recourse if the trustee breaches the trust
- ◆ The trustee is therefore responsible for entering into arrangements relating to assets of the trust and it is the trustee who must follow through with such obligations
- ◆ The trustee therefore needs to appreciate the importance of their role and the risks associated with it
- ◆ Non-discretionary trusts may make it easy for beneficiaries to attack when a trustee breaches their obligation
- ◆ Discretionary trusts relax things due to the discretionary nature

# Things to appreciate

- ◆ The trust deed terms is paramount as it is arguable that if the trustee does not follow the terms, that the trustee is failing in their fiduciary duty
- ◆ Clients (and advisers) should, therefore, understand what can or cannot be done in the trust deed
- ◆ The trust deed can often trump certain default legislation, so it should always be read
- ◆ Personal view – variation clause most critical, but good to know if there are ‘weird’ clauses to be aware of



# Trust distribution clauses

- ◆ What can be distributed?
- ◆ Can it be reclassified and separately classed?
- ◆ Can things be streamed? What can be streamed?
- ◆ How can things be distributed – appreciate section 101 ITAA 1936
- ◆ Who can receive the distribution?
  - ◆ Appointing beneficiaries
  - ◆ Removing beneficiaries
  - ◆ What's the process

# Trust vesting clauses

- ◆ Perpetuity period
- ◆ What happens to the trust assets on vesting?
- ◆ Automatic beneficiaries?
- ◆ TR 2018/6
- ◆ Bare trust for certain beneficiaries

# Trustee powers

- ◆ Allow 'speculative' or 'risky' investments?
- ◆ Prior to entering into a transaction, the trust deed should be reviewed to ensure it can enter into the proposed transaction (think obtaining a call option)
- ◆ Catch-all clause
- ◆ Sometimes important clauses are hidden in the trustee powers

# Trustee liability and indemnity

- ◆ Anyone indemnify the trust?
  - ◆ Trustee can be personally liable for liabilities arising as trustee
  - ◆ Trustee can usually be entitled to use trust assets to meet such liabilities related to the trust
  - ◆ Trustee does not necessarily have to indemnify beneficiaries except for the case of fraud, gross negligence or breach of trust
  - ◆ Beneficiaries not normally required to indemnify anyone for losses in connection with the trust
- ◆ General trustee remuneration

# Change of trustee/controller clause

- ◆ Succession planning
- ◆ How can control pass
- ◆ Is it flexible enough
- ◆ Can appointments be made conditional?
  - ◆ By Will?
  - ◆ Subject to death or loss of capacity?
  - ◆ Cascading?
  - ◆ Over certain trust assets?
  - ◆ Restrictions on who can be appointed?

# Variation clause

- ◆ Broad?
- ◆ Difference between a 'trust' and a 'power'
- ◆ Conditions on what 'trust' or 'power' can be changed/varied
- ◆ Consents required?

# Contact details



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