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FAMILY (DISCRETIONARY) TRUSTS: CONSIDER THE BENEFITS…

Trusts have their origin in medieval England when a landowner would, for estate planning purposes, convey land to another person to hold it for the benefit of a third person. From those simple beginnings, many forms of trust have evolved. These include family (or discretionary) trusts, fixed trusts, unit trusts (a form of fixed trust), hybrid trusts, testamentary trusts and superannuation funds.

Many businesspeople struggle to understand the nature of a trust. The key concept to understand is that a trust is a relationship between the trustee, the trust property and the trust beneficiaries. The terms of the relationship are defined by the trust deed and the law. The trustee is obliged to administer the trust property for the benefit of the trust beneficiaries in accordance with those terms.

The family trust is one of the most popular business and asset holding structures currently used in Australia. This is because of the family trust's **asset protection**, **succession** and **tax efficiency** characteristics.

The asset protection benefits of family trusts exist because, in the absence of security or guarantee arrangements and the application of bankruptcy clawback rules, the trust property is generally **quarantined** from legal claims made against beneficiaries (and vice versa). This is because, although the assets of the trust may be *controlled* by the beneficiaries, they are not *owned* by them.

Family trusts typically have a broad range of potential beneficiaries including, for example, the children of the current business controller. Therefore it is possible for the control of a business owned by a family trust to be passed from one generation to another without actually transferring any property. This results in **tax** and **stamp duty savings**.

Family trusts offer much greater flexibility in terms of **income distribution** than other structures such as companies or sole traders. At year end it is possible for the trustee to allocate the trust's income to a range of beneficiaries in the most tax effective manner. It is also possible to access the 50% CGT discount and the CGT small business concessions via a family trust.

Unlike companies, family trusts are not heavily regulated. They are created by **private** documentation and, besides various tax compliance obligations, family trusts' affairs generally need not be reported.

Family trusts can borrow, lend, carry on business, grant security and own property in the same way as a person or company. Financial institutions in Australia are used to dealing with family trusts.

Of course, family trusts are not appropriate in every case. For example, you cannot effectively 'sell' a family trust (as you would, say, shares in a company) although a trust can sell its assets. It is not appropriate for more than one family group to operate a family trust. Trust losses are 'trapped' in the trust – therefore trust losses are not able to be accessed by beneficiaries. Also, trust losses are subject to strict tests in order to carry them forward for offset against future trust income. The income of a family trust must be distributed each year to avoid a penalty rate of tax. Therefore, a family trust is not an appropriate vehicle in which to accumulate profits. However this can be achieved by distributing profits from the trust to a company to be accumulated there in a 30% tax environment.

About Us

Baggiolegal is a boutique law firm, specialising in commercial, taxation and private client law. **We understand** our client's objectives and provide clear and independent advice. Service is paramount to us. **We deliver** technically sound, timely and commercially oriented solutions. **We know** and understand the South Australian landscape, but our international perspective is unique in Adelaide. Our people have excelled in the legal profession in private practice and industry all over the world. **We apply** international best practice to our local client's needs. **We work** with our clients. **We listen** to our clients. We are approachable, accessible and personable.

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