

# The matter of validity: can you trust the trust deed?

By [Trinette Hartley](#)

2 Oct 2013

You may have complied with all the requirements of creating a valid trust, but how effective, practical and up-to-date is the trust deed?

Was it correctly drafted in the first place or will the person who drafted the deed, when called upon during a dispute, testify that a detrimental statement relied upon by the counter party is "without any meaning and was never intended to form part of the document" and that it "unintentionally found its way into the draft" because he "slavishly copied a precedent without realising that the statement was inapposite to the deed that he prepared."

How will you know whether your trust is effective, practical and up-to-date? How can you tell whether there are any "unintended" clauses that were "slavishly copied" into your trust deed?

The best way of ensuring peace of mind is to have the trust deed reviewed by a qualified trust practitioner. This person will go through the trust deed and compile a comprehensive trust audit report setting out any problem areas and making the necessary recommendations in order to address those problem areas.

There are many potential problem areas, but the following will give you an idea of what to look for next time you read through your trust deed:

- If the founder was a non-related party, does the trust deed provide him with certain rights (or benefits)? If so, this is probably the result of a drafter copying a precedent that was created for those cases where the founder is a family member (or even one of the trustees). An example would be where the intestate heirs of the neighbour's cousin's friend will benefit at termination of the trust - because the trust deed provides for the founder's intestate heirs to benefit at termination. Another example would be where the trust deed provides that the founder (who is not even a trustee) cannot be removed from his office as trustee.
- Do the trustees have the power to nominate beneficiaries of their own choice from outside a defined group or class of beneficiaries? One of the requirements of a valid trust is that the beneficiaries should be determined or determinable. By giving the trustees the power to nominate "any other person" as trustee, the object of the trust becomes very vague and the trustees can literally add any person to the group of beneficiaries.
- Does the trust deed provide one of the trustees with excessive powers? These powers may include the power to singlehandedly appoint and dismiss trustees, to nominate beneficiaries of his choice or to veto certain decisions.
- Are the trust objectives and distribution clauses clear? Capital gains tax and income tax benefits are often unintentionally restricted.
- Does the trust deed contain an early termination clause? Continuity is one of the benefits of a trust - the termination

date should therefore be in the discretion of the trustees.

- Has the trust deed been amended at some stage? Has any beneficiary accepted benefits from the trust before those amendments were made? If so, the trust deed cannot be amended without the consent of that beneficiary and any amendments that have been made without such consent, will be invalid.

If you've identified any of the abovementioned pitfalls or any other provisions that made you uneasy, you should consider having the trust deed reviewed by a professional. Not only will a professionally drafted audit report expose the potential pitfalls in your trust deed, but it will also be a useful exercise in the proper management of the trust. The first step in properly managing a trust is to read and understand the provisions of the trust deed. This exercise will cause the trustees to read the trust deed, to question any provisions that they don't understand and to understand those provisions going forward.

## Conclusion

If you are not sure about the validity of your trust, it is advisable to contact a qualified trust practitioner who will be able to determine whether the trust was validly created and, where there is a problem with the validity, be able to provide a solution.

## ABOUT TRINETTE HARTLEY

Trinette Hartley is a fiduciary specialist at Glacier by Sanlam and a FISA member.  
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