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FORMING A FAMILY DISCRETIONARY TRUST

WHAT IS A TRUST?

A trust is a relationship where a person or company (the trustee) is under an obligation to hold property for the benefit of others (the beneficiaries). The terms of the obligation are contained in a trust deed which is entered into between the trustee and the settlor (the person who sets up the trust).

The trustee is the legal owner of the trust property, although not the beneficial owner, and is responsible for managing the trust fund. The trustee's overriding duty is to obey the terms of the trust deed. The trustee also has a duty to act in the best interests of the beneficiaries. There are many other duties imposed on the trustee by law.

It is important to understand how a trust operates and the roles within the trust, as this may affect your Will and other estate planning strategies.

SETTLOR

The settlor is the person who pays a nominal sum to the trustee to establish the trust. The settlor cannot be a potential beneficiary (i.e. a relative) under the trust, as the settlor cannot derive any benefit from the trust. The settlor and the trustee sign the trust deed which reflects the agreement between them recording the terms and conditions under which the trustee shall hold and deal with the trust property.

TRUSTEE

The trustee is the legal owner of the trust property and has the power to make investments on behalf of the trust, to make income distributions to one or more of the specified beneficiaries of the trust, to accumulate any income for future distributions and to make limited variations to the terms of the trust. The trust deed specifies the powers of the trustee. The trustee also has the power to borrow money from banks and other financial institutions.

BENEFICIARIES

Beneficiaries for a discretionary trust can extend to a wide range of people. The beneficiaries may include the person for whose main benefit the trust is established, their spouse, parents, brothers, sisters, children, grandchildren and related companies and trusts. It is important for a discretionary trust that the range of potential beneficiaries is as wide as possible upon

Built on reputation

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inception of the trust, as any changes or inclusions of additional beneficiaries after the trust has been established and has accumulated assets may constitute a resettlement of the trust which may give rise to tax and duty implications. This should be discussed with your lawyer, accountant and financial advisor.

APPOINTOR

The appointor (or principal) is a nominated person under the trust deed (usually the person who has initiated the establishment of the trust) who has the power to remove the existing trustee and appoint a new trustee in its place. The appointer effectively controls the trust due to their power to remove and appoint the trustee. There is normally allowance in the trust deed for the appointor to nominate another person or successor to the role of appointor. For example, if you are the appointor named in the trust deed, you may nominate your spouse as the successor to the role of appointor in a separate document or in a nomination in your Will. For this reason it is important that you review your will when your personal circumstances change significantly to ensure the appropriate person or persons take control of your trust including distributions from it.

NAME OF YOUR TRUST

As you do not have to register the name of the trust with any Government organisation, you may choose any name that you like. It is recommended that the name of the trust be quite short as it must be recorded on legal documents.

CONCLUSION

The lawyers at Mackey Wales Law are experienced in providing advice and solutions to small business owners on the correct entity with which to run their business. This includes easy to understand advice and explanations on family discretionary trusts. If you would like to proceed further, you can download an order form from our website at www.mackeywales.com.au.