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TRUST SERIES – PART 1

Fundamentals of trusts in Australia

Presented by

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Questions?

Please ask questions through the Q & A pod not on the chat pod.

Not Answered Questions will be emailed to you along with the **webinar recording**

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Introductory remarks

- Trusts provide flexibility, asset protection and longevity of ownership of assets. And, yes, they can deliver taxation benefits depending on the type of business or investments held in the trust and the amount of income or capital gains derived.

- Prevalent and complex

- Private markets turn on the use of trusts and advisors' knowledge of them

- It's a must know, rather than a want to know.

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Contents

This session will cover:

- Origins of trusts in Australia
- Advantages of using a trust
- Disadvantages of using a trust
- The rule against perpetuities.
- Different types of trusts.
- The trust dictionary.
- Essential principles of a trust.
- The trust deed.

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Origins of trusts in Australia

- Nearly 1m trusts in Australia!
- Trust = a relationship between the trustee of the trust and the beneficiaries of the trust, over the subject matter of the trust. The trustee holds property for the benefit of the beneficiaries.
- Trusts are not a legal entity. Legal entity = the trustee. Legal vs beneficial ownership.
- Relevant jurisdiction is state law. Income Tax law falls off that.

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Advantages of trusts

- Continuity of ownership of assets (e.g., deceased estates)
- Asser protection
- Flexibility
- Tax advantages (Caution!!)

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Disadvantages of trusts

- Loss quarantining
- Distribution decisions must be made before the end of 30 June
- Hyper complex and poorly understood
- Difficult to transfer ownership (especially for non-fixed trusts)
- Difficulties in family breakdown

Rule against perpetuities

- Legal entities such as a company, have an ongoing existence.
- Trusts have a limited life = the rule against perpetuities (mostly defined in the trust deed).
- At the vesting date, the entirety of the trust property must be absolutely vested in the beneficiaries at the end of the perpetuity period.

Types of trusts

- Discretionary trusts
- Unit trusts
- Hybrid trusts
- Bare trusts
- Public unit trusts
- Family trusts
- SMSF
- Others: MITs, resulting trust, constructive trusts etc.

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Trust dictionary

APPOINTOR/GUARDIAN	The ‘Chairperson’
BARE TRUST	At the beneficiary’s discretion – the ‘puppet’
BENEFICIARY	Those who can (surprise, surprise) benefit
EXPRESS TRUST	Supported by a deed
FIDUCIARY OR FIDUCIARY DUTY	Duty to act in the best interests of another person, here the beneficiaries, in accordance with the terms of the trust instrument.
INTER-VIVOS TRUST	An express trust established during the lifetime of the settlor. In contrast, a testamentary trust is established by will.
SETTLOR OR CREATOR OF THE TRUST	The ‘Creator’
TRUSTEE	The ‘CEO’
EXPRESS TRUST	Supported by a deed
FIDUCIARY OR FIDUCIARY DUTY	Duty to act in the best interests of another person, here the beneficiaries, in accordance with the terms of the trust instrument.
INTER-VIVOS TRUST	An express trust established during the lifetime of the settlor. In contrast, a testamentary trust is established by will.

Trustees

- Corporate trustee
  - Super common
  - Limited liability
  - Easier to change
  - Often do nothing but be trustee
- Indemnification
  - Usually indemnified by the assets of the trust (except for, e.g., in the event of fraud)
- Duties
  - Fiduciary
    - Act honestly in relation to the powers given to it
  - Read the deed!

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Essential principles of an express trust

- **Certainty of intention.** Clear intention to create the trust
- **Certainty of subject matter.** Clear what the trust property
- **Certainty of object.** Clear beneficiaries
- **Requirement of writing.** (For some!)
- **Vesting.** The traditional common law rule is that a trust must “vest” or terminate.

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The Trust Deed

- Generally very wide
- Can have some quirks
- It's the trust's playbook for the trustee to follow
- Also sets out:
  - Who are the beneficiaries of the trust?
    - Primary and special beneficiaries – see in the deed
    - Excluded beneficiaries – who can not benefit
    - Distributing to someone who is not a beneficiary – likely leads to a trustee assessment at the top marginal rate
  - The ability to determine whether receipts by the trust are income or capital for trust law purposes.
  - How and when distributions of income and capital are made.

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