



## Duties of a trustee

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A trustee is a person, group of persons or a company who has the power to manage assets of a Trust. No matter what the nature of the Trust is, the trustee has a number of duties in managing a Trust. These duties apply whether the trustee is an individual, a group of individuals or a company. If the trustee is a company, the duties must be performed by its directors.

The use of Trusts has been increasing significantly over the past two decades. It may be a family trust established by parents for the benefit of the whole family, a [testamentary trust established by the Will](#) of a deceased person, or it could be a self-managed superannuation fund.

In very general terms, the trustee is to hold the assets of the Trust, manage those assets and deal with the capital and income in accordance with the terms of the Trust. The trustee owes a duty directly to the beneficiaries and must always act in the best interest of those beneficiaries.

## Primary duties of a trustee

The relationship between a trustee and the beneficiaries is known as a fiduciary relationship. This requires the trustee to put the interests of the beneficiaries before the interests of the trustee.

The main responsibilities of a trustee are as follows.

**A trustee must preserve the trust property**

The trustee must protect and safeguard the capital and the income of the Trust for the beneficiaries against any loss. This would include an obligation to invest the assets of the Trust properly.

For example, if there is an asset held which is deteriorating in value, then the trustee may need to act quickly to sell the asset. Or the trustee might carefully consider whether it is appropriate to invest in highly speculative shares or other investments.

### A trustee must act honestly and in good faith

There are differing perspectives on this. So, if a trustee took advice from a financial planner to invest in a particular product as it would provide growth and income, but the investment failed, the trustee is not likely to be responsible for any loss due to that failure.

But, if the trustee did not seek financial advice and made a speculative investment in association with a friend or family member, then the trustee may well be liable for the loss of the investment if it later failed.

If you have concerns about this responsibility, you should seek financial and/or legal advice before acting on any investment opportunity.

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### A trustee must be loyal to the beneficiaries

The trustee cannot place itself in a position where the trustee's own interest, and the duty to act in the best interests of the beneficiaries, may be in conflict. For example, a trustee cannot use the trust funds as part of the purchase of a home in which the trustee is also personally investing.

The duty of loyalty extends to a duty to place the interests of all beneficiaries ahead of any other concerns. A trustee cannot be swayed by their own personal, social and political views when making decisions for the Trust.

### A trustee must keep accounts and supply information when requested

A trustee is required to keep up-to-date or proper and accurate accounts as to the assets and income of the Trust and to make that information available to beneficiaries when requested. The trustee may employ accountants to assist with this duty.

### A trustee must act personally

If the trustee is a natural person, they must act personally and, if there is more than one of them, unanimously. The trustee cannot delegate decision-making to another person, but a trustee usually can engage professionals such as lawyers, accountants and financial advisers to assist if the advice is reasonably required.

## A trustee must consider whether to exercise a discretion

The trustee must consider how best to exercise any power it has to deal with assets in the Trust and to use a discretion as to whether to exercise those powers.

This duty commonly applies to the distribution of income and/or capital of the Trust to beneficiaries.

In an interesting recent case, the trustee of a superannuation fund, after a member had died, decided to pay the whole of the fund to herself as one of a number of eligible beneficiaries for the fund. The Court set aside the decision of the trustee on the basis that the trustee had failed to consider the circumstances and needs of other eligible beneficiaries of the fund.

## The trustee must not profit out of the trust

The trustee cannot use their position to gain a profit from the Trust or to benefit themselves, or to provide for a third party who is not a beneficiary of the Trust.

For example, a trustee cannot buy an asset owned by the Trust where the trustee had personal knowledge that the asset could be purchased cheaply from the Trust and then resold later by the trustee for the trustee's own profit.

## Trustee obligations generally

The above sets out some of the duties applying to a trustee. The primary duty to keep in mind is that the trustee must act for the benefit of the beneficiaries in all actions that the trustee takes.

## Get help from a lawyer experienced in Trusts

Factual circumstances in each case can impact how a trustee might act. If you are a trustee and are ever unsure as to how to act or what to do, then we can assist you with some guidance and, in the extreme case, assist you in applying to the Supreme Court for judicial advice.

## Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

[02 9997 2111](tel:0299972111)

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