



TRUSTS AND DEATH

Author: Peter Porcellini

If anything in this Article raises a question or concern for your personal circumstances then call us or email us immediately at derek@munrothompson.com.au peter@munrothompson.com.au

Discretionary Trusts are structures used widely as investment structures.

They are known by a wide variety of names, which often relate to their purpose. These names include Family Trusts, Active Trusts, Passive Trusts, Property Trusts, Flipper Trusts and more.

Whatever they are called, a Discretionary Trust is generally intended to continue to exist after the death of its main players, for the benefit of other individuals who are usually family members.

On the death of the main players, it is not generally intended that the Trust be wound up and the assets distributed in the same way as the rest of the main players' estates. This would often lead to disastrous tax and stamp duty consequences.

A Trust structure is often used to limit assets that are held personally, for all sorts of reasons but principally:

1. asset succession (to regulate the inheritance of assets);
2. protecting estates from claims;
3. tax minimisation; and
4. asset protection.

If the aims of using the Trust Structure include one or more of items 1, 2 and 4 then there are unresolved legal issues that make it wise to structure the Trust so as to remove the risk that an Executor can obtain control of the Trust through the position of :

1. Trustee;
2. Director or Shareholder of the Trustee Company;
3. Appointor / Principal; or
4. Guardian.

In every case, when first establishing a Trust it is vital to build in a careful and absolutely clear line of succession for the positions of Trustee, Appointor/Principal and Guardian.

When first establishing a Trust it is also vital that careful thought be given to what should happen on the death of the main players, even though that issue is not usually the immediate concern.

Unfortunately, amending the Deed later to fix these succession aspects of the Deed can be disastrous from a tax and stamp duty perspective.

PROPERTY

BUSINESS

SUCCESSION

TERRY BETHKE

Principal

Accredited Specialist Property Law 

PETER PORCELLINI

CALVIN KONG

Senior Lawyers

LINDY GOULTER

Property Transfer Manager

Level 2, 77 The Esplanade
P.O. Box 5, Mooloolaba
Queensland 4557

Phone: 07 5444 3466

Facsimile: 07 5444 2150

www.munrothompson.com.au

ABN: 38 141 168 377

Member of Law Australasia

Things to consider generally

1. You should take legal advice on the repercussions that can flow from the selection of a Trustee, Beneficiaries, an Appointor/Principal and a Guardian.
2. The establishment of a Discretionary Trust is not a one size fits all exercise.

Before establishing the Trust your Lawyer and Accountant must make sure that they have a sufficiently clear appreciation of:

- (1) your intentions in establishing the Trust;
 - (2) the personal and financial circumstances of the main players;
 - (3) the risk exposure and intended future activities of the main players;
 - (4) the relevant succession intentions of the main players; and
 - (5) any other specific concerns that might exist in respect of any of the main players or any of the intended beneficiaries.
3. Should a Lawyer be involved, particularly in the Succession aspects of the establishment of a Trust?
The work clearly falls within the meaning of legal work under the *Legal Profession Act 2007*.
Only a Lawyer will have the protection of professional indemnity insurance when performing that work.
Consequently you need to be careful about establishing a Trust without a Lawyer's assistance if you want the protection of professional indemnity insurance.

How Can Munro Thompson Help?

We regularly assist with :

1. the establishment of appropriate structures to conduct business or investment activities;
2. tailoring specific aspects of an existing Trust or of one being established by other professionals;
3. reviewing Trust Deeds and Constitutions as part of an overall estate or succession plan; and
4. the preparation of documents to try and alleviate problems arising out of existing Trust Deeds that were not prepared to properly reflect a Clients overall circumstances, intentions and concerns.

We will :

1. make sure that we have an appreciation of your circumstances, intentions and concerns;
2. prepare documents that reflect your specific circumstances, intentions and concerns;
3. ensure that you understand the nature and effect of the documents;
4. act as Settlor of a Trust and provide the necessary settlement sum;
5. arrange for the proper signing of documents;
6. provide a number of properly certified copies of the documents; and
7. hold the original documents in safe custody so that they do not go missing in the future (a surprisingly common occurrence no matter how many originals are produced).