

Establishing a Hybrid Discretionary Trust – Negative Gearing

October 2023

Description	This guide looks at buying a rental property and negative gearing with a hybrid discretionary trust.
Other relevant guides	<ul style="list-style-type: none">- <i>How to set up a land tax unit trust</i>- <i>How to set up a hybrid discretionary trust</i>- <i>How to set up a land tax unit trust and negative gear</i>
Documents required	<ul style="list-style-type: none">- <i>Resolution to establish a Hybrid Discretionary Trust</i>- <i>Hybrid Discretionary Trust deed</i>- <i>Resolution to acquire property</i>- <i>Application for Special Income Units (Hybrid Discretionary Trust)</i>- <i>Resolution to issue Special Income Units (Hybrid Discretionary Trust)</i>- <i>Unit Certificate (Special Income Units)</i>
Notes	<p>Prior to considering the following material, it is recommended that you read the “How to” Guides dealing with the establishment of a hybrid discretionary trust and the establishment of a unit trust.</p> <p>The following steps should be undertaken in relation to the strategy of negative-gearing with a hybrid discretionary trust.</p>

Step 1 – Identify Trustee, Appointor, Controller (if any), Beneficiaries and Settlor:

a) The Trustee(s)

The trustee of a trust controls its day-to-day operations and decides who will receive distributions of its income and/or capital. Subject to certain restrictions, the trustee of a trust controls what happens to its assets. The trustee of a trust is the entity that enters into transactions on its behalf, including the borrowing of funds, entry into contracts and acquisition of assets.

SUGGESTION: The trustee of a trust is usually a senior person from the group of people who will benefit under it, more than one such person or a company controlled by such persons.

The trustee is usually:

- Mum or Dad
- Mum & Dad

A company is controlled by Mum & Dad

TIP: If a trust is merely a passive investor in income-producing assets, avoid using a company as its trustee. In these circumstances, it is recommended that senior people from the group of people who will benefit under the trust are made its trustees.

b) The Appointor(s)

Establishing a Hybrid Discretionary Trust – Negative Gearing

The appointor of a trust has the power to remove the trustee and replace them with a new one. Consequently, this position is very important, as the appointor decides who controls the trust.

SUGGESTION: The appointor of a trust is usually a senior person from the group of people who will benefit under it.

TIP: Ensure that two appointors are selected (so that one can carry-on in that role if the other passes away) and that they are two senior people from the group of people who will benefit under the trust.

c) The Controller(s)

A Controller is a person that the Trustee has to seek approval to appoint additional beneficiaries, vest the trust or amend the trust deed. Where a Controller of a trust is named, that person is vested with the power to give the trustee of that trust consent to act in various ways, e.g. to appoint additional beneficiaries, determine an earlier vesting date and vary the trust deed.

SUGGESTION: This role is optional and should only be used where beneficiaries want the Trustee to seek approval from another person to do certain things.

TIP: A controller can be appointed at a later stage.

d) The Beneficiaries

The beneficiaries of a hybrid discretionary trust may be entitled to receive distributions of its income and/or capital. In a hybrid discretionary trust, there is usually a Principal Beneficiary, to whom all other beneficiaries are related or connected. (see sample clause below).

It may sometimes be desirable to exclude certain persons or entities from ever becoming beneficiaries of a particular trust, e.g. the settlor of the trust, which may be achieved by default pursuant to the existing clauses in the trust deed.

SUGGESTION: The Principal Beneficiary of a trust is usually a senior person from the group of people who will benefit under it or more than one such person.

It should be ensured that the trust deed specifically excludes or, at least, allows certain persons or entities to be excluded from ever becoming beneficiaries of that trust.

TIP: Ensure that two senior people from the group of people who will benefit under the trust are selected as its Principal Beneficiaries. The Settlor, the Settlor's legal personal representative and the children of the Settlor are automatically excluded from benefiting under the trust.

e) The Settlor

Establishing a Hybrid Discretionary Trust – Negative Gearing

The settlor of a trust establishes it, usually by gifting an amount of money. They do this by handing the money to the trustee. It is recommended that the settlor is never a beneficiary.

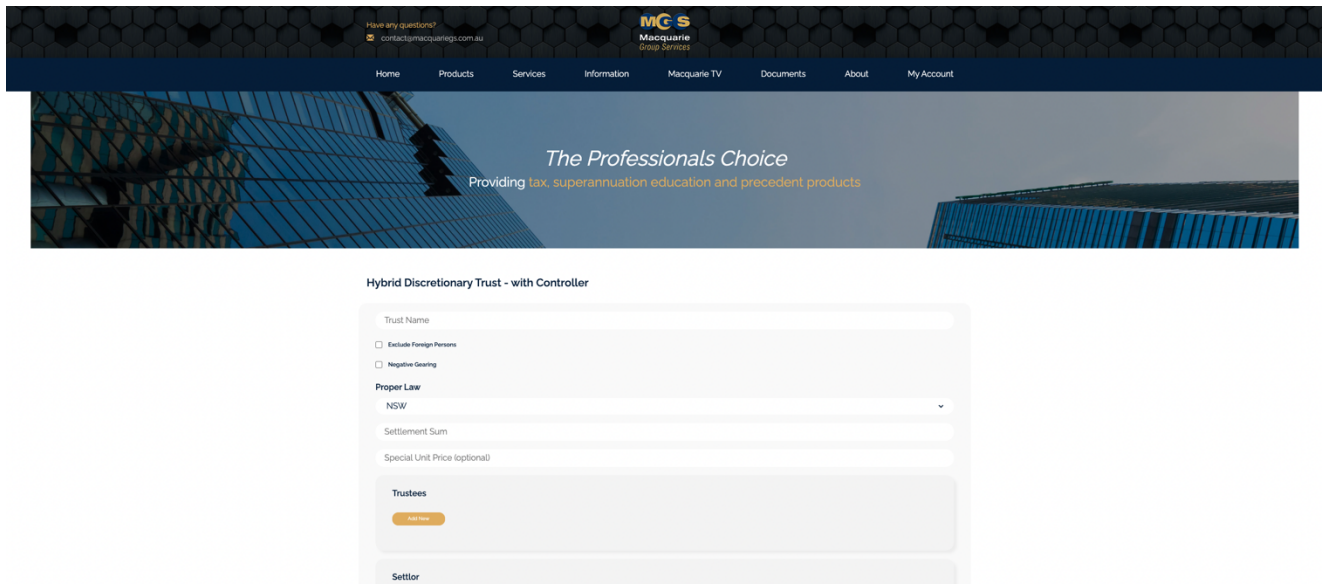
SUGGESTION: The settlor of a trust is usually an accountant, a solicitor, a friend, a neighbour, or a work-colleague of the group of people who will benefit under it.

TIP: Ensure that the settlor is a friend or neighbour of the family who will NOT benefit, and that they gift \$100 as the settled sum.

NOTE: The trustees, appointors, and beneficiaries of a trust can, and in many circumstances will, be the same people.

WARNING: Although it's permitted at general law, there can be severely adverse tax consequences if the settlor of a trust is also one of its beneficiaries.

Step 2 – Complete the instruction sheet or order online



The screenshot shows the Macquarie Group Services website. The header includes the MGS logo and navigation links: Home, Products, Services, Information, Macquarie TV, Documents, About, and My Account. A banner image of a modern building is displayed with the text "The Professionals Choice" and "Providing tax, superannuation education and precedent products". Below the banner is a form titled "Hybrid Discretionary Trust - with Controller". The form includes fields for "Trust Name", checkboxes for "Exclude Foreign Persons" and "Negative Gearing", a "Proper Law" dropdown menu set to "NSW", a "Settlement Sum" field, a "Special Unit Price (optional)" field, a "Trustees" section with a "Add New" button, and a "Settlor" field.

NOTE: There are generally no restrictions in relation to the naming of a trust, e.g. There would be no prohibition on naming your trust the “Westpac Trust” or the “Mercedes Trust”.

Step 3 – Execute the documents

When the trust documentation arrives, ensure that the trustee executes and dates the resolution to establish the trust, and that the trustee and settlor execute and date the trust deed in the presence of a witness.

NOTE: At this point, the settlor of the trust will have to give the settled sum (usually \$100) to the trustee.

Establishing a Hybrid Discretionary Trust – Negative Gearing

WARNING: The signatures of the trustee and the settlor need to be witnessed, and the witness will need to sign the deed.

Step 4 – Acquire the property

The trustee of the Hybrid Discretionary Trust enters a contract for sale of land. It is important that the trustee be able to prove that it paid for the property with funds of the trust. This is normally achieved by opening a bank account in the name of the trust and taking the deposit from that account.

NOTE: The trustee of the Hybrid Discretionary Trust must resolve to acquire the property on behalf of the trust before the exchange of the contract for its sale.

WARNING: The Hybrid Discretionary Trust must be executed before the trust conducts any business, including the exchange of contracts for the acquisition of real property. This may occur on the same day.

Step 5 – Arrange the loan

Arrange the loan in the name of the person who wishes to claim the losses from the property. This is normally the high income earner. Other people including the trustee may act as guarantors for the loan.

NOTE: The financier will usually require a copy of the trust deed.

Step 6 – Issue Special Units

Issue Special Units to the borrower equal to the amount of the loan.

NOTE: The number of units in the trust on issue should equal the loan amount.

Step 7 – Settle the property

Settle the property with the funds from the bank together with any other money to come from the trust.

NOTE: The name of the trustee should appear on the title certificate.

Step 8 – Administration

Depending on the nature of the property acquired and the amount of rental income to be received by the unit trust, the unit trust may require some or all of the following:

1. Registration for GST;
2. Application for a Tax File Number; and
3. The opening of bank accounts.

NOTE: The unit trust should have a tax file number and a bank account.

Establishing a Hybrid Discretionary Trust – Negative Gearing

Step 9 – Have the deed stamped

Have the trust deed and copies stamped at the relevant Office of State Revenue.

NOTE: The amount of stamp duty liability for the creation of a trust is different in each State and Territory and may be anywhere from nil to around \$500.

WARNING: Where stamping of a trust is required, you have a limited time to do so before penalties apply (in NSW, the period is 3 months from the date of the creation of the trust).

Other Important Information

1. The perpetuity period for trusts is dependent upon the proper law of the trust. In Queensland the perpetuity period is 125 years. In South Australia the perpetuity period has been abolished. In all other states it is 80 years;
2. The trustee of a hybrid discretionary trust can be an individual, group of individuals or a company;
3. The special unitholders of a hybrid discretionary trust (absolute entitlement version) can demand the redemption of their special units;
4. Additional special units can be issued at any time;
5. If a trust is acquiring real property, then the trust must have been in existence and evidenced in writing prior to the exchange of contracts for its purchase;
6. A hybrid discretionary trust is eligible to receive the general 50% Capital Gains Tax discount;
7. The trustee of a hybrid discretionary trust is obliged to distribute its income and capital to its special unitholders in proportion to their respective special unitholdings;
8. Distributions of the income of a trust to minors (i.e. people under 18 years of age) are generally taxed at the penal rate of 66%;
9. If the trustee of a trust is sued for an amount representing more than the available assets of the trust, they will generally become personally liable;
10. If a business is conducted through a trust, then its trustee should be a company;
11. If a trust is merely a passive investor in income-producing assets, its recommended that senior people from the group of people who will benefit under it are made its trustees;

Establishing a Hybrid Discretionary Trust – Negative Gearing

12. There are negative taxation consequences if a superannuation fund invests in a hybrid discretionary trust.

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

Advice Warning: This document is intended to provide general information only and has been prepared by Macquarie Group Services Pty Ltd ABN 70 090 831 039 (AFSL 399059) 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.