Checklist - reviewing discretionary trust deeds

What provisions should you look out for?

Key points

- The laws governing the operation of trusts (in particular the taxation of trusts) and the requirements of financiers who lend to trusts are constantly changing
- It is important to review your discretionary trust deed and ensure it appropriately deals with the intended beneficiaries and succession of the trust and provides sufficient flexibility to the trustee
- This checklist summarises some of the main provisions of a trust deed that should be reviewed

Beneficiaries

1. Are the classes of beneficiaries wide enough?
2. Are new spouses and related companies and trusts included as beneficiaries if they need to be?
3. Are there default income and capital beneficiaries?

Appointor/Principal

4. Who is this and what powers do they hold (in particular, do they hold the power to appoint the trustee)?
5. What happens on death of the Appointor/Principal?
6. Can the position be passed as the clients intend for their estate planning?

Income

7. Is the definition of income flexible? Can the trustee choose a different concept of income?
8. Are notional amounts (such as franking credits) excluded from the default definition of income?
9. Can the trustee stream different classes of income?
10. Must distributions be made by 30 June?

Powers

11. Does the trustee have the power to do anything an individual can do?
12. In particular, can the trustee:
    (a) make elections
    (b) exercise wide borrowing, charging and guarantee powers
    (c) appoint powers of attorney
    (d) open and operate accounts with banks and other financial institutions
    (e) make payments to CGT concession stakeholders
    (f) enter into:
        (i) long term leases
        (ii) bills of exchange and futures contracts?

Other traps

13. Foreign duty and land tax surcharge – these rules vary between the states. We recommend you have the deed reviewed before your client purchases property in a particular state.

T 61 7 3231 2444
www.cgw.com.au