



# Beneficiaries in a Discretionary Trust: A Snapshot

Emily Pritchard, current as of: 2 August 2022.

We are often asked questions related to the beneficiaries of discretionary trusts. Who is included as a beneficiary? Who is excluded as a beneficiary? What happens if the trustee doesn't distribute to a beneficiary?

What is essential, above all else, is a trust deed that clearly answers these questions, so the trust can confidently be administered in compliance with its terms.

## **Discretionary Trust Beneficiaries**

A discretionary trust deed generally identifies, by name or description, the beneficiaries of a discretionary trust. The trustee of the trust has a discretion to determine which of those beneficiaries are to receive distributions of income and/or capital from the trust and in what amounts.

A discretionary trust usually has a wide range of potential beneficiaries, including natural persons, companies and other trusts. The trustee may only make determinations to distribute to those persons or entities that are eligible beneficiaries of the trust.

The beneficiaries of a discretionary trust have no right or entitlement to trust assets until such time as the trustee determines to distribute to them (or in the event of deemed, default distributions which we've [discussed below](#)).

## **Beneficiaries in the Acis Discretionary Trust Deed**

### **Primary Beneficiaries**

Primary Beneficiaries are the Beneficiaries nominated at the time of ordering and generally described by name.

### **Secondary Beneficiaries**

Secondary Beneficiaries are those described by virtue of their relationship with Primary Beneficiaries and include:

- Spouses of the Primary Beneficiaries;
- Children and remoter issue of the Primary Beneficiaries;
- Uncles, aunts, nieces, nephews, cousins, parents, brothers and sisters of the Primary Beneficiaries;



- Children and remoter issue, uncles, aunts, nieces, nephews, cousins, parents, brothers and sisters of Spouses of the Primary Beneficiaries;
- Spouses, Children or remoter issue of any of the previously mentioned Beneficiaries;
- Executors or trustees of the estate of any deceased Beneficiary.



### **Tertiary Beneficiaries**

Tertiary Beneficiaries are entities described by virtue of another Beneficiary's involvement in them, and include private companies in which other Beneficiaries are shareholders or Directors or in which the Trustee is a shareholder, trusts and superannuation funds in which any other Beneficiary has a beneficial interest or is a member, charities and other tax exempt entities.

[Contact Acis](#) for a sample of the Acis Discretionary Trust Deed, outlining Primary, Secondary & Tertiary Beneficiaries in full.

### **Excluded Persons**

Excluded persons are generally those persons that are specifically excluded from all, or any, benefit under the trust. The trustee cannot make a determination in favour of excluded persons, and this can generally never be changed.

The settlor is generally excluded from being a beneficiary of a discretionary trust. This is certainly good practice and avoids any suggestion that the trust is a revocable trust for the purposes of Section 102 of the *Income Tax Assessment Act 1936* (Cth), which could result in far less than ideal tax consequences for the trustee.

### **Excluded Persons and the Acis Discretionary Trust Deed**

Excluded Persons in the Acis Discretionary Trust Deed are those people or entities that are nominated as Excluded Persons at the time of establishing the Trust, the Settlor, any minor Child of the Settlor, and any company or trust in which any other Excluded Person has an interest. Foreign Persons and potentially NSW Foreign Persons are also excluded ([see below](#) for Foreign Person exclusion information).



Excluded Persons are excluded from being a Beneficiary, Trustee, Appointor or Alternative Appointor in the Acis Discretionary Trust Deed and this cannot be changed.

### **Default Beneficiaries**

Default beneficiaries are those beneficiaries who the trustee is deemed to have made a determination to distribute to, in the event that the trustee fails to exercise a discretion to make a valid distribution of income and/or capital of the trust by a relevant date.

### **Default Distributions of Income in the Acis Discretionary Trust Deed**

In the event there remains any undistributed Income of a Trust on 30 June in any year, the Trustee is deemed to have made a determination to distribute and Set Aside any Income remaining to the Default Beneficiaries (in equal shares if more than one). If there aren't any Default Beneficiaries alive or in existence, then the Trustee is deemed to have accumulated the Income.

### **Default Distributions of Capital in the Acis Discretionary Trust Deed**

If, on the Vesting Day, there remains any undistributed capital of the Trust, then the Trustee is deemed to have made a determination to pay, apply or Set Aside any remaining capital to the Default Beneficiaries (in equal shares if more than one).

If there aren't any Default Beneficiaries alive or in existence, then the Trustee is deemed to have made the determination in favour of the Primary Beneficiaries.

If there are no Primary Beneficiaries, then the Trustee is deemed to have made the determination in favour of the Children of the Primary Beneficiaries and, if there are none, then for their Children. If there are still none, then the determination is deemed to have been made for the persons entitled to the property of the last Primary Beneficiary to die. A trust does not technically require default beneficiaries, and identifying them should be approached on a case-by-case basis. One of the clearest potential benefits of having default beneficiaries is in relation to tax planning.

Having default beneficiaries can help avoid income being accumulated and taxed in the hands of the trustee at the highest marginal rate. This can be beneficial where more income comes to light after resolutions are prepared or, in rare cases, the trustee does not distribute trust income until after 30 June. There is, therefore, a clear benefit in selecting default beneficiaries who are on low tax rates.

It is also important that default beneficiaries are not minors to avoid them being taxed at penalty rates.

### **Default Beneficiaries & Duty**

Beneficiaries of a discretionary trust are not generally automatically entitled to distributions, but are dependent on the trustee first making a determination to that effect. Default beneficiaries are, however, generally considered to have an interest in the trust's assets. This is important when considering changing default beneficiaries, as the changes may have duty consequences depending on the location of the trust's assets.

### **Default Beneficiaries & Trust Cloning**



While it's still possible to clone a trust from a duties perspective in Queensland (although not in other jurisdictions), the existence of default beneficiaries can be critical to the ability to do this.

## **Discretionary Trust Beneficiaries – Tips & Tricks**

### **Minor Beneficiaries**

Specifically naming minors as beneficiaries of trusts can be problematic. Banks generally require 100 points of ID from all named beneficiaries when opening bank accounts, and personal guarantees from named beneficiaries when trusts are applying for finance. Minors cannot give personal guarantees, and, for obvious reasons, it can be difficult to provide 100 points of ID.

In most cases, minor children will likely fall within the description of secondary beneficiaries, for example as a child of a primary beneficiary, so naming them is generally unnecessary.

### **Foreign Persons**

Most states and territories have either foreign person land tax surcharges or foreign person duty surcharges, and many have both. It is important to consider the impact of these surcharges on discretionary trusts so that, where the trusts own property, they aren't inadvertently assessed at surcharge rates.

## **Foreign Person Exclusions and the Acis Discretionary Trust Deed**

The standard Acis Discretionary Trust Deed excludes foreign persons for the purposes of all states and territories that have surcharges, *except NSW*. A discretionary Trust Deed that excludes foreign persons for the purposes of all states and territories that have surcharges, *including NSW*, can also be ordered.

In some circumstances there is a genuine desire to distribute to foreign persons, and the imposition of the surcharges is





acceptable to the trustee. In this case, a Trust Deed that does not exclude foreign persons at all should be considered (and ordered using the Special Instructions section of the order).

## Read the Deed

Above all else, it's important to ensure that the trust deed you're using allows the actions that you intend. This includes making distributions in accordance with the trust's terms and having the security of knowing with certainty how the trust deed deals with beneficiaries. Amendment should be considered for those trust deeds that do not sufficiently deal with such matters.

[Contact](#) the Acis Legal Services team to discuss any variations and special exclusions you may need.



<b>Additional Resources</b>	
<a href="#">Discretionary Trust Checklist</a>	<a href="#">Trust Structuring Video</a>
	

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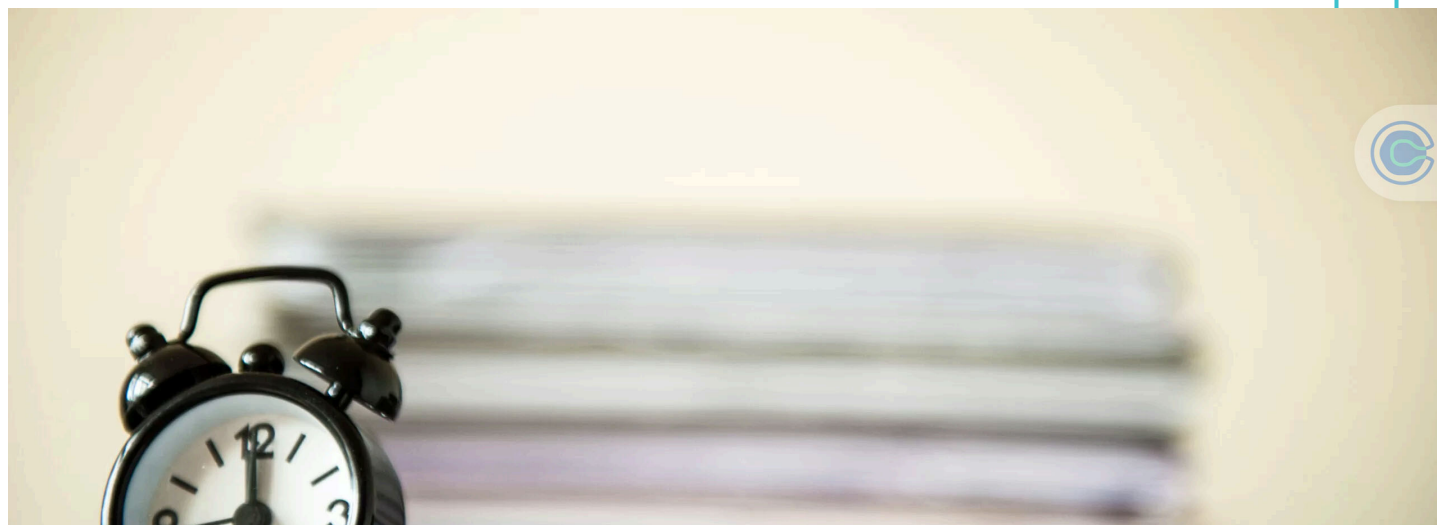


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