

What happens if I lose my Trust Deed?

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The COVID-19 pandemic certainly opened up the opportunity to sign documents electronically. And it also led to a great deal of digital document creation. Despite all of this, there are still areas of law in which the presentation of the original wet ink signed document is important. A Trust Deed is one such document. Unfortunately, it is not uncommon for clients to approach us in situations where the original Trust Deed is lost and requesting what their options are.

We have previously considered where an original Will might be lost and there are ways to work around that. And, similarly, an original Trust Deed is important to protect and have available and, where it has been lost, there are a number of ways to deal with that.

The prevalence of Trusts

Over the past number of decades, the use of Trusts for wealth protection and, in some cases, tax benefits has grown significantly. These Trusts might be created in your lifetime for the purpose of holding investments (called an *inter vivos* trust), a trust created under the Will of a deceased person (called a Testamentary Trust) or a superannuation fund (whether it is a public fund or a self-managed fund).

It is likely that the use of Trusts will continue to increase subject to what taxes might be introduced or other controls passed by Parliament.

Why is the original Trust Deed so important?

The primary reason is to establish clearly:

- the intent or object of the Trust;
- the powers the Trustee has to deal with the assets held by the Trust;
- how long the Trust may operate for;
- how the income generated by investments of the Trust funds may be disturbed to beneficiaries; and
- how the capital as held by the Trust, may be distributed.

Commonly, Trust Deeds are lengthy and detailed to ensure that the Trustee has a broad range of discretion in the management and administration of the assets held in the Trust. This generally follows the principle that, if a power or authority does not show in the Trust Deed, then the Trustee is presumed not to be given that power.

So, as soon as there is any question as to a decision by the Trustee or the rights of the beneficiaries, the first port of call will be to look at the Trust Deed. And the best evidence of what was intended in the Trust Deed will be as set out in the original signed document.

When will the original Trust Deed be needed?

When we talk about a lost Trust Deed, we also mean any deed subsequently made which creates a variation to the original Trust Deed.

Whenever the Trust acquires assets, be it shares in ASX companies, a bank account, real estate or investment in managed funds, the identity of the Trust needs to be established. This usually can be covered by presenting a copy of the Trust Deed as well as verifying the identity of the Trustee (whether that be an individual or a company). But in certain cases, the original Trust Deed will be required.

The original deed is certainly needed if there is a dispute as to the terms of the Trust, and it is the subject of Court proceedings. Further, if the Trust holds dutiable property (such as real estate) and there is a need to change the Trustee, then Revenue NSW usually requires to sight the original stamped Trust Deed.

Further, apart from having a wet ink copy of the Trust Deed, the Trust Deed needs to be stamped with appropriate duty. If there is a dispute as to the terms of a Trust and it is being dealt with in a Court, an unstamped Trust Deed cannot be used as evidence (section 304 *Duties Act 1997* NSW).

What options are there if I cannot find the original Trust Deed?

If a Trust Deed is lost or missing, there is no simple solution of just signing a new Trust Deed as that can have significant issues of creating a new separate and distinct Trust.

It may be that for current operating purposes, a copy of the Trust Deed will suffice. But that will not help if a third party insists on sighting the original deed.

If a signed copy of the Deed is available

If there is a copy of the original Trust Deed, and it can be established that the terms can be properly identified and coincide with how the Trust has been operating, then a Deed of Confirmation may be done. That may be enough for dealing with the bank or a government department.

But, if there is some dispute as to who controls the Trust or how distributions might be made, then the Deed of Confirmation may not be sufficient.

If there is no signed copy of the Deed

If no copy of the Trust Deed can be located and all avenues have been checked (such as checking with the accountants or lawyers who have had some involvement with the Trust over the years, checking with the bank with whom the Trust deposited or borrowed funds, checking with insurance brokers and so on), then an application may need to be made to the Supreme Court seeking that the Court confirm what the terms of the lost Trust Deed are.

The Court would need to consider the steps taken to locate the lost deed, and if there is an unexecuted and unstamped version of the deed, then the Court would need to determine if that version of the deed replicates the terms of the original lost deed. This is not a simple application, and it can be quite costly.

Presumption of regularity may help

One last point is if the Trust is being administered, even though a copy of the Trust Deed cannot be found, and a dispute arises with a potential beneficiary or a regulatory authority, the *presumption of regularity* may help.

This is the principle that all is presumed to be rightly and duly performed until the contrary is proven. Unfortunately, in dealing with banks and other institutions that have certain requirements to know their client, the presumption alone may not be sufficient.

Where is the Trust Deed for a testamentary trust?

This question frequently arises both with those persons involved with the Trust but also with banks and other institutions.

Generally speaking, the Grant of Probate will be accepted as being the ‘Trust Deed’. No stamp duty needs to be paid on these Trust 'deeds' because the Trust is created by the Will, which Trust only comes into existence on the death of the Will-maker.

Get help from a lawyer experienced in Trusts

If you have been unable to locate your Trust Deed, you should seek advice from a lawyer experienced in Trust law. One of our experienced lawyers would be more than happy to assist.

Contacting E&A Lawyers

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

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