

ACN DIRECT PTY LTD

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DISCRETIONARY TRUST ORDER FORM

WHEN COMPLETING THIS FORM, PLEASE USE BLOCK LETTERS, TYPEWRITTEN OR DARK PEN ONLY TO ENSURE ACCURACY OF INFORMATION PROVIDED.

Date: Client Ref (if any):

FROM Instructing Person:

Instructing Firm/Company:

Address:

Telephone Facsimile: e-mail:

Please complete the following detail if different from above or use for comments ie "phone/fax A.C.N. to xxxxx on registration"

Invoice Details:

Invoice Address

Delivery Address:

I confirm my order for a Discretionary Trust as specified below and acknowledge that I am primarily responsible for settlement of your quoted charges.

PAYMENT DETAILS (tick one)

- Cash Cheque Bank Transfer (Contact ACN Direct for account details)
- Mastercard Bankcard Visa

Amount \$ Credit Card No: Expiry: /

Cardholder's Name (PRINT) Cardholder's Signature

NAME OF TRUST (Please include ALL punctuation as name will be registered exactly as follows:)

First Choice:

SETTLOR [1]: Full Name:
 & Address:
 Settled Sum: \$.....

TRUSTEE [2]: Full Name:
 Address:
 Full Name:
 Address:

Trustee's ACN (if applicable):
If Corporate Trustee please indicate method for signing formal documents:

- More than 1 director (Execute documents with common seal)
- More than 1 director (Execute documents without common seal)
- Sole director only (Execute documents with common seal)
- Sole director only (Execute documents without common seal)

APPOINTOR: [3] Name:.....
Address:

Appointor by Default 3] Name:.....
Address:

SPECIFIED BENEFICIARIES [4]

Full Names & Addresses:
.....
.....
.....
.....

ADDITIONAL CLASS OF GENERAL BENEFICIARIES [5] (If Any)

Full Names & Addresses:
.....

CLASS A BENEFICIARIES (If any) [6]

Full Names & Addresses:
.....

EXCLUDED BENEFICIARIES (If Any) [7]

Full Names & Addresses:
.....

[1-6] For more information regarding these questions, please refer to the Discretionary Trust Deed Notes - over page.
Please note: When completing these items ensure you state the full name, ACN (if applicable), street address of beneficiary (not PO Box) and whether that person is acting in his/her/its own capacity or as trustee of a fund or trust.

EXPLANATORY NOTES ~ DISCRETIONARY TRUST DEED

1. ***The Settlor is the person who "sets up the trust". The Settlor does this by providing to the Trustee the sum of \$10.00 by cheque or cash (or such other amount as deemed fit) and signing the trust deed which shows that the \$10.00 is now held by the Trustee on the terms of the trust. The Settlor cannot be a beneficiary under the trust and is often, but not necessarily, the solicitor or accountant involved in the matter. The Settlor should be a person who will not have any future dealings with the trustee in its capacity as trustee of the trust. Adverse income tax consequences will arise if the Settlor is the parent of a beneficiary under 18 years of age.***
2. It is important to note that the person(s) or corporation named as trustee or trustees of the trust (other than a public trustee of a State or Territory) is automatically "connected" to the trust for the purposes of Division 152 of the 1997 Tax Act. Refer to note 6 for more details and the relevance of the potential applicability of Division 152. However, that person(s) or corporation as trustee won't be "connected" to the trust for the purposes of Division 152 if the trust has at least one Class A beneficiary that is not a spouse or child under 18 years of the trustee and is not a person that acts or could reasonably be expected to act in accordance with the directions or wishes or in concert with the trustee.
3. ***The Appointor has the following powers:***
 - (a) the Appointor may remove the Trustee from office and appoint another person or himself as new trustee or additional trustee;
 - (b) the Appointor may give written directions to the Trustee as to the general policy to be followed by the Trustee in the investment of trust funds;
 - (c) any termination of the trust requires the Appointor's approval.

Any amendment to the trust deed by the Trustee can only be made with the approval of the Appointor.

The Appointor may nominate an Appointor to replace himself or herself either by deed or in his or her Will or by notice to the Trustee. The Appointor by default will become the Appointor in the event that the original Appointor dies and fails to nominate an Appointor in his place by either of the aforementioned methods.

4. ***Specified beneficiaries are the reference point for describing the beneficiaries of the trust. Once Specified Beneficiaries are named or described the Trustee can act for the benefit of (and distribute income to) those persons as well as their parents, grandparents, uncles, aunts, brothers, sisters, spouses, widows, widowers, children and grandchildren, parents and grandparents of any spouse, uncle or aunt. The Trustee can also act for the benefit of and distribute to any trusts that any of the above persons have an interest in or any company in which any of the above people hold shares as well as any charity or relative the Trustee may nominate.***

We do not encourage the setting up of a new trust by describing the Specified Beneficiaries as "the children of A and/or B" which seems to be a fairly common practice of those instructing solicitors to establish deeds. Problems can arise if in fact there are no such children at the commencement of the trust because this will mean that there are no beneficiaries at all. Hence at least one person or entity named as a Specified Beneficiary must be alive or in existence at the commencement of the trust.

5. ***If it is desired that the trust also distribute to people not included by virtue of the provisions noted in note 4 above, then he she or it should be nominated in Item 7 of the Instruction Form. Any additional beneficiary nominated in Item 7 is not necessarily a Class A Beneficiary (refer below).***
6. ***Class A Beneficiaries are those individuals and entities, if any, selected by you from all of the beneficiaries of the trust.***

Where there are persons named or nominated as Class A Beneficiaries, the Trustee of the trust is only allowed to distribute a limited amount of income or capital to those beneficiaries of the trust who are not Class A Beneficiaries. These beneficiaries are only entitled to receive, in any distribution from the trust, a maximum of thirty nine per centum (39%) of the income or capital distributed. In contrast, Class A Beneficiaries are entitled to receive in any distribution of the trust up to 100% of the income or capital distributed.

If there are no persons nominated as Class A Beneficiaries of the Trust, then the Trustee has no limit on its power to make distributions of income or capital to the beneficiaries of the trust. Restrictions only apply if there is at least one Class A Beneficiary. Hence if the Trustee is to have no limits on its power to distribute income or capital to any person do not complete Item 8 and ensure no Class A Beneficiaries are ever nominated by the Trustee. If there is at least one Class A Beneficiary and the Trustee makes a distribution to a beneficiary of the

trust who is not a Class A beneficiary that exceeds 39% of the income or capital of the Trust distributed, then any excess distribution shall be deemed to be made to the Class A Beneficiaries.

This Trust Deed has been drafted this way to better enable the Trustee of the trust to access the small business CGT concessions contained in Division 152 of the 1997 Tax Act. However, of itself, the adoption of this Trust Deed will not guarantee those small business CGT concessions can be utilised by the trustee.

There are a number of core requirements that need to be satisfied for any of the small business relief CGT measures to apply, one of which is the maximum net asset value test.

We make no comment in this note on any of the other tests.

A taxpayer satisfies the maximum net asset value test if the total net value of CGT assets owned by:

- (a) the taxpayer;
- (b) an entity that is the taxpayer's "small business CGT affiliate"; and
- (c) an entity "connected with" the taxpayer or a small business CGT affiliate of the taxpayer

does not exceed \$5,000,000 just before the CGT Event happens to a CGT asset of the taxpayer.

The essential purpose of the maximum net asset value test is to treat the taxpayer and all of its related entities as a single economic unit.

A "small business CGT affiliate" for the purposes of these provisions will be the spouse or a child under 18 years of the taxpayer or an entity that acts, or could reasonably be expected to act, in accordance with the taxpayer's directions or wishes, or acts, or could reasonably be expected to act in concert with the taxpayer.

Relevantly, an entity is "connected with" a taxpayer if one controls the other or both are controlled by a third entity. Further, an entity will be connected with another entity if there is a control percentage of at least 40% of the rights to income, capital or voting power beneficially owned by the relevant entity.

Special rules apply for identifying control of a discretionary trust for the purposes of the "connected with" test.

A taxpayer controls a discretionary trust if it or its small business CGT affiliate or both;

- (a) are trustees of the discretionary trust; or
- (b) have the power to determine the manner in which the trustee exercises the power to make any payment of income or capital to or for the benefit of beneficiaries of the trust.

Further, for the purposes of determining whether an entity is connected with another entity, the legislation provides that where the trustee of a discretionary trust has the power to pay to, or apply for the benefit of, an entity any income or capital of the trust, then the legislation applies to the entity as if it beneficially owned interests in any distribution of income or capital of the trust equal to the maximum percentage of the income or capital that the trustee is empowered to pay to, or apply for the benefit of, that entity.

Thus every beneficiary of a discretionary trust under a trust deed under which the trustee is not limited in the amount of income or capital it can distribute to a beneficiary will be treated, for the purposes of the legislation, as if that beneficiary was beneficially entitled to 100% of the assets of the discretionary trust. Thus a beneficiary will "control" the trustee and the trustee and that beneficiary will be "connected with" each other.

Therefore, if the taxpayer is the trustee of a discretionary trust, unless there are limits in place on the trustee restricting any distribution of income or capital to any one beneficiary to 39% or less, all of the net assets of all of the beneficiaries of that trust may be taken into account in determining whether the \$5,000,000 threshold applies.

You should note that by simply adopting this Trust Deed and nominating or naming at least one Class A Beneficiary, the trust will not automatically fall outside the potential operation of the provisions in Division 152 of the 1997 Tax Act which could apply to connect entities to the trust to cause it to exceed the \$5,000,000 threshold test. However, if clients are properly advised, we believe that the structure of this Trust Deed will put clients in a better position to be able to fall under the \$5,000,000 threshold than they would be in were they to adopt a trust deed which has no facility to impose restrictions on the trustee's power to distribute income or capital.

7. ***If it is desired that anybody within any of the classes referred to in note 4 above should be specifically excluded from the trust then he, she or it should be listed in Item 9 of the Instruction Form as an Excluded Beneficiary.***

Please check this form and ensure that all information is complete before returning it. In particular please ensure that full legal names and ACN's are provided and that addresses are completed.

These notes are for client information purposes only and do not constitute legal advice. Legal advice may be obtained from Norton & Smailes and may be the subject of separate charges.

Disclaimer

This information sheet is not and does not purport to represent legal advice of any kind. The factual details provided by you are necessary for us to prepare the documents required. We take no responsibility whatsoever if any of the information supplied by you is incorrect or not or if the execution of any deeds or other documents prepared by us based on the information provided by you herein has the effect of causing any adverse tax, stamp duty or any other consequences to any person or entity.

The taxation laws are subject to continual change. The Government has previously foreshadowed legislation to tax all but a limited number of trusts and estates under a proposed revamped corporate tax system known as "entity tax". Although these measures were deferred indefinitely, it is uncertain what measures may be enacted in their place in future.

The above proposals have put taxpayers and their advisors in a difficult position. They have to make planning decisions based on announcements that may or may not translate into legislation. Whilst any deed we prepare will be drafted in line with current legislation and practice, we can accept no responsibility as to whether or not the deed or the trust structure is suitable for the particular circumstances of individual clients. Further, future changes to legislation and its interpretation may mean that the deed should be reviewed and amended.

In order to better enable the trustee of the discretionary trust to access the small business CGT concessions contained in Division 152 of the *Income Tax Assessment Act 1997* ("the 1997 Tax Act"), this deed allows certain restrictions to be placed on the ability of the trustee to distribute income or capital to persons who are not Class A Beneficiaries. Refer notes 4 and 6.

If you do require advice in relation to whether or not the preparation and execution of the deed or documents as the case may be is appropriate or advisable in the relevant circumstances then we would be pleased to provide such advice in accordance with our normal rates and conditions or as may be agreed with you.