

DISCRETIONARY (FAMILY) TRUST

The Topdocs Discretionary (Family) Trust deed provides for a range of effective tax management and estate planning strategies.

The Discretionary (Family) Trust deed contains appropriate (Bamford) income streaming provisions, flexible appointor options, allows for a very wide range of beneficiaries, and is drafted to minimise stamp duty risks relating to certain states and territories. The key features of the Topdocs Discretionary (Family) Trust are outlined below.

1. Income Streaming

The recent Bamford decision of the High Court supports the view that the income of the trust is whatever the trust deed determines it to be but in order to benefit from the outcomes of the Bamford case, trustees and their advisors need to be aware of the definitions that their trust deeds contain.

The Topdocs Discretionary Trust Deed:

- has an appropriate definition of trust income that allows the inclusion of capital gains and also ensure the trustee has the discretion to adopt a different concept of income to provide maximum flexibility;
- ensures the income definition excludes “notional amounts” such as franking credits as it is not possible for a beneficiary to be presently entitled to

these notional amounts. This is an issue highlighted by the Commissioner in the Decision Impact Statement;

- has provisions to give the trustee a discretion to apply outgoings against income or capital and make distributions out of gross income (which may allow distributions out of gross income to preserve franking credits etc);
- removes any requirements that the trustee must resolve to distribute income or determine what concept of income applies by 30 June in any year. The Commissioner has indicated that, where the deed stipulates that income distributions must be made by 30 June, he will insist on strict compliance.

2. Appointor options for estate planning flexibility

The Appointor or Appointors have the ultimate control over the Trust as they can “hire or fire” the Trustee. It is vitally important to ensure that the Trust Deed allows for the issues of succession of this power for Estate Planning purposes as well as incapacity or bankruptcy.

The Topdocs Trust deed is drafted to ensure the appropriate flexibility and protection.

3. Beneficiaries

The Topdocs Discretionary Trust provides for a wide range of beneficiaries within the family group, and also allows for distributions to associated companies and trusts associated with the beneficiaries.

The Trustees of the Trust can distribute the income and capital of the Trust to the following entities:

- a. the specified beneficiaries of the Trust, as named at the establishment of the Trust.
- b. where a Specified Beneficiary is a natural person, the spouse, widow, widower, parents, grandparents, brothers, sisters, children, grandchildren, uncles, aunts, nieces, nephews, and cousins of that Specified Beneficiary and the spouses, widows, widowers, parents, brothers, sisters, children, grandchildren, uncles, aunts, nieces, nephews, and cousins of such first mentioned spouses parents, brothers, sisters, children, grandchildren, uncles, aunts, nieces, nephews and cousins;
- c. where any Specified Beneficiary is a company (other than a corporation in the capacity of a trustee of a Trust or Settlement) - the

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- members or shareholders of that company;
- d. where any Specified Beneficiary is the trustee of any Trust or Settlement - every person having a beneficial interest in that Trust or Settlement;
 - e. any persons or persons named as General Beneficiaries at the establishment of the Trust.
 - f. the trustees can also elect at any time to distribute to the following entities, by nomination:
 - g. the trustees of any Trust that a beneficiary has a beneficial interest in;
 - h. any company at least one share of which is beneficially held by a beneficiary;
 - i. any other legal entity at least one share or other interest in is beneficially owned or held by a beneficiary;
 - j. charitable bodies.

4. Drafted to remove some stamp duty risks

Changes of Trustees of a Discretionary Trust can inadvertently trigger ad valorem stamp duty on the value of the Trust Property. Topdocs Discretionary Trust Deed is drafted to avoid this issue. The particular stamp duty issues are as follows:

A change of trustee with respect of a trust which may be constituted under the Deed will

be subject to only nominal duty for the purposes of Subsection 54(3) of the Duties Act 1997 (NSW), subsection 52(2) of the Duties Act 1999 (ACT), and section 119 of the Duties Act 2008 (WA) if the Chief Commissioner is satisfied that, as the case may be:

- *none of the continuing trustees remaining after the retirement of a trustee is or can become a beneficiary under the trust, and*
- *none of the trustees of the trust after the appointment of a new trustee is or can become a beneficiary under the trust, and*
- *the transfer is not part of a scheme for conferring an interest, in relation to the trust property, on a new trustee or any other person, whether as a beneficiary or otherwise, to the detriment of the beneficial interest or potential beneficial interest of any person.*

If the Chief Commissioner is not satisfied, the transfer is chargeable with the same duty as a transfer to a beneficiary under and in conformity with the trusts subject to which the property is held, unless subsection (3A) applies.

5. Vesting Dates

All Topdocs Trusts are prepared on a state by state basis, ensuring the relevant perpetuity period applies according to the state the trust is registered in. Accordingly, Trusts established in

SA will not be subject to an enforced perpetuity period. Unless otherwise nominated in the schedule of the Trust Deed by the client, the vesting date of the Trust will be that determined by the relevant states perpetuity period.

6. Very broad Trustee powers

The trustee's powers have been drafted as broadly as possible to ensure that most situations are covered.

The Discretionary Trust package includes:

- the choice to receive your documents by email or professionally printed, bound and couriered;
- 2 bound copies of the Discretionary Trust deed, plus 1 unbound copy of the deed to scan;
- high quality binder indexed with tabs to store your documents;
- trustee minutes to establish the Trust, detailed information on how to have the Trust deed stamped by the local Revenue Office;
- register of beneficiaries;
- information on how to open a bank account in the name of the Trustee(s).

More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.