

## What's in a name? Pitfalls when registering business names under corporate trustees

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*For some, little consideration is given when naming a corporate trustee. It may seem logical to name the corporate trustee in line with the intended business name. Whilst there is nothing wrong with this approach, difficulties will arise when registering the business name. **Jessica Wright** highlights these pitfalls to help you avoid them, or at least prepare you for what is in store should you be considering establishing a trust with a corporate trustee.*

### 1. Overview

Considering purchasing a business or starting up a new venture?

Whilst it is easy to get caught up in the long term goals and big ideas of your exciting new venture, it can be frustrating when your lawyer or accountant draws you back to the mundane, such as appropriate and tax-effective company structures.

These mundane details, however, will most probably save you time, money and stress in the long-run and can offer you greater flexibility and freedom when you do commence your business venture. This is true for small details – such as a company name.

### 2. The Corporate structure

One of the most popular structures for small or family-run businesses is a discretionary or 'family' trust with an incorporated company to act as trustee (known as a corporate trustee). The role of the corporate trustee is to run and manage the everyday affairs of the trust, and it holds the legal title to the business and assets. It is the trust, however, that holds what is known as the beneficial title to the business and all the assets. In this sense, the asset protection is greater - although not impenetrable.

This structure will also provide you with flexibility to lawfully minimise your tax, as seen in the diagram below. We note, however, that the government is considering introducing laws to tax trusts at the same level as companies.<sup>1</sup> This is only in the early stages and to date, no bill has been drafted. We would, however, recommend ensuring that your lawyer or accountant is up to date with this debate before establishing a trust in the near future.

We also note that this structure may not be suitable to everyone and you should take care to discuss the best structure with your financial and/or legal adviser first.

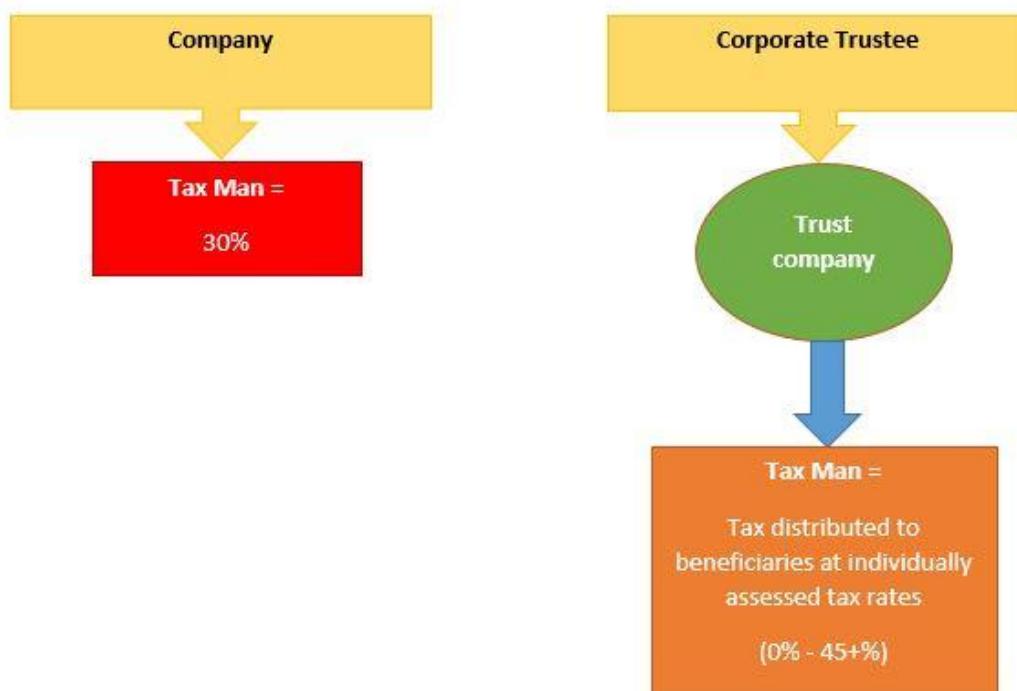
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<sup>1</sup> See recent new publications including:

Janda, M., "Trust and tax minimisation explained," *ABC News Online*, 28 July 2017 at <http://www.abc.net.au/news/2017-07-28/trusts-and-tax-minimisation-explained/8752480>.

Thomsen, S., "Bill Shorten plans to tax family trusts at the same level as companies" *Business Insider* at <https://www.businessinsider.com.au/bill-shorten-plans-to-tax-family-trusts-at-the-same-level-as-companies-2017-7>.

Crowe D., Kelly, J., "Labor's tax war on trusts to hit business," *The Australian*, 25 July 2017 at <http://www.theaustralian.com.au/national-affairs/treasury/labors-tax-war-on-trusts-to-hit-business/news-story/6ef94e926581673ee85e55b6b9c8a5ad>;



### 3. The Small Details – registering business names under this structure

By way of example, Jo has decided to start up a healthy, organic animal treats company. She decides to call this company 'Paw Treats'. Jo decides to establish a discretionary trust with a corporate trustee. She sets up a proprietary limited company to act as the corporate trustee, its legal entity name being 'Paw Treats Pty Ltd' and simultaneously creates the trust, 'Paw Treats Trust'.

As the business is beneficially held by the Trust, Jo then applies for an Australian Business Number ('ABN') for that Trust which is registered under the name 'the Trustee for Paw Treats Trust.' This ABN allows the Trust to carry on its business, particularly for GST and PAYG purposes, and to register a business name.

Paw Treats Pty Ltd as trustee for Paw Treats Trust cannot, however, trade under the name 'Paw Treats' until Jo has registered this business name with the Australian Securities and Investments Commission ('ASIC').

#### A. The obstacle – now the trustee needs an ABN as well

When Jo goes to register the name 'Paw Treats' under the Trust with ASIC, the name shows as unavailable. Whilst Paw Treats Trust and Paw Treats Pty Ltd are related entities, ASIC is unable to register this name under the Trust's ABN as it is too similar to the existing Paw Treats Pty Ltd.

#### B. What does this mean?

We are often asked, "But if the name is unavailable, that means no one else can claim it either, so can't I just use the name and not bother registering it? It seems like too much effort".

Unfortunately, the answer is no. It is an offence for an entity to carry on business under a name which is not registered.<sup>2</sup>

If Jo doesn't want to register 'Paw Treats' as a business name, she will have to trade under the company's full legal name, being 'Paw Treats Pty Ltd (ACN 123 456 789) as trustee for Paw Treats Trust (ABN 12 345 678 910)'.<sup>3</sup>

### C. *The Solution*

1) If the corporate trustee is already established then the only solution is as follows:

- a) apply for an ABN for Paw Treats Pty Ltd;
- b) register the name 'Paw Treats' with Paw Treats Pty Ltd;
- c) apply to ASIC for a Consent to Transfer Number for this registered name;
- d) transfer the business name from Paw Treats Pty Ltd to Paw Treats Trust.

2) If you have not yet incorporated the corporate trustee, you should strongly consider naming the trustee something entirely different to your business name to avoid this complication. For example, if Jo had called her corporate trustee 'Jo Vets Pty Ltd', she would have not experienced this problem.

3) Of course, you may still wish to incorporate the trustee using a similar business name for ease of accountability. For example, you may already have a business which sells baby food – Baby Treats Pty Ltd as trustee for Baby Treats Trust. It is very clear who the company is trustee for. In this instance, you may decide that the effort needed to obtain the business name for the trustee is of little consequence compared to having such an obvious, transparent company structure.

### 4. **Other tips when considering a business name:**

There are no ASIC fees to apply for an ABN.

A registered business name only secures you the use of this name for your business. It does not give you full intellectual property rights. Should you wish to protect this name further, you may wish to consider obtaining a trademark. IP Australia offers a great source of information on trademarks and other forms of intellectual property rights and protections at <https://www.ipaustralia.gov.au/trade-marks>.

Useful websites to assist you when registering a business name and starting out a business include:

1) for general information on businesses and registering a business name:  
[www.business.gov.au](http://www.business.gov.au);

2) to check availability of a business name:

[https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?\\_af.ctrl-state=renr5of56\\_4](https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?_af.ctrl-state=renr5of56_4) ;

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<sup>2</sup> see section 18(1) of the *Business Names Registration Act 2011* (Cth).

<sup>3</sup> see section 119 of the *Corporations Act 2001* (Cth).

3) for steps to register a business name:

<http://www.asic.gov.au/for-business/registering-a-business-name/#beforeyoustart>

## 5. **Conclusion**

Don't be discouraged by this additional challenge, or decide not to establish a trust with a corporate trustee if this is the most suitable structure for you. Do, however, take care to think about what you would like your business name to be before you incorporate the trustee. Now that you know the hurdles which can be side-stepped or ploughed through when registering a business name, you are one step closer to creating your own enterprise. So what are you waiting for?

For advice on setting up your corporate structure and registering company names, please contact Bowden McCormack on 08 8941 6355 or email the writer at [jess@bowden-mccormack.com.au](mailto:jess@bowden-mccormack.com.au).