COOPER GRACE WARD
LAWYERS

Discretionary trusts

Who should be the trustee?

Key points

- If there is one individual acting as trustee of a trust who is also a beneficiary of that trust, there is a tax risk that the ATO will argue there is no effective trust
- We generally recommend using a company to act as trustee, as this provides some protection to the individual controllers of the trust from the risks of the activities of that trust, and it also allows for simpler succession of the trust and its assets

How many trustees should I have?

1. We recommend against having a sole individual trustee who is also a beneficiary of the trust.
2. There is an argument that, where a sole trustee is also a beneficiary, all of the net income is assessable to that trustee because they have the unilateral power to retain or distribute to other beneficiaries.
3. While we are only aware of one occasion where the ATO has raised this as a possible issue, the prudent approach is to have joint trustees for clients who do not want a corporate trustee. If there are joint trustees, then no beneficiary has unilateral power to determine how the income is distributed.
4. The maximum number of trustees you can have is four.

Should I have a company as trustee?

5. A trustee is personally liable for debts incurred on behalf of the trust and, although the trustee has the right to be indemnified out of the assets of the trust, it is usually preferable for a sole purpose company to be trustee so that the risk of trust activities is quarantined to the assets in the trust.
6. Where individuals are trustees, they will be personally liable for all debts of the trust, which means that their personal assets could be vulnerable.
7. Where a company acts as trustee, the directors may be personally liable for debts incurred by the trustee in circumstances prescribed by the *Corporations Act 2001* and other Acts that impose personal obligations on directors. However, the extent of the liability of directors of a corporate trustee is not any greater than the liability that would attach to the directors of a normal company.
8. Essentially, directors will not be personally liable where they have discharged their director duties (subject to some exceptions).
9. Having individual trustees might be considered simpler and cheaper because there is no establishment fee for the company or ongoing ASIC reporting obligations. However, the advantages of having a corporate trustee generally outweigh the company establishment costs.
10. With individual trustees, all assets must be transferred into the name of a new trustee if a current trustee resigns or dies. However, if the trustee is a company, there is simpler succession because there is no need to transfer assets if a director dies or resigns.
11. The costs associated with maintaining a corporate trustee are not substantial.
12. The directors of a trustee company can be beneficiaries in their individual capacity while still being in control of the trust.