

## 4 KEY CONSIDERATIONS WHEN CHANGING THE TRUSTEE OF YOUR TRUST

Changing the trustee of your trust involves more than just a trustee resolution. Care must be taken to ensure the appointment is effective and the Trust does not incur any stamp duty obligations

A number of considerations need to be addressed when changing the trustee of your Discretionary, Unit or Hybrid Trust. These include the validity of the appointment documentation, if registration of the documentation is required, whether the new trustee can receive distributions and the criteria that must be met to ensure that the trust fund does not incur adverse stamp duty consequences.

### 1. Appointment documentation

Review of the specific procedures and parties required to change the trustee, as outlined in the trust deed for the trust, is critical to ensure the appointment is effective. If the required parties are not party to the change of trustee documentation, and any specific procedures are not followed, the appointment of the new trustee may be deemed invalid.

The specific process of removing an outgoing trustee is also relevant, particularly in the case of death or incapacity of a trustee, as resignation is not possible in these circumstances. In addition, where resignation is permitted (ie for an outgoing trustee that has capacity), there may be substantial notice requirements (for example, some deeds require 30 days notice) that have to be met in order for the removal to be effective.

Further to this, the actual form of documentation prepared to change the trustee can be equally

important. If permitted by the provisions of the trust deed, the appointment and/or removal of a trustee is best done by way of deed. Where the trust deed provides that an appointment must be done other than by way of deed, such as by notice, this may still be effective provided the new trustee accepts such appointment, but in the event that the deed is silent as to the manner of appointment, it is prudent to have that appointment document in the form of a deed.

### 2. Registration of the appointment documentation

When considering registration of the change of trustee documentation, the ability for deeds to be registered in the relevant state, the relevant trustee legislation and the provisions of the particular trust deed all need to be considered.

Firstly, in some states and territories, being NSW, WA, SA and the ACT, there is a register for *deeds* administered by the state/territory. In these states, and particularly when a deed affects land in the state, deeds effecting a change in trusteeship of a trust may be registered<sup>1</sup>. Whilst in WA and SA the

registration of the deed effecting the trustee change is optional, doing so enables the deed to become a public document. As such, where registration of the *original* trust deed has occurred, it may be beneficial to register the change of trustee also, since the public recording of the document will be relied on by third parties dealing with the trustee. The relevant lodgment form will be required and a fee will be payable<sup>2</sup>.

“

*Review of the specific procedures and parties required to change the trustee, as outlined in the trust deed for the trust, is critical to ensure the appointment is effective.*

”

#### When registration is compulsory

Whilst registration in WA and SA is optional, NSW and the ACT **require**

<sup>1</sup> **NSW:** may be registered in the General Register of Deeds under the *Conveyancing Act 1919*; **WA:** may be registered in the Office of Registration of Deed, Conveyance and Other Instruments under the *Registration of Deeds Act 1856*; **ACT:** may be registered in the General Register of Deeds under the *Registration of Deeds Act 1957*; **SA:** may be registered in the General Registry Office under s10 *Registration of Deeds Act 1935*

<sup>2</sup> **NSW:** refer Land & Property Information (LPI), fee: \$98, **WA:** refer Landgate, fee: \$85 **ACT:** refer Office of Regulatory Services, fee: \$86; **SA:** refer Lands Title Registration Office, fee: \$148

Current as at 13 May 2016

Please note this article is for information purposes only and does not constitute legal or financial advice.

## 4 KEY CONSIDERATIONS WHEN CHANGING THE TRUSTEE OF YOUR TRUST

the deed changing the trustee to be registered, *unless* there is a specific provision in the trust deed for the trust that states that registration is *not* required to effect a change of trustee *and* that the trust fund will vest in the new trustee on a change of trustee without registration occurring.

This being the case, it is important to examine the provisions of the trust deed for the trust to determine if there is mention of a requirement to register a deed changing the trustee. In the absence of any guidance in the trust deed, you would then turn to the legislation of each respective state, and if the governing law of the trust is NSW or ACT, registration will be required.

The Topdocs Discretionary and Unit Trust deeds contain an express provision that states registration of the deed changing the trustee of the trust is not required to be registered in NSW or the ACT.

### 3. Administration of Assets

Trust assets must be held in the name of all trustees as trustees for the trust. If there is a change in trustee, you will therefore be required to change the name on the ownership documents (such as a title deed) for each trust asset and notify all relevant authorities and registries including the ATO.

### 4. Duty on transfer of Assets

To register a change of name for some assets (for land at the relevant state's Land Registry Office or for shares or units (marketable securities) in the relevant entities register), a *transfer* will need to be executed and lodged.

In undertaking the transfer the tax consequences also then need to be

considered as a change of trustee may cause a dutiable transaction to occur under the relevant state legislations and be liable to transfer duty.

Even though in all jurisdictions there is either an exemption or concession from stamp duty where a transfer is affected due to a change of trustee, it is important to ensure that the exemption/concession applies and that if there are any other criteria, these are also fulfilled. Otherwise you risk the possibility of incurring stamp duty at ad valorem rates.

You should also be aware that there may be certain evidentiary requirements to lodge with the relevant state revenue office.

In particular, the concession may not apply where a legal transfer of land or marketable securities takes place in NSW or the ACT where the new trustee or any continuing trustee *is a beneficiary of the trust*. As such an appropriate exclusion or disclaimer document may need to be drawn up to exclude the trustee from benefiting under the deed. Alternatively, the corporate reconstruction exemption may be available for unit trust schemes in some instances however further supporting evidence will need to be lodged with the relevant state revenue office.

### Topdocs Change of Trustee documentation

Topdocs provides you with everything required by your trust's deed and the Australian Tax Office to change the trustee of your Discretionary, Unit or Hybrid Trust, including full legal sign off on your prepared documents.

Our team firstly examines your trust deed to determine the specific procedures and documents that have to be prepared to change the trustee of your trust. Then we prepare the relevant resolutions and deed of appointment and retirement of trustee, along with the required documentation to notify the ATO of the new trustee appointment.

We also provide a procedures sheet for your client, outlining their signing and reporting responsibilities.

### More information

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

Current as at 13 May 2016

Please note this article is for information purposes only and does not constitute legal or financial advice.