

TOPIC 1: INTRODUCTION AND THE CLASSIFICATION OF TRUSTS

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Topic 1: Introduction and the classification of Trusts

Introduction:

A trust is a legal instrument that is perhaps one of the most important instruments in law. Trusts derive their history almost entirely from equity – and it is equity that we look to for the primary creation of trust law.

In modern times, Trusts are primarily used for estate and tax planning due to the manner in which cash flows are distributed. A number of unique features exist in Trusts that will be explored throughout these notes – and where relevant – the taxation advantages of the structures will be highlighted.

A trust generally exists where the owner of property is obliged to deal with that property for the benefit of some other person or persons, or for some purpose recognised by law.

A person who creates a trust in their life is a settlor and it is known as an inter vivos trust. A trust which is created in a will is called a *post mortem* or testamentary trust where the creator is known as a testator (male) or testatrix (female), and a trustee may be a beneficiary if they are one of a number of beneficiaries.

The Elements of a Trust:

- There are 3 elements of a trust:
 - Trustee (individual or company)
 - Trust property (purpose ie charitable trust)
 - Beneficiary or object (cestui que trust)

The trustee:

- The titleholder, whose title may be legal or equitable, and who is under a personal obligation to deal with property for the benefit of the beneficiary or object of the trust.
- Legal person who holds a vested legal title (or vested equitable title) in the property, subject to fiduciary duties.
- Can be anyone as long as they have the legal capacity to hold property and are able to exercise the responsibilities of a trustee.
- In NSW the number of persons who can be trustees of certain private trust is limited to four.
- The crown can be a trustee - *Williams v Attorney General 1913*.
- Corporations can act as trustees.
- In the event the nominated trustee is unable or unwilling to act as the trustee, the trust wont necessarily fail, the court will likely appoint a new trustee.
- One or more beneficiaries can act as trustee - However, one party cannot be sole beneficiary and sole trustee of a trust - *Cook 1948*.
- The trustees obligations are stipulated primarily from three sources:
 1. The terms stipulated in the trust deed;
 2. Statutory obligations; and
 3. Equitable obligations.
- The trustee-beneficiary relationship is a presumed fiduciary relationship under equity and therefore the fiduciary obligations of trust and confidence apply to trustees. This fiduciary relationship requires that trustees act in the best interests of the beneficiaries and must take reasonable and adequate care of the trust.

Trust property:

- Must be identified and capable of being held on trust and which is impressed with the trust, so that the beneficiary has rights against the property as well as the trustee.
- Property in real or personal form that is identified or ascertainable and capable of being held on trust.
- The trust property can be legal or equitable property.

The beneficiary:

- A person or group of persons, including children yet unborn, who hold a beneficial equitable estate in the property and on whose behalf the trustee must act.
- Any person or corporation can be a beneficiary.
- A private trust will not be valid unless the beneficiaries can be sufficiently ascertained.
- Where there is more than one beneficiaries their shares in the trust can be equal or unequal.
- A equal share must be specified.
- Different classes of beneficiaries can take different interests under a trust.

Settlor:

- Any person or corporation can be a settlor.

Trustee	One or more persons (including companies) who own/s or hold/s the trust property.
Object	One or more person/s (including companies) or purposes who will benefit under the trust. The term object is most commonly used in discretionary trusts to describe a person or class of persons who may benefit.
Beneficiary	Also called 'the cestui que trust' in older cases. One or more persons for whom the trust property is held. A beneficiary is an object who has vested interest in the trust.
Trust property	Also called the subject or the subject matter the property that is held by the trustee on trust for others. Any kind of property can be the object of a trust.
Trust Deed	Also called the trust instrument or the settlement deed; a document used to create a trust, but not essential to its creation. If there is no trust deed, the trustee's duties are determined in accordance with equitable and statutory requirements.
Settlor	One or more persons who creates the trust. Settlor is the term used when the trust is created during the settlors lifetime.
Testator	A deceased person who has left a valid will. Many trusts are established under a testators will, and take operation after the testators death. The feminine for of testator is testatrix.
Inter Vivos Trust	A trust created during the lifetime of the settlor.
Testamentary trust	Also called a post modern trust; a trust created by the will of a testator.