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Let's chat

The Chat Legal Discretionary Trust Deed – December 2024/January 2025

With:

Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances



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What's the price?

\$160 (GST inclusive)

- Accountant's only
- From 1 January 2025
- No credit card fees apply



What's included?

- Trust deed establishing a 'standard family trust'
- Accompanying trustee resolution
- Template trust distribution resolution (for consideration by tax advisors)
- Sample trust resolution wording for common transactions
- Cover letter including a seven (7) page summary of a 'standard family trust' and next steps
- *A lawyer reviewing the instructions to identify **clearly** missed issues to limit the risk of issues arising post-establishment*



Limit of lawyer review

- Chat Legal acts for your firm, **not your client**
- Identifying whether trust deed will require stamping (*separate fees may apply to arrange for trust deed to be stamped*)
- Querying whether:
 - Trust acquiring investment property should have individual trustee/s
 - Trust acquiring investment property should 'exclude foreign beneficiaries'
 - Trustee incorporated before trust establishment date
 - Primary beneficiaries should include children
 - Unrelated persons should hold a Trustee/Appointor role
 - Trust can be established prior to Chat Legal receiving the instructions
- Separate fees may apply where formal legal structuring advice is required or if legal advice regarding deed required



Why use us?

- Made for Queensland
- Drafted to reduce likelihood of common issues arising
- Covers the reasons for having a discretionary trust:
 - tax planning flexibility
 - succession planning flexibility
 - asset protection drivers
- Maximum flexibility

- Supporting a small business who wants to support you



Reducing establishment issues

- Reducing the discrepancy between 'date of deed' and 'trust establishment date'
 - *A The Settlor wishes to establish a trust for the benefit of the Beneficiaries on the Trust Establishment Date.*
 - *B The Settlor has paid or agrees to pay the Settlement Sum, to settle the Trust, to the Trustee.*
 - *C The Trustee agreed or has agreed to accept the Settlement Sum from the Settlor.*
 - *D The parties agreed or has agreed that the Trustee will act as the trustee of the Trust from the Trust Establishment Date and to enter into this document to record the Settlor's intention of the terms of the Trust as from the Trust Establishment Date.*
 - *E The Trustee consents to act as the trustee of the Trust from the Trust Establishment Date.*



Reducing establishment issues

- Recommending execution by 'wet-ink' and having individuals signatures to be witnessed
- Reduces:
 - Risk of non-compliance of execution
 - Some States allow electronic signing subject to stringent requirements
 - Most States require a person to witness an individual executing a deed
- Limiting unnecessary defined 'Roles' in the Schedule and variations to the Deed will reduce 'missing roles':
 - E.g. Trust Deed that refers to an Appointor in the Schedule but no Appointor being named in the Schedule



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Vesting day

- Currently 80 years for all States except for South Australia
- Once approved, 125 years for Queensland



Discretionary beneficiaries

- A wide class of beneficiaries may cause various issues, including but not limited to:
 - Payroll tax grouping
 - Landholder duty
 - Unwanted beneficiaries disputing the trust
- Our view is a reasonably wide class of beneficiaries (see next page) and providing the Trustee with the power to appoint or remove persons as beneficiaries



What's a reasonable wide class?

- The 'family group' as known by making a family trust election
- Replace 'Test Individual' with 'Primary Beneficiary':
 - (a) *a Primary Beneficiary;*
 - (b) *a Spouse of the Primary Beneficiary;*
 - (c) *any Parent, Grand-Parent, brother or sister of the persons named in paragraphs (a) and (b) above;*
 - (d) *any Children, niece or nephew of the persons named in paragraphs (a) and (b) above;*
 - (e) *any Lineal Descendant of the persons named in paragraph (d) above;*
 - (f) *any Spouse of the persons named in paragraphs (a) to (e) above;*
 - (g) *the trustee of any trust which any Beneficiary is a member of a class of beneficiaries named in that trust, or holds units in that trust;*
 - (h) *any company that a Beneficiary, or this Trust holds any type of share or is a director in that company;*
 - (i) *the personal representatives of the deceased estate of any Beneficiary;*



Default beneficiaries

3.4 If the Trustee does not make a determination in respect of any part of the Income for a Financial Year by 11:55pm on the Distribution Date (Default Amount), then the Trustee holds the Default Amount for such of the Primary Beneficiaries then living provided that if all Primary Beneficiaries are deceased, then the Trustee holds the Default Amount for such of the children of the Primary Beneficiaries then living as follows:

- (a) if those children are living at 11:55pm on the Distribution Date then the children take the share of the Default Amount that their parent would have taken under clause 3.4 had the parent been living; and*
- (b) if any of those children is not living at 11:55pm on the Distribution Date but is in turn survived by one or more children who are living on that day, then the surviving children (the grandchildren of the deceased Primary Beneficiary) take the share of their deceased parent.*



Default beneficiaries

4.3 *If the Trustee does not make a decision under clause 4.2 with respect to any part of the Trust Fund (Default Capital) then on the Perpetuity Date the Trustee holds the Default Capital on trust for those Primary Beneficiaries then living.*

4.4 *If any of the Primary Beneficiaries dies before the Perpetuity Date and the deceased Primary Beneficiary leaves one or more children:*

(a) *if those children are living on the Perpetuity Date then the children take the share of or interest in that part of the Trust Fund that their parent would have taken under clause 4.2 had the parent been living on the Perpetuity Date; and*

(b) *if any child is not living on the Perpetuity Date but is survived by one or more children who are living on the Perpetuity Date then the surviving children (the grandchildren of the deceased Primary Beneficiary) take the share of their deceased parent.*

4.5 *If no person attains a vested interest in any part of the Trust Fund under clauses 4.1 to 4.4 for any reason, then on the Perpetuity Date the Trustee holds that part of the Trust Fund on trust for the same persons (and in the same proportions) as are entitled to the property of the Primary Beneficiary according to the laws then in force in the jurisdiction where the situs of the Trust Fund is.*



Excluded beneficiaries

- No unexpected exclusions
- Trust deed excludes
 - the Settlor;
 - any Child of the Settlor under the age of 18 years;
 - the trustee of any trust which the Settlor is a member of a class of beneficiaries named in that trust, or holds units in that trust;
 - any company that the Settlor holds any type of share or is a director in that company;
 - the personal representatives of the deceased estate of the Settlor; and
 - the person or classes of persons outlined in Item 9 of the Schedule
- Can either:
 - exclude 'foreigners'; or
 - specific individuals/defined classes of persons



Excluding foreign persons

- Allows an Australian citizen residing overseas to still benefit
- *Notwithstanding any other clause in this document:*
 - *the Trustee excludes such persons from being a beneficiary of this Trust; and*
 - *no action, decision, discretion or power may be exercised pursuant to the terms of this document,*
which would cause the Trust to be liable for:
 - *lodging an application required under the Foreign Acquisitions and Takeovers Act 1975 (Cth);*
 - *any 'foreigner' surcharge under any duty or land tax legislation in Australia; and*
 - *any 'vacancy' fee under any State or Federal legislation.*



Tax flexibility

- Trustee can determine what constitutes Income in any manner they decide
- Streaming provisions
- Ability to determine the extent to recover losses
- Ability to receive 'Estate Property' for the purposes of the excepted trust income provisions
- Trustee should be proactive in ensuring appropriate resolutions are prepared



Succession planning flexibility

- Default Event defined to include:
 - In relation to a Trustee or Appointor – death **or** the loss of lawful capacity through age, accident or illness (evidence of which is by certificate of a registered medical practitioner)
 - In relation to a Trustee – a Bankruptcy Event occurring
- Note some providers include a Bankruptcy Event to an Appointor
- Note some providers include a Relationship Breakdown Event to a Trustee and/or Appointor
- Deed provides power for:
 - Appointor to appoint a successor Trustee on any terms the Appointor determines;
 - Appointor to appoint a successor Appointor on any terms the Appointor determines noting that each Appointor may appoint a separate successor



Succession planning flexibility

- If no appointment made and a Default Event occurs, then:
 - any remaining Trustee/Appointor continues to act
 - if there are no remaining Trustee/Appointor, then relation to the last Trustee/Appointor who had a Default Event occur to them:
 - if they were an individual – the legal personal representative of that individual
 - if they were a company (only relates to bankruptcy) – the directors on the most recent company statement of the company



Variation power

- Broad variation power provided the variation:
 - does not result in an Excluded Beneficiary benefiting
 - breach the rule against perpetuities;
 - affect a beneficial interest in respect of any income directed up to the date of the variation



Mantra

- Maximum flexibility to add to or remove provisions from the Trust Deed
- Active involvement to ensure Trustee can comply with the Trust Deed



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Where

<https://chatlegal.com.au/document-discretionary>

Contact details

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