



# The Choice of Trustees

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## Role of Trustee

The law imposes upon a Trustee a duty to act in good faith for the benefit of Beneficiaries named in the Deed establishing the Trust. The Trustee must administer the Trust in accordance with the Terms, Conditions and Powers contained in the Trust Deed and implied by law.

What follows is an overview of the Role, Duties and Choice of Trustee of a Family Trust.

## Liability of a Trustee

Where a Trustee enters into a transaction, the Trustee will be liable for that transaction as if the Trustee had entered into the transaction on its own behalf. If the Trustee acts in accordance with the Terms, Conditions and Powers contained in the Trust Deed and those implied by Law, the Trustee has the right to be indemnified from the Trust Fund for any liability the Trustee incurs as a result of entering into the transaction. If the Trust Fund has insufficient funds to meet the liability, the Trustee will remain liable. The Trustee is therefore personally liable for transactions entered into in respect of the Trust. Hence limited liability corporate entities are often chosen to be the Trustee of a Family Trust.

If the Trustee is a corporate entity, it will be necessary for the Trustee directors to comply with the provisions of the *Corporations Act 2001* (Cth) in relation to all regulations in relation to the corporate entity such as to notification of changes to directors and shareholders, holding of meetings and preparing and approving formal accounts each financial year etc. The Trustee must maintain two sets of financial records: one in respect of its own affairs and the other in respect of its activities as Trustee of the Trust.

Proper accounting records should be maintained by the Trustee. If the Trustee's activities are limited to acting as Trustee of the Trust and the Trustee does not engage in any business on its own account, the accounts of the corporate entity should not change from

year to year. The accounts are to be maintained by the Trustee in respect of the Trust must record all receipts and payments, all distributions of income and capital of the Trustees. A balance sheet and profit and loss account should be prepared for the Trust in respect of each financial year of operation and, if the Trust had earned income during the period, an income tax return must be lodged with the Commissioner of Taxation.

## Problems Associated with Trustees

A common problem is finding a suitable successor to the original Trustee when that person dies or steps down. The heirs of that person may well be inappropriate not only because they are themselves potential Beneficiaries but also because they lack the necessary skills and/or because they are not available physically.

Persons, who know their limitations can, of course buy in the necessary expertise. A greater danger is that a person who is honest and well disposed to the family but who does not realise their own lack of knowledge in investment matters might accept an appointment as Trustee. Trustees can be nominated from friends or business associates of the family or in-laws. However, this is likely to result in a sympathetic stewardship.

Trustees can also come from professional advisers, such as accountants and solicitors. Naturally, such persons will need to charge for their time at their usual hourly rates. Having regard to their professional obligations they may also carry out their Trustee obligations with a greater degree of literalism than is really desired in an informal family context.

## Qualities of a Good Trustee

In many instances the Trustee of a Family Trust may be appointed to by persons who are primarily connected with the family. However, given the issues noted above not everyone in this situation has the time or the inclination to act as Trustees, or the necessary technical knowledge; for example in regard to Investment, accounting, taxation and legal



aspects. As such it is desirable to have additional Trustees who can better act at arms length and/or who can organise a replacement for an original Trustee on that person's resignation, death or disability.

Such an appointee should:

1. Have a high standard of integrity.
2. Be willing to assume responsibilities of Trusteeship.
3. Be able to act in a business like manner.
4. Preferably live in the area in which the family and/or the main Trust assets are located.
5. Be agreeable to respecting the confidentiality of the Trust's and the family affairs.
6. Not have any conflicts of interest.
7. Preferably be likely to live long enough to be effective.
8. Be a person who can be trusted both to carry out the intentions of those who set up the Trust and to consider the reasonable wishes of the Beneficiaries.
9. Be able to devote the time needed for the task.
10. Have some knowledge of the type of investments making up the bulk of the Trust portfolio.
11. Have competence in any other areas of relevance.
12. Know when it is important to consult outside experts and when it is better not to waste the Trust's money on seeking expensive external help needlessly.
13. Be likely to be impartial in the event of any disputes amongst the Beneficiaries.
14. Have the skills to act as the mediator.
15. Be able to negotiate appropriate deals as required, for example, temporary banking accommodation in the event of unexpected cash needs.
16. Be able to assist with any other tasks appropriate to the family's special circumstances, for example choosing schools for dependant children or liaising with the guardians of orphan children.

making certain decisions such as addition of a new Beneficiary to the class of General Beneficiaries, the Trustee may require the consent of the Appointor.

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### **Control and Change of Trustee**

Most Trust Deeds empower the person or persons named as the Appointor to remove any Trustee of the Trust and appoint a new or additional Trustee at anytime by instrument in writing. Furthermore before