

## A Bare Trust and why you might use one

### ***What is a Bare Trust?***

A Bare Trust is generally the simplest form of trust.

A “Bare” Trust arises where X holds a particular item of property, for example, a parcel of shares or a piece of real estate, simply as a “nominee” for one or more specifically identified beneficiaries.

Under a Bare Trust, the trustee has no active duties to perform beyond conveying the property to the beneficiaries when instructed to do so. (*Kafatris & Anor v FC of T 2008 ATC 20-048, 8649 (Lindgren JJ)*). The trustee is merely the nominee of the beneficiaries. As an analogy, the Trustee is a straw man or puppet controlled by the puppet master, the beneficiary.

### ***Why and When should I use a Bare Trust?***

#### ***Use a trust to secretly buy your neighbour’s house!***

You have found the perfect property, however it’s your neighbour’s property. Your neighbour dislikes you and would never consider selling their property to you under any circumstance. What can you do? You can set up a Bare Trust and secretly and legitimately purchase your neighbour’s property.

#### ***Use a Bare Trust to buy property for the love of your life!***

So you have been saving money during your lifetime for purchasing a property for the love of your life. You have plans to gift the property you have purchased to you beloved on your 5<sup>th</sup> wedding anniversary. You want this to be a surprise. How do you do this without telling her and triggering transfer duty? You can simply set up a Bare Trust.

#### ***Use a Bare Trust to buy property using you self-managed super fund (SMSF)!***

Ok, so you have a SMSF you want to buy property using your SMSF, however you don’t have enough money in your SMSF and you need a loan for the remainder of the purchase price. What do you need to do for a SMSF to borrow money? Under the Superannuation legislation amongst other things, you will need to set up a Bare Trust to hold the property until the purchase price is paid in full.

### ***How is a bare trust established?***

A Bare Trust can be established by a formal deed known as a declaration of trust or a deed of settlement.

The declaration of trust involves an owner of property declaring themselves as trustee of that property for the benefit of the beneficiaries, such as where ABC Pty Ltd holds property and declares that it will hold that property from now on as bare trustee for Mr Z, rather than for ABC Pty Ltd’s own benefit.

The deed of settlement involves an owner of property transferring that property to a third person on condition that they hold the property on trust for the beneficiaries.

In essence there are 2 types of Bare Trusts that can be established.



1. Husband and wife purchase a property and the registered owners on the title are the husband and wife. The husband later decides to hold his share on trust for the wife **subsequent** to the purchase and issue of title; or
2. Alternatively, the husband purchases the property but **prior** to the contract being signed, he states in writing that he is holding 100% of the property on Bare Trust for his wife. Therefore, the husband appears on the title to be issued and signs the contract of sale.

More commonly the scenario in paragraph 2 above is used.

### ***Essential characteristics of a Bare Trust.***

1. A Bare Trust deed must outline the role of the Bare Trustee.
2. The deed must be carefully drafted so that it is in full compliance with the legislative exception but also must be acceptable to the banks as they will require to check the deed before granting the loan.
3. A Bare Trust should clearly show:
  - a. that the sale of contract was between the vendor and the Bare Trustee as the apparent purchaser;
  - b. that all of the purchase money was provided by the beneficial owner and its lender and none by the Bare Trustee;
  - c. that the Bare Trustee is simply holding the property on trust;
  - d. the obligations of the Bare Trustee to only act on any request or direction from the beneficiary; and
  - e. finally, in order not to incur transfer duty twice, the bare trust document was signed **before** the offer and acceptance was signed.

### ***Who signs the Contract of Sale?***

The Trustee of the Bare Trust is the entity that holds the legal title to the property on trust for the beneficiary. Therefore, it is the Bare Trustee that has to be noted as the purchaser of the property on the contract of sale.

There is no mention of the beneficiary, and as long as the Bare Trust deed was signed before the offer and acceptance, there is no problem with double transfer duty.

### ***Does the Trust appear on the Certificate of Title? – Transfer of Land 1893 (WA) – Section 55.***

The Registrar cannot enter trusts in the Register but declarations of trust may be deposited with the Registrar under Section 55 of the Transfer of Land Act. The original or a duplicate may be deposited and a Registrar's Caveat is lodged to protect the interests of the beneficiaries under the trust deed.



There is no special form to be used, but any form used is to be duly stamped by the State Revenue Department and it must contain:

- the name and address of the registered proprietor (the trustee);
- the name and address of the beneficiary;
- an accurate description of the land;
- a declaration by the trustee that the land specified is held in trust for the beneficiary;
- any special limitation, or condition on the powers of the trustee; and must be dated and signed by the trustee in the presence of an adult witness.

***What is the duty on the transfer? - Duties Act 2008 (WA) – Section 117.***

My wife owns Waland. Waland is residential property. My wife wishes to transfer the property to me. I will hold it as bare trustee for her and her alone.

What is the Western Australian duty on that transfer?

By having a Bare Trust declaration or deed the transaction will be subject to nominal transfer duty of currently, \$20.00, as there will be no change in the beneficial ownership of Waland and if the Commissioner is satisfied the other requirements are met, the declaration of Waland will be subject to a maximum amount of duty of \$20.00 section 117 of the Duties Act.

Under section 117 of the Duties Act,

1. Nominal duty (ie currently \$20.00) is chargeable on –
  - a. a declaration of trust made by an apparent purchaser in respect of identified dutiable property vested in the apparent purchaser upon trust for the real purchaser that provided the money for the purchase of the dutiable property; or
  - b. to be vested in the apparent purchaser upon trust for the real purchaser if the Commissioner is satisfied that when liability for duty arose in respect of the transfer, or agreement for the transfer of, the dutiable property, the money for the purchase of the dutiable property was or was to be provided by the real purchaser; or
2. A transfer of dutiable property from an apparent purchaser to the real purchaser if —
  - a. the dutiable property is property, or part of property, vested in the apparent purchaser upon trust for the real purchaser; and
  - b. the Commissioner is satisfied that, when liability for duty on the transaction arose, the money for the purchase of the dutiable property and for any improvements made to the dutiable property after the purchase has been or will be provided by the real purchaser.





***Who pays the income tax? - Income Tax Assessment Act 1997 (Cth) – Section 106 – 50.***

The asset subject to the Bare Trust will always belongs to the beneficiary therefore any income tax associated tax matters will be linked back to the beneficiary. For example, each year, the rental income has to be declared by the beneficiary and not the trustee.

For further information contact Murfett Legal by telephone on +61 8 9388 3100, via our website at [www.murfett.com.au](http://www.murfett.com.au) or email one of the following directors:

[Jason De Silva](mailto:jason.desilva@murfett.com.au) : [jason.desilva@murfett.com.au](mailto:jason.desilva@murfett.com.au)

[Kelly Parker](mailto:kelly.parker@murfett.com.au) : [kelly.parker@murfett.com.au](mailto:kelly.parker@murfett.com.au)

[Peter Broun](mailto:peter.broun@murfett.com.au) : [peter.broun@murfett.com.au](mailto:peter.broun@murfett.com.au)