

# Explanatory Memorandum

## Hybrid Discretionary Trust

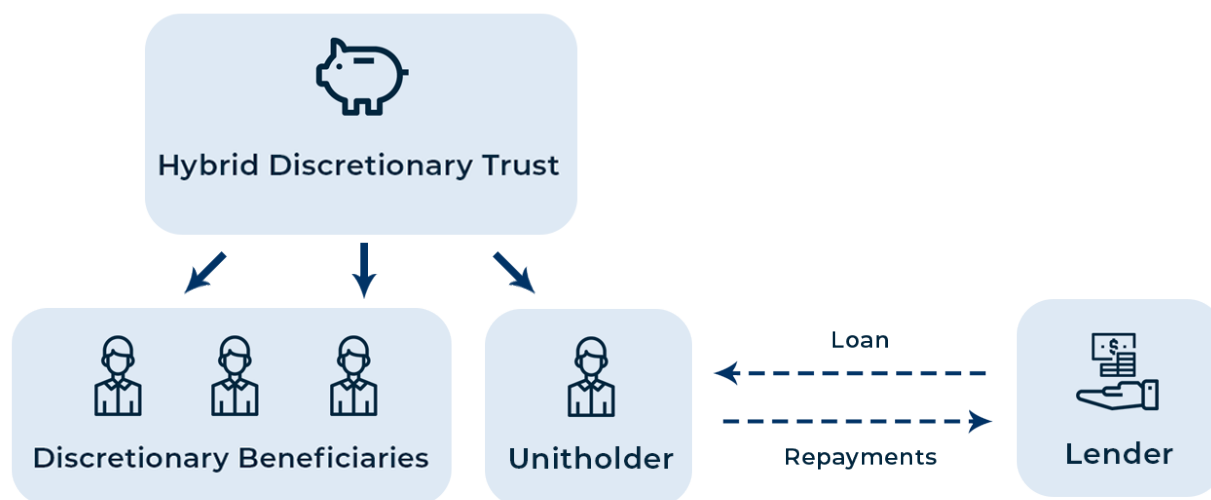
October 2023

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| Subject      | Hybrid Discretionary Trust   |
| Alert Status | Medium   |
| Topic        | Trusts   |
| Legislation  | Income Tax Assessment Act 1936<br>Income Tax Assessment Act 1997   |
| Case Law     | N/A  |
| Comments     | Trusts are an important tool for investors. Understanding how they operate and what advantages can be achieved is essential. |
| More info    | <a href="http://www.macquariegs.com.au">www.macquariegs.com.au</a>   |

Following various rulings and statements issued by the Commissioner, a great deal of caution needs to be exercised in establishing and operating Hybrid Discretionary Trusts.

### Explanatory Memorandums – Hybrid Discretionary Trust

The following memorandum is provided as a guide to provide a general overview of the operation of a hybrid discretionary trust sourced from Macquarie Group Services. It is not intended to be an exhaustive nor complete statement but should merely be viewed as an introduction to hybrid discretionary trusts in general (and ours in particular) and further reading is encouraged. Many accounting and legal matters have not been addressed, and the *Fringe Benefits Tax Assessment Act 1986* (Cth) and various other enactments, including the State and Territory stamp duty and land tax statutes, have implications which have not been exhaustively discussed here. Both Trustees and Beneficiaries should have an understanding of hybrid discretionary trusts, to enable them to exercise their rights, powers and duties in accordance with the Deed of Trust. The Deed of Trust should be read immediately by those parties, and any queries or concerns raised with their professional advisers.



# Hybrid Discretionary Trust

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## Deed of Trust

A trust is usually established with the payment of an amount, called the Settlement Sum, to the Trustee to be held in accordance with the Deed of Trust for the benefit of the Beneficiaries. The Trustee is to hold all trust property (known as the Trust Fund) and invest such assets for the Beneficiaries. The Appointor may remove/replace the Trustee in accordance with the Deed of Trust.

The Deed of Trust provides for a Vesting Day on which the Trust is to terminate. On the Vesting Day, the Beneficiaries are entitled to the whole of the Trust Fund. Until that day, however, distributions of income or capital of the trust are made at the discretion of the Trustee, in accordance with the Deed of Trust.

## Controller

Where a Controller of the Trust is named, that person is vested with the power to give the Trustee consent to act in various ways, e.g., to appoint additional Beneficiaries, to determine an earlier Vesting Date and to vary the Deed of Trust.

As the occupancy of this role is not mandatory, where it's vacant the requirements for the Controller to provide such consent do not apply and the Trustee may generally act without constriction. The Family Court is likely to find that a Controller has control of the Trust for property settlement purposes.

## Appointor

The Appointor shall have the power, exercisable by notice in writing and delivered to the Trustee, at any time and from time to time to remove any Trustee and may also appoint any new or additional Trustee. This power is usually constrained by the inability of the Appointor to authorise the Settlor to be appointed as a Trustee.

There may be more than one Appointor at any given time, and, upon the death or disability of a sole Appointor, their legal personal representative (if any) shall become the Appointor.

As the Appointor has effective control over the Trust, the Trust Fund is accountable in *Family Law Act 1975* (Cth) property settlement matters.

## Settlor

A trust *inter vivos* (which means it's formed during the life of its creator, as opposed to being formed under the Will of the creator) may be constituted either by a declaration of trust in respect of specified property, or by the settlement of money (the Settlement Sum) or other property by a person upon a Trustee upon trust, to deal with it as provided in the Deed of Trust.

Although it's permitted, to avoid there potentially being serious taxation consequences the Settlor should not be a Beneficiary of the trust. For this reason, the Settlor is usually unrelated person, e.g. an employee of the solicitor or accountant's office, a relative or a friend, who provides the necessary funds to establish the Trust. The Settlor will relinquish their interest in

# Hybrid Discretionary Trust

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the trust property and usually assume no further involvement in the affairs of the Trust – consequently, courts normally find that Settlers don't have control of Trusts.

A liability to stamp duty usually arises in most jurisdictions when a trust is constituted and, therefore, consideration should be given to the amount of the Settlement Sum and any gifts or transfers of property to the trust – the stamp duty liability will often be a function of the value of the gift or property transferred to the trust.

## Trustee

A Trustee of an *inter vivos* express trust (which usually means that evidence for the creation of the trust exists in written or oral form) may be appointed:

1. by the settlor;
2. pursuant to an express power contained in the Deed of Trust;
3. by the courts in certain instances; and
4. under the provisions of the various *Trustee Acts* of the States and Territories.

The Trustee holds the legal title to the Trust Fund, and gains its powers from the Deed of Trust, legislation and from the common law.

The Trustee may be one or more individuals or a company (typically a \$2.00 corporate Trustee wherein the spouses or one of the spouses are directors and shareholders).

Trustees owe a fiduciary duty to the Beneficiaries of the Trust, and also have various other duties, including the duty to: preserve the Trust Fund; keep and to render to the Beneficiaries full and candid accounts; act personally; acquaint and be familiar with the Deed of Trust; exercise reasonable care; act impartially between the Beneficiaries, subject to the terms of the Deed of Trust; act gratuitously and not to profit from the trust; and the duty not to deal with the Trust Fund for their own benefit or otherwise to profit by the Trust.

While remedies are available for breach of duty, Beneficiaries generally do not have the power to compel the Trustee to exercise a discretion. The duties of a Trustee are many, and they may be held personally liable for debts incurred in their capacity as a Trustee. Nevertheless, the Trustee has the right of indemnity out of trust assets for such liability, although it should be understood that it may sometimes occur that trust assets are less than those liabilities.

A person or company may disclaim the trust if they do not wish to act as Trustee. However, to be effective, they must disclaim it in writing to the Settlor as soon as possible. A trusteeship may only be disclaimed before acceptance, and a Trustee may only retire after acceptance if:

1. they're authorised by the Deed of Trust to do so;
2. a new Trustee is appointed in their stead;

## Hybrid Discretionary Trust

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3. if the conditions prescribed by a provision in a *Trustee Act* of a State or Territory are satisfied; or
4. if it's permitted by a court.

If the Trust is a trading trust, then it's advisable that the Trustee be a company rather than individuals. In all cases, however, resolutions should be signed and maintained when the Trustee makes a decision or takes an action.

The Trustee is to maintain proper accounting records (including books of accounts), which show all receipts, payments, and distributions of income. A Profit and Loss Statement and a Balance Sheet should be prepared, and all relevant returns and statements lodged with the various revenue authorities where any relevant income is derived, assets held, or activities are engaged in by the Trust.

### Primary and other Beneficiaries

Where such a person is named, they become a Beneficiary of the Trust – all other Beneficiaries (except unitholders of any description) have that capacity by virtue of their relationship to the Primary Beneficiary. For example, the spouse, parent, grandparent, and child of the Primary Beneficiary are all automatically included as beneficiaries of the Trust, without having to be specifically identified by any particular action or in documentation. Although it's not a requirement, the Primary Beneficiary may also be the "test individual" for the purposes of Family Trust Elections.

A Beneficiary does not have any proprietary interest in the Trust Fund (*Gartside v IRC* (1968) AC 553) and has no interest in the Trust Fund pending the completion of administration. Instead, the Beneficiary's interest is a chose in action which entitles them to a right of due administration, i.e. to call upon the Trustee to deal appropriately with the income and or capital of the Trust. In other words, the Beneficiaries have the right to secure proper administration of the Trust, including the proper management and exercise of the Trustee's power and discretions.

### Distribution of Income

Distributions from a Trust may take many forms and have different implications for a Trustee and a Beneficiary. The Trust Deed allows the Trustee various alternatives in dealing with the net Trust income earned in each financial year. These alternatives, and their taxation ramifications, are that:

1. the Trustee may distribute the net Trust income amongst the Beneficiaries, or any one or more of them, in such proportions as it determines. All the net trust income can be distributed to one Beneficiary to the exclusion of others, it can be distributed equally amongst them, or it can be distributed disproportionately.

If the whole of the net trust income is distributed to adult Beneficiaries, the amount received by each of them is taxable in their hands as an addition to their total income. Thus, if a particular Beneficiary received a distribution of \$10 000 from the

## Hybrid Discretionary Trust

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Trustee, and also earned salary/wages of \$40 000 in the same period, for example, then their total taxable income for the year in question would be \$50 000. Their tax liability would be the amount of tax personally payable by them on a total taxable income of \$50,000;

2. tax on income held on trust for, or applied for the benefit of, Beneficiaries under the age of 18 (or any other Beneficiary under a legal disability) is effectively paid by the Trustee on behalf of the Beneficiary. Special provisions apply where such a Beneficiary has income from other sources, and higher rates of tax apply to income held, applied, or distributed to minors - in general, \$416 in total may be safely distributed to a child Beneficiary without attracting the higher rates of tax;
3. in any particular year, the Trustee may determine not to distribute *any* proportion of the net income of the trust, but, rather, to accumulate that income as an addition to the Trust Fund. In these circumstances, the Trustee is liable to pay tax on the net income of the trust at the highest personal rate.

Nevertheless, in exceptional circumstances, the Commissioner has a discretion not to apply the highest rate to accumulated trust income. Where his discretion is so exercised, the ordinary tax rates applicable to an individual earning salary or wages of an identical amount to the distribution is applicable.

Income accumulated by the Trustee in this way then forms capital of the Trust Fund and, when it's distributed to the Beneficiaries on the Vesting Day, is not taxable in the hands of those Beneficiaries;

4. the Trustee may decide to distribute only a part of the net trust income and to accumulate the balance. In these circumstances, the amounts received by Beneficiaries would be taxable in their hands in the manner described in paragraphs 1 or 2 above, and the balance retained and accumulated by the Trustee would be taxable in the Trustee's hands in the manner described in paragraph 3 above; and
5. in the absence of any written determination by the Trustee to distribute or accumulate the net trust income in a particular year, that income is accumulated automatically as an addition to the Trust Fund and the tax consequences outlined in paragraph 3 above apply.

### Distribution of Capital Gains

As a result of the existence of taxation on capital gains, careful consideration will need to be given to the consequences for the Trust of various types of transactions which may give rise to a taxable capital gain.

In particular, if the Trustee sells a trust asset to an arm's-length person and realises a gain on the disposal, the gain will be included in the assessable income of the Trust to be distributed or accumulated in the same way as any other income. Capital losses may be subtracted from the

## Hybrid Discretionary Trust

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gain (but not from any other type of income) before a net amount is included as assessable income of the Trust.

It is sometimes the case that the “accounting” income of a Trust is not equal to its net income according to tax law – this often arises due to the difference in the treatment of consideration received on the disposal of CGT assets. The now judicially accepted “proportionate theory” (acknowledged by the Commissioner of Taxation in Practice Statement PS LA 2005/1 (GA)) essentially provides that where there are differences between accounting and tax law income for a Trust arising from the disposal of its CGT assets, the distribution (and assessability) of its realised capital gains to the Beneficiaries will be in the same proportion as the distribution of its ordinary income.

Other situations may give rise to deemed capital gains and, therefore, require careful consideration. For example, if Trust assets are appointed or distributed to any particular Beneficiary, the Trustee is regarded as having sold the asset to that Beneficiary at its then market value and a capital gain may arise (depending on the cost-base of the asset).

Consideration needs to be given to whether the capital gain should be allocated to the same Beneficiary (usually the most appropriate person in the circumstances) or some other Beneficiary – the taxable capital gain will, thus, form part of the income of the Beneficiary to whom it is allocated, and it's **Clause 3.1** of the Deed of Trust which permits the Trustee to make this allocation.

### Other Distribution Matters and Distributions to Minors

Very importantly, a decision in relation to the income of the Trust should be made before 30 June in each and every year by the Trustee, and such decision recorded in a written resolution of the Trustee on or before that date (see Income Tax Ruling IT 347). The resolution may be prepared and signed after 30 June, provided that it records what actually took place on or before 30 June. Although the long-standing practice of the Commissioner of Taxation is to allow two months for such a decision to be made (i.e. up until 31 August in each year), that stance is not law and may be ignored by the Australian Taxation Office (or any other revenue authority) without it having to provide any justification.

A problem obviously arises, then, in that until accounts for the Trust for a financial year have been prepared, it may well be impossible to estimate with accuracy the amount of the net income of the Trust. This difficulty can be overcome by the Trustee resolving on or before 30 June to distribute the income in proportions - for example:

| Beneficiary | Proportion % |
|-------------|--------------|
| X           | 50           |
| Y           | 30           |
| Z           | 20           |
|             | <hr/>        |
|             | 100          |

Alternatively, if it's desired to set aside a specific sum for a Beneficiary or Beneficiaries, it's possible for the distribution resolution to be as follows:

## Hybrid Discretionary Trust

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To Beneficiary V - the first \$5000 of the net Trust income.

To beneficiary W - the next \$2000 of the net Trust income.

As to the balance of the net Trust income, to the following Beneficiaries in the following proportions:

| Beneficiary | Proportion % |
|-------------|--------------|
| X           | 50           |
| Y           | 30           |
| Z           | 20           |
|             | <hr/>        |
|             | 100          |

After the exact amount of the net Trust income is known, and the proportion to which each Beneficiary is entitled has been calculated, those specific amounts should be recorded in further Trustee resolutions.

Notably, a distribution to a Beneficiary need not entail a physical payment to them. If the Trustee wishes to retain the money which it has decided to distribute to a particular adult Beneficiary, then it may, with the consent of the relevant Beneficiary, establish a loan account in the books of the Trust in their name, and then credit the amount of the distribution to that loan account. The Trustee can then deal with the amount of the loan in accordance with the powers given to it by the Deed of Trust, but the Beneficiary can call for payment of the amount credited to their account at any time in the absence of any arrangement to the contrary. It should be remembered, however, that the amount credited to the Beneficiary's loan account is assessable income to them and will also constitute "property" for the purposes of the *Bankruptcy Act 1966* (Cth).

Where the Trustee resolves to distribute part of the trust income to a Beneficiary who is a minor, the Deed of Trust provides for the Trustee to hold the amount of the distribution (and any future distributions to the same child) in trust for them until the child attains the age of majority. This trust is separate to the Discretionary Trust from which the child receives the initial income. The Trustee has no discretion as to the persons entitled to the income of the separate trust, i.e. it's obliged to hold the trust fund for the particular child concerned. The whole of the capital and income of that separate trust belongs to the nominated child Beneficiary when they reach the age of majority.

Notably, the Trustee has certain additional powers given to it, in respect of separate trust funds for child Beneficiaries. In particular, it may apply money held for such Beneficiaries in payment of education, clothing and other similar expenses which are for the maintenance, education or benefit of the Beneficiary, reducing the actual amount due to the Beneficiary. Alternatively, it can pay the whole or any part of the money held to the parent or guardian of the child.

The receipt of a parent or guardian for money paid to them on behalf of their child is a sufficient receipt for the Trustee, and the Trustee is not required to concern itself as to the way in which the parent or guardian then deals with the money paid to them.

# Hybrid Discretionary Trust

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The Trustee may loan the separate trust fund back to the main Trust or invest it in any investment authorised by the Deed of Trust - but if any income is earned as a result of that investment, it is assessable income of the child Beneficiary and tax is payable at higher rates than under normal circumstances (as discussed above).

The situation could arise where a child Beneficiary approaching the age of majority is entitled to receive a substantial amount from the Trustee, the payment of which would be a matter of some difficulty. If this situation arises, it's possible to avert the necessity for the Trustee to actually make a payment of the amount due, and discussions with professional advisers at the appropriate time would be necessary.

## Distribution of Corpus

On the winding-up of the Trust on the Vesting Day, or at any time before, the Trustee may exercise its discretion as to the manner in which the corpus (sometimes referred to as the "capital") of the Trust Fund will be distributed to the various Beneficiaries in accordance with the Deed of Trust. Corpus usually includes amounts settled on the Trust, or amounts that do not form part of its net income, e.g. depreciation.

From the Vesting Day, any assets belonging to the Trust or constituting the Trust Fund are held by the Trustee until payment or transfer specifically for the Beneficiaries, and in the proportions in which the Trustee has exercised its discretion. Failing the exercise of that discretion, payments or transfers are made in accordance with the default clauses of the Deed of Trust.

The Trustee need not realise the assets of the Trust on the Vesting Day and distribute monies to the Beneficiaries – indeed, the Trustee may transfer those assets to the Beneficiaries *in specie*, i.e. in kind.

## Entering into Contracts

It is the Trustee who enters into contracts on behalf of the Trust and, although the Trustee is not required to state its capacity, it's advisable to do so and avoid confusion as to the beneficial ownership of assets and rights. If asked whether a person or entity is acting in the capacity of Trustee, it would be advised that responses be both factual and in good faith.

## Resolutions

When undertaking any transactions, including the acquisition of assets, or making distributions from the Trust, the Trustee should evince its intention to do so by way of resolution. Resolutions should be filed in the Trust binder and maintained as a record of the decisions and agreements affecting the Trust Fund and/or its net income. As noted above, a resolution by the Trustee to distribute the net Trust income should be made on or before 30 June each year.

## Income Streaming

Trust income retains its character when it is distributed to Beneficiaries. Therefore, if a Trust derives interest income, trading income and capital gains, each Beneficiary who receives a



## Hybrid Discretionary Trust

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distribution of net Trust income will receive a proportion of each of those types of income, and the tax paid by them must be calculated accordingly.

Trust distributions can be made more tax-effective by employing the process known as streaming. Streaming is the distribution of different types of income and capital gains to particular Beneficiaries, in order that the overall tax payable by all Beneficiaries and the Trustee is minimised.

Where a trust estate has a net capital gain, a franked distribution or a franking credit for an income year, the position before the income year ending 30 June 2011 was that these amounts were brought into the calculation of the net income, section 95 of the Income Tax Assessment Act 1936 (ITAA36) of the trust estate for the income year and that net income was attributed to the beneficiaries proportionately according to the presently entitled share of the trust income of the trust estate. That is no longer the position.

Where a trust estate has a net capital gain in the income year ending 30 June 2011 or later, the Tax Laws Amendment (2011 Measures No. 5) Act 2011 (Cth) applies.

In very broad terms, where a trust estate has a net capital gain and 'net income' for an income year, a capital gain that is not reduced to nil by the application of the method statement in section 102-5 of the ITAA97 is taken out of the operation of Division 6 of Part III of the ITAA36: Division 6E of that Part.

Instead, its treatment is governed by the provisions of Division 115 of the ITAA97, and in particular Subdivision 115-C of that Act.

The position is that:

- (a) to the extent to which a beneficiary is 'specifically entitled' to an amount of the capital gain (before applying the method statement), an appropriate part of the gain (after applying the method statement) is attributed to the beneficiary as a capital gain.
- (b) to the extent to which there is no beneficiary 'specifically entitled' to an amount of the capital gain (before applying the method statement), beneficiaries have an appropriate part of the gain (after applying the method statement) attributed to them on a pro rata basis according to their share of the distributable income of the trust estate.
- (c) If there is no distributable income of the trust estate for that income year (or there is part of the distributable income to which no beneficiary is presently entitled), the trustee is taxed on the amount of the capital gain (or the appropriate part of the capital gain) after applying the method statement.

### Income Streaming Possibilities

Capital gains to Beneficiaries who can apply capital losses against them.

# Hybrid Discretionary Trust

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Capital gains to Beneficiaries on low marginal tax rates. Capital gains from collectibles to Beneficiaries who can apply capital losses from collectibles against them.

Interest income, royalties, and unfranked dividends to non-resident Beneficiaries to make use of the lower withholding tax rates.

Trading income, dividends, etc. to Beneficiaries on low marginal rates of tax or who have carry-forward income losses.

Foreign source income to non-resident Beneficiaries so that no tax is payable.

## Refinancing

As with all other types of Trusts, the “refinancing principle” from *FC of T v. Roberts & Smith* 92 ATC 4380, would allow the Trustee of a Discretionary Trust a deduction for interest expenses incurred on funds borrowed and used to reduce or extinguish a Beneficiary’s interest in the corpus, or which is used to discharge a liability to pay a Beneficiary a share of the income of the Trust.

## Family Law Acts and Trusts

It is not proposed to discuss in any detail the impact which certain provisions of the *Family Law Act 1975* (Cth) may have on trusts. The following is intended only as an alert to the possibility of interference by the Family Court in plans or arrangements which may be contemplated by a person whose marital situation is not secure. In any such case, it would be prudent to seek legal advice from someone well-versed in the *Family Law Act 1975* (Cth) before executing any trust, particularly one which is intended to preclude or limit claims which may be made by a (former) spouse or partner. Nevertheless, brief mention should be made of several of the powers which the Family Court has and which, in certain circumstances, may affect provisions contained in a trust, and the exercise of discretionary powers conferred by the Deed of Trust upon the Trustee.

Problems would usually only arise where there is a marital or relationship break-up. When this occurs, the Family Court has wide powers in relation to the property of the parties to the marriage or relationship. The pitfall, into which the unwary may fall, is to believe that if income-producing assets are transferred to a Discretionary Trust, the exercise of the discretionary powers by the Trustee is immune from interference by the Family Court.

For example, where there is a Trust the ultimate Beneficiaries of which are the children of the Settlor, the Court’s considerable powers in regard to the maintenance of those children will generally include the ability to appoint or remove Trustees (paragraph 80(1)(e) of the *Family Law Act 1975* (Cth)). Thus, for example, the Court could remove the existing Trustee and appoint the divorced spouse or former partner to that role. Again, if a person who fears that their marriage or relationship is about to break-up transfers assets to a Discretionary Trust, in the hope that it will prevent their spouse or partner from making claims against them, this may prove to be false hope. Under subsections 90AF(1) and 90AF(2) of the *Family Law Act 1975* (Cth), the Family Court has power to make any order or to grant any injunction that directs a third-party to do a thing in relation to the property of a party to a marriage, or which alters the rights, liabilities or property interests of a third-party in relation to a marriage.

## Hybrid Discretionary Trust

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As a result, even if a person causes assets and/or income to be held by a Discretionary Trust simply for tax-planning reasons, and with no thought of avoiding any claim by their spouse or partner, the provisions of the Trust may not be inviolate. This may be so, even if the assets were never the property of that person or the subject of any disposition made by that person. In other words, where the Trust Fund can be applied for the benefit of a couple and their children, it appears that the Family Court would be able to treat it as family property and would have wide powers in relation thereto.

Nevertheless, the Court will not find that a party has control of a Trust merely by virtue of being a Beneficiary *per se*. Although a Beneficiary has a right to call upon the Trustee to deal with the Trust Fund in a manner appropriate to the due administration of the Trust, which is an equitable *chose in action* which is itself “property” in the strict sense, the Beneficiary has no interest, vested or contingent, in the Trust

Fund itself, nor in any particular asset of the Trust. Thus, unless the Trust was the Beneficiary’s alter ego or “puppet” the only property of the Beneficiary is their equitable *chose in action* (*Shaw and Shaw* (1989) FLC 92-030 at p 77,416). In fact, the Family Court has given an extremely wide meaning to the word “property” (see *Duff and Duff* (1977) FLC 90-217 at p. 76,127), and it may not avail a person to contend that, as a discretionary Beneficiary of the Discretionary Trust, their right or interest is not “property” within the meaning of the *Family Law Act 1975* (Cth).

Further, as stated above, as the Appointor has effective control over the Trust, the Trust Fund is accountable in *Family Law Act 1975* (Cth) property settlement matters, and it is also likely that the Family Court would find that a Principal has control of the Trust for property settlement purposes.

### Minors

Careful consideration must be given when distributing either income or capital to minors (who, for the purposes of the Income Tax laws are natural persons under 18 years of age). This is because of the penal rates of tax that apply to such distributions, which are as follows.

Where the eligible taxable income of a resident minor is less than a threshold (\$416 for the 2022/2023 financial year) the special (higher) rates do not apply; instead, the general rates applicable to resident adults apply to the whole of the taxable income. Resident minors may also be eligible for the rebate for low income-earners, which effectively increases this threshold, if the minor has no other income.

Where the eligible taxable income of a resident minor is within a certain band (i.e. in excess of \$416 and less than \$1308 for the 2022/2023 financial year), then the tax on the eligible taxable income is the greater of:

1. 66% of the excess over the lower threshold; and
2. the difference between tax on the whole of the taxable income and the tax on the taxable income other than the eligible taxable income.

# Hybrid Discretionary Trust

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Where the eligible taxable income exceeds the upper threshold (\$1307 for the 2022/2023 financial year), tax is payable on the whole of the eligible taxable income at the highest marginal rate.

However, this is not the case where the Trust is a Capital Vested (or Child Maintenance) Trust, in which case income distributed to minors is taxed at non-penal adult rates. Capital Vested Trusts are created at the death of a person or upon a marriage or relationship break-up, whereby the assets of the Trust must vest in the Capital Vested Beneficiaries. Before any distributions are made to any minors, the Trustee should consult their accountant or financial adviser.

## Stamp Duty and Land Tax

The issue of units in a hybrid discretionary trust will not normally constitute a dutiable transaction for the purposes of any of the relevant State/Territory statutes dealing with stamp duty. On the other hand, a redemption or transfer of such units may attract duty, sometimes depending upon the value of the transaction and the nature of the underlying assets of the trust.

Most State/Territory statutes dealing with the imposition of land tax provide for special non-concessional rates of such an impost for land held in trusts that are not “fixed.” Although the definitions of what constitutes a “fixed” trust for these purposes varies between the jurisdictions, it usually requires that all of the interests to the income and capital of the relevant trust are vested and indefeasible – this cannot be said of a Discretionary Trust.

If any queries exist or a further explanation is required following reading the above together with the Deed of Trust, please contact your professional adviser.

## Special Features of Hybrid Discretionary Trusts

As they have no statutory or judicial definition, it can be said that hybrid discretionary trusts have always been in existence, in one form or another – their precise drafting will vary between the multitude of providers. An MGS hybrid discretionary trust has all the features of a discretionary trust, as described above, but additionally vests the Trustee with the power to issue units.

The units may be known as Special Units, Special Income Units, Special Capital Units or such other distinctive name as the Trustee determines. The rights as to income and/or capital of the Trust Fund attaching to these units is determined by the Trustee in its absolute discretion and are described in the Certificate of Units. For example, a Special Unit may entitle the unitholder to a present and absolute entitlement to the Special Income of the Trust Fund, in the proportion of the number of Special Units they hold to the total number of such units on issue at that time. For these purposes, the Special Income of the Trust Fund means that portion of the income of the Trust Fund as the Trustee determines is reasonably attributable to the investment by the Trustee of the moneys received by it from the issue of Special Units, e.g. in a trust which has assets of \$500 000 and 250 000 Special Units on issue which had been issued at \$1 each, those units would be entitled to 50% of the income of the Trust Fund.

## Hybrid Discretionary Trust

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There do not have to be any units of any description on issue at the time of the creation of a hybrid discretionary trust (nor, indeed, at any other time). Where they are issued, the issue value of units may be any denomination, but \$1.00 each is recommended for the purposes of simplicity. Importantly, however, the total number of units issued multiplied by the number of units issued should reflect the market value of the new unitholder's proportional interest in the underlying assets of the Trust (which includes the monies that will be added to the trust Fund pursuant to the issue of the units themselves) – to do otherwise risks the Commissioner substituting such a market value for the acquisition of those units.

Further, Special Units that have been redeemed by the Trustee may entitle their former holders to receive from the Trustee an amount calculated in various possible ways, including the market value of the units, the market value of the units plus an increment (e.g. CPI or some other percentage), or to the amount paid to acquire the units - although such redemption formulae are possible from a trust law perspective, adopting anything other than the market value of the units as the redemption amount will seriously jeopardise the deductibility of interest on any funds that may have been borrowed by the unitholder to acquire such units. It is notable that the deductibility of the interest expense will still be available to the former unitholder, irrespective of the application of the monies received upon the redemption of their units. Apart from their entitlement under a redemption, the holders of Special Units may not have an entitlement to any part of the corpus (or capital) of the Trust Fund.

In essence, this means that an MGS hybrid discretionary trust can operate as “routine” unit trust vesting unitholders with fixed entitlements (where units are on issue) and as a “routine” discretionary trust allowing distributions of income and/or capital to be made to all of the Beneficiaries at the discretion of the Trustee (where all units have been redeemed or there have never been any on issue), either separately or simultaneously. As a consequence, hybrid discretionary trusts with these or other similar features are extremely flexible and useful vehicles that are capable of serving multiple purposes, which include estate-planning, asset-protection and tax-efficiency.

### The Commissioner's View

As the number of providers of hybrid discretionary trusts in Australia grows, they're all seeking to differentiate themselves by making increasingly contentious claims, e.g. no stamp duty or CGT on the transfer or redemption of units, the availability of land tax concessions, and that Deeds of Trust will never be affected by the introduction of any adverse legislation! Certain providers are also clearly asserting that capital gains realised by the disposal of CGT assets by the trustee can be streamed away from unitholders – again, although that outcome is, indeed, possible from a trust law perspective, it seriously jeopardises the deductibility of interest on any funds that may have been borrowed by the unitholder to acquire such units.

Not surprisingly, the Commissioner noticed the growing proliferation of hybrid discretionary trusts and embarked upon an intelligence-gathering exercise, which culminated in the release of Taxpayer Alert TA 2008/3, to voice a number of concerns he has in relation to certain features of particular arrangements. The particular features of some hybrid discretionary trusts which the Commissioner appears to have the most difficulty with include:

## Hybrid Discretionary Trust

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- an ability to defeat a unitholder's entitlement to receive distributions of fixed proportions of trust income and capital gains;
- a unitholder not being entitled to receive distributions of trust capital gains at all;
- interests or entitlements being conferred upon associates of a unitholder for less-than-market-value consideration;
- a unitholder's entitlement to receive distributions of the trust ordinary income being less than what it should be, meaning that they've borrowed to fund income to which other beneficiaries are entitled;
- a unitholder only being entitled to receive distributions of the trust capital gains;
- a unitholder's interest in the trust ending before the cost of their investment has been recouped;
- a unitholder redeeming their units at their purchase price or less than market-value; and
- units being purchased at an amount less than their market-value.

Interestingly, the Commissioner does not mention the "proportionate theory" (as discussed above) in his Alert. This is considered an important omission, as the theory would apply to ensure that distributions to unitholders entitled to income of the Trust will also receive a distribution of an appropriate proportion of the Trust's realised capital gains.

Nevertheless, the Commissioner's views in Taxpayer Alert 2008/3 are particularly relevant to taxpayers/unitholders who have undertaken a borrowing to acquire their units, and who are seeking an income tax deduction for the interest expenses incurred on that borrowing.

Notably, the Commissioner's received numerous applications for Private Binding Rulings on the issue of the deductibility of interest on funds borrowed to acquire units, and has subsequently issued Interpretative Decisions, which are overwhelmingly adverse to the taxpayer/unitholder.

In fairness to the Commissioner, it's difficult to criticise those adverse decisions, because they all seem to be with respect to poorly drafted and even abusive Deeds of Trust. Importantly, therefore, in order to be entitled to deductions for interest expenses they incur, geared unitholders must:

- essentially be in the same position they'd be in if they held the underlying asset of the Trust directly;
- be entitled to both the ordinary income of the Trust and its realised capital gains; and
- have their units redeemed at amounts reflecting the market value of the underlying asset of the Trust.

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The provisions of Macquarie Group Services hybrid discretionary trusts do not contain any of the features that the Commissioner has described as offensive. In particular (and as noted above), a holder of Special Units is typically entitled to that proportion of the net income of the Trust (ordinary and statutory income including realised capital gains) which is reasonably attributable to their investment. This right cannot be defeated, including by way of accumulation. Importantly, units should always be acquired and redeemed at amounts that reflect the market value of the underlying asset of the Trust - if they aren't, the CGT "market-value substitution rules" will apply in calculating any tax liability.

The Commissioner has also raised a concern regarding distributions from hybrid discretionary trusts to complying superannuation funds, in Taxpayer Alert TA 2008/4, which is in similar form to Taxpayer Alert 2008/3.

If any queries exist or a further explanation is required following reading the above together with the Deed of Trust, please contact your professional adviser.

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**NOTE:** The above information is meant as a general guide only, and the information applies to hybrid discretionary trust deeds provided by Macquarie Group Services Pty Limited.

**Advice Warning:** This document is intended to provide general information only without taking into account any particular person's objectives, financial situation or needs. Investors should, before acting on this information, consider the appropriateness of this information having regard to their personal objectives, financial situation or needs. We recommend investors obtain financial advice specific to their situation before making any financial investment or insurance decision.