

## **When Family Trusts sign an "ASP" (Agreement for Sale and Purchase) – The Pitfalls**

We are noticing that ASPs are often not being signed correctly where a Trust is involved. A Family Trust may be the Vendor or the Purchaser and to be sure the Agreement is correctly signed by the Trust different approaches can be taken depending on whether the Trust is the Vendor or the Purchaser.

A Trust is actually not a separate legal entity – it is an ongoing arrangement (a "contract") between the Settlor (i.e. the person setting up the Trust) and the Trustees. Accordingly all property that is owned by the Trust must be owned by all the individual Trustees (collectively on behalf of the Trust). If you search a title owned by a Family Trust you will not see any mention of the Trust itself - only the names of the two or three Trustees.

If the property is currently owned by a Family Trust (i.e. the Trust is the Vendor of the property) then all Trustees who are named on the title must sign the ASP as Vendor. A common mistake is for a couple who have set up a Trust to sign an ASP and overlook having the third independent trustee sign. In certain circumstances a third trustee may refuse to sign an Agreement if he/she considers that entering into the Agreement is not a prudent thing to do on behalf of the Trust.

The same applies to where a Family Trust is proposing to purchase a property. However given that the Trustees are not registered on the title yet the easiest way to approach this is often for either Mr and/or Mrs Jones to sign the Agreement together with the words "and/or nominee". Then it allows the Trustees (collectively on behalf of the Trust) to be nominated as the ultimate Purchaser prior to settlement being completed. If the ASP records the "Purchaser" as "The Jones Trust" and not all Trustees have signed then it is likely that neither party to the ASP has an enforceable contract.

Furthermore the Vendor may be able to allege that the individual or individuals who signed the Agreement are personally liable to complete the Agreement (not the Family Trust). Trustees who sign an ASP are **personally** liable to complete the ASP unless they include a clause limiting their liability.

As you can see even getting the right people to sign an ASP once all the other terms and conditions have been negotiated is still not necessarily an easy task!