

BUSINESS ADVICE

INDEPENDENT TRUSTEES - HOW IMPORTANT ARE THEY?

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AN independent trustee is effectively a person with the required level of knowledge, integrity and professional skills. The main characteristics of such person are detailed as follows:

- » A person not related to the trustees, beneficiaries and/or founder who accepts and understands the responsibilities of trusteeship to ensure that the trust assets are properly managed in accordance with the trust deed.
- » Whilst it is not necessary, it is recommended that the person selected be either a professional accountant, admitted attorney or advocate who is affiliated to the relevant professional body or alternatively, a fiduciary practitioner who is a member of FISA.
- » That person is not a beneficiary of such trust (i.e. does not have interest in the trust property/assets)

Due to recent changes, the Master now has the authority to appoint an independent trustee where a trust is registered for the first time and ALL of the following criteria are met:

- » The trust deed allows the trustees the power to contract with independent third parties (i.e. the creation of trust creditors);
- » The trustees are all beneficiaries; and
- » The beneficiaries are all related to one another.

Where the Master decides that an independent trustee is required, the Master must request nominations for such

appointment from the founder, the existing trustees and the beneficiaries who have a vested right to the assets of the trust. However, the Master is not bound to make the appointment from the nominations provided and can choose another suitable person but only in exceptional circumstances.

In instances where the Master does not appoint an independent trustee, the Master can still request that security be provided by the trustees and/or the financial statements of the trust be audited.

We highly recommend that the trust deed make provision for the appointment and replacement of independent trustees and that such trustee/s be appointed at the inception of the trust to avoid the Master either:

- » Appointing his/her own independent trustee. Although nominations are allowed it is not guaranteed that the trustee will be chosen from there which can lead to unnecessary complications later;
- » Requesting security from the trustees; or
- » Insisting on an audit of the financial statements which can prove rather costly.

We further recommend that the founder of the trust appoints two independent trustees and himself to comprise the board of trustees as this would put to rest the issue of the trust being regarded as the “alter-ego” of any person.