What is a unit trust?

A unit trust is a trust in which the trust property is divided into a number of defined shares called units. The beneficiaries subscribe for the units in much the same way as shareholders in a company subscribe for shares.

In an ordinary unit trust a beneficiary is entitled to the income and capital of the trust in proportion to the number of units held. A unit in a unit trust is really just a means of describing the share in the trust fund to which the unitholder is entitled.

How is a unit trust established?

Most unit trusts are established by subscription; that is, the initial unitholders (the “subscribers”) subscribe for units in the unit trust, paying a set amount for each unit to the trustee and, in return, the trustee issues those subscribers with the requisite number of units, much like shareholders applying for shares in a company.

The parties to the trust deed of a unit trust by subscription will be the trustee and the subscribers or initial unitholders.

What are the benefits of a unit trust?

The main advantage of the unit trust over other types of trusts is that the parties involved are issued with units which (like shares):

- Define that party’s interest in the assets and income of the trust;
- Can be easily transferred; and
- Can be re-acquired by the trustee.

Other benefits of a unit trust include the following:

- Less regulation than a company;
- Taxation advantages over a company (in some cases);
- The trust deed can be tailored to the needs of principals and beneficiaries;
- No legal problems with redeeming units from the unitholder; and
- Easier to wind up than a company.

What are the disadvantages of a unit trust?

As the units themselves are an asset a unit trust does not offer the same sort of asset protection as a discretionary trust does. If a person is made bankrupt, then the person’s units will be treated like any other asset and sold to raise funds to pay their creditors.

Another disadvantage of a unit trust is that tax-free distributions cannot be made as easily from a unit trust as from a discretionary trust.

Also, the flexibility and the advantage of being able to distribute on a discretionary basis is not usually present.

When does a unit trust start?

A unit trust by subscription is created when the unitholders subscribe for units in the trust.

Elements of a unit trust

There are a number of elements of a unit trust, including:

1. the trustee;
2. the trust fund;
3. the unitholders; and
4. a personal obligation on behalf of the trustee in respect of the property.

The trustee

The trustee is the legal owner of the trust property, although not the beneficial owner, and is responsible for managing the trust fund. For example, where it holds land for the trust, the trustee's name will appear as owner at the Land Titles Office.

The trustee's overriding duty is to obey the terms of the trust deed. The trustee also has a duty to act in the best interests of the beneficiaries. There are many other duties imposed on the trustee by law.

Who should be the trustee?

As the trustee is personally liable for the debts and transactions they undertake on behalf of the trust, it is generally best that a company be the trustee for the following reasons:

- it is easier to effect changes of control;
- a company never dies; this saves the expense of transferring assets to new trustees on the death or retirement of the existing trustees; and
- the limited liability of a company means the personal liability of the trustee is limited (however, the directors may be personally liable in certain circumstances).

It is generally preferable for different trusts to have separate trustees.

The trust fund

The trust fund is all the property of the trust including the income accumulated and any other money and property held by the trustee pursuant to the terms of the trust.

The beneficiaries

The beneficiaries are the people (including entities) for whose benefit the trustee holds the property. In the case of a unit trust, the beneficiaries are the unitholders.

Features of NTAA Corporate's Unit Trust Deed

The following are some of the features of NTAA Corporate's Unit Trust Deed, most of which are common to many unit trusts. However, the deed should be read in full to fully ascertain the relationship between the trustee(s) and the subscriber(s).

- The trustee does not have an indemnity from unitholders for any debts – unitholders are protected to the largest extent possible.
- The trustee must keep a register of unitholders (much like a company keeps a register of its shareholders).
- A unitholder cannot demand that a particular asset owned by the trust is distributed to it.
- New units must be offered to existing unitholders at market value on a pro rata basis, before they can be offered to others (unless unitholders unanimously resolve otherwise).
- The trustee can issue units of different classes or reclassify existing units into different classes. You should obtain professional advice before taking any such action.
- Similarly, transfer of existing units by unitholders (other than to family members, etc) must follow the same procedure as above.
- The trustee can repurchase or redeem some or all of a unitholder's units if requested and the trustee exercises its discretion to do so. Such units will generally be repurchased at their market value (unless all of the unitholders allow them to be repurchased on a different basis).
- Unitholders can meet to make decisions about the unit trust, including regarding the removal and appointment of the trustee. The procedures for these meetings are governed by the trust deed. Generally, each unitholder is entitled to one vote for each unit they hold.

- The unit trust under this deed will not be a "fixed unit trust" for income tax purposes. A unit trust will be a "Fixed Unit Trust" if the issue of new units or the redemption of existing units must be valued in accordance with Australian accounting principles, which is not a requirement of this trust deed.

Disclaimer

These notes are intended to be a guide only. You should not act solely on the basis of the information contained in these notes because many aspects of the material have been generalised and the tax laws apply differently to different people in different circumstances. Further, as tax laws change frequently, there may have been changes to the law since the notes were written.

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