



Do trusts need to have appointors?

An often posed question in relation to trust structuring is – why is it that some trusts (including testamentary trusts) have appointor or principal powers, whereas others do not?

As is the case in many estate, trust and tax planning areas, the answer is often that ‘it depends’ on the exact factual matrix.

Very broadly we recommend an appointor role be used where there is a desire by the willmaker or person establishing the trust to ensure particular people have ultimate power to mandate control of the trust. That is, by having the right to remove an incumbent trustee – regardless of who the trustee is from time to time.

Some of the factors that can be relevant in this regard are as follows:

ISSUE	RELEVANCE FOR APPOINTOR/PRINCIPAL POWER
Ultimate control is intended to change on certain trigger events	If the trigger event occurs, the appointor may be automatically replaced by (say) an independent adviser.
Adult supervision	While (say) adult children may be nominated as trustees, there may be the desire to have another party (again, for example, an independent adviser) granted the right to unilaterally remove the trustee.
Bespoke ‘super powers’	There may be additional powers granted to an appointor over and above the traditional right to unilaterally remove and appoint trustees – for example the right to veto certain distributions, nomination of new beneficiaries or end the trust.
Automatic trustee disqualification	If there is the automatic disqualification of a trustee on certain events, the appointor may have the sole authority to appoint a new trustee.
Tailoring of triggering events	The types of triggering events causing automatic disqualification (both for expulsion of trustees and appointors) might include death; the loss of lawful capacity; committing an ‘act of bankruptcy’ or being a party to Family Court proceedings.
Lapsing of appointor powers	As part of an estate planning exercise it may be that (say) a parent retains appointorship during their life time, however on death the role of appointor automatically ends.
One individual is intended to have complete control of the trust	Naming that individual as appointor would allow them to appoint another trustee, without sacrificing overall control.
Multiple people (for instance, siblings) are intended to control the trust	The siblings could be named as joint appointors however given the power to appoint/remove the trustee would usually need to be exercised by all appointors acting unanimously, this role becomes largely superfluous if there is a dispute.
Specific trustee control mechanisms are being implemented (for instance, a tailored constitution for the trustee company)	An appointor would not be used for the trust, as any appointor could unwind the control mechanisms by removing the trustee.
The intended controller of the trust is a non-resident	The non-resident may be named as appointor of the trust to retain control, while Australian residents are named as the trustees to ensure the trust remains an Australian tax resident.

Ultimately, the most critical issue generally is that regardless of whether there is an appointor role there must be a disciplined approach to understanding the terms of the trust deed; this starts with following the mantra ‘read the deed’.

View has published an array of content highlighting the importance of considering appointor or principal powers – please contact us if you do not otherwise easily have access to this material.