

Making a Trustee's Resolution

What is a resolution and how is it different from a minute?

A 'resolution' is a decision of the trustee made in accordance with a power available to it under the trust deed. A minute or written trustee's resolution creates a record of that resolution. Unless the trust deed provides otherwise, the minute or written resolution can be — and most often is — finalised some time after the resolution has been made .

When does the resolution need to be made?

The resolution must be made by the earlier of 30 June or the date set out in the trust deed (see also Part 5 of the 'streaming' rules for capital gains and franked dividends).

Ready to save time and hassle
with your yearly trustee resolutions?
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The A Firm can save you time by
completing this process for you!

We can provide a yearly service which includes an annual reminder for us to complete your trustee resolution. We will prepare all the paperwork for you including an estimate for where your profit will be distributed. The benefit of using our service is that we offer a more accurate estimate of what your tax position will be at the year end.

Get in touch with The A Firm anytime from April. You must have completed and signed your trustee resolution by/on the **30th of June each year**, so make sure to contact us as soon as possible!

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How do the trustees make a resolution?

The resolution must be made by following the process that is set out in the trust deed. While the process will vary depending on the particular terms of the deed, it will generally involve a consideration of the following matters (in sequence):

- **The trust deed:** The trustee should have the trust deed (and any deeds that have varied it over time) and refer to it when making a trustee's resolution.
- **The beneficiaries:** The trustee should refer to the trust deed to see who it defines as beneficiaries of the trust and should determine the individuals or entities to which the trustee wants to make distributions of trust income are beneficiaries of the trust.
- **The income of the trust:** The trustee should consider how the trust deed defines income and should determine that what is sought to be distributed is 'income of the trust' as defined.



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- **The distribution of income:** The trustee should consider and resolve to distribute the income of the trust (as determined) to the beneficiaries (as determined) in the manner and amounts/proportions desired.
- **The payment (or otherwise) of distributions:** The trustee should consider and resolve how the distributions of income will be paid, applied or set aside to or for the beneficiary.

What happens if the trustee is a company?

If the trustee is a company, there may be further requirements in the company's constitution about how directors' meetings are to be convened and held.

Problems can arise if you have not closely considered what the company's constitution says about directors' meetings. For example, if you find that one of the directors is overseas and the constitution does not permit meetings to be conducted other than in person, the company may be unable to form a quorum and the meeting cannot take place.

How can the trustees prove that they have made a resolution by 30 June if the minutes or written resolutions are not prepared at the same time?

You need evidence that objectively shows that a resolution was made in accordance with the terms of the deed (and, if you have a company trustee, at a properly convened meeting of the directors) on or before 30 June (or any earlier date the trust deed requires). This may include:

- notes or a diary entry recording the meeting and the matters discussed, prepared by the participants in the meeting or by an external observer (e.g. an accountant);
- an exchange of correspondence (letters, email etc.) recording or confirming the meeting and the matters discussed;
- a 'draft' minute that was circulated and discussed at the meeting and approved to be finalised (with or without further amendment).

While in theory it may be permissible under the terms of the trust deed to make a resolution orally or mentally, you will have greater difficulty proving that such a resolution has been made in the event of a dispute or if the ATO requires you to substantiate that the resolution was made before 30 June.

Part 4: Preparing a trustee's minute

What is a trustee's minute and how is different from a resolution?

As discussed above, the trustee's minute serves as a record of the resolution made by the trustee.

If the trustee is a company, the trustee's minute will be a record of the meeting of the directors of the company at which the resolution was made. In the case of a sole director company, the document produced to record the sole director's resolution can be called a 'Minute of Resolution' or simply a 'Trustee's Resolution'.

Similar principles apply where the trustee is one or more individuals.



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If a document referred to as a 'Trustee's Resolution', rather than a 'minute', is not produced on or before 30 June, it should be made clear in the wording of the document that it is a record of a resolution made by the trustee at an earlier point in time. Otherwise, there may be some confusion about the date the resolution was made.

Who should draft the trustee's minute?

Usually, the trustee's minute or resolution is prepared by an accountant or lawyer acting for the trustee.

In larger companies, the minutes of directors' meetings may be prepared by the company secretary.

When does the trustee's minute need to be prepared?

The trustee's resolution or minute should be prepared within a reasonable period of time following the making of the resolution. If it is prepared shortly after the meeting it is more likely to be seen as a contemporary and reliable record of what happened at the meeting.

If the trustee is a company, the directors have an obligation under section 251A of the Corporations Act 2001(Cth) to record the resolutions in a minute, and to place that minute in the company's minute book (a required record of the company), within 30 days of the resolution being passed. Not doing so is a strict liability offence under the Corporations Act.

When should the trustee's minute be signed and dated?

The minute itself should not be dated 30 June unless it was prepared and finalised at this time. It is perfectly acceptable to sign and date the minute after 30 June. What is important is that the minute notes that the meeting was held on or before 30 June.

The same applies for a trustee's resolution in the case of a sole director company trustee or a sole individual trustee. Similarly, though, it should be clear that the resolution was made on or before 30 June and that the document is simply recording this resolution.

What should be in the trustee's resolution or minute?

The trustee's resolution or minute should be a narrative of how the meeting was conducted (except for sole directors and trustees, where meetings are not required), documenting what matters was considered and what determinations and resolutions were made.

Adopting the process set out above (in Part 3), the trustee's resolution or minute should record the following information:

- that the general details of the meeting (if applicable) were provided, including the date and time it was held, the place it was held, who was present (and, in the case of a company, who was appointed chair of the meeting) and who attended as an observer;
- that the trust deed was tabled at the meeting and referred to by the trustee;
- that the provisions of the trust deed defining the beneficiaries of the trust were referred to (the particular clause could be noted in the minutes), and that the trustee determined that the individuals or entities to which the trustee wants to make distributions of trust income are beneficiaries of the trust;



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- that the provision of the trust deed defining the income of the trust was referred to (the particular clause could be noted in the minutes), and that the trustee determined that what is sought to be distributed is 'income of the trust' as defined;
- that the provision of the trust deed setting out the process by which the trustee may distribute income was referred to (the particular clause could be noted in the minutes), and that the trustee resolved to distribute the income of the trust (as determined) to the beneficiaries (as determined) in the manner and amounts/proportions desired; and
- that the provision of the trust deed which states that the income of the trust can be paid, applied or set aside for a beneficiary was referred to (the particular clause could be noted in the minutes), and that the trustee has resolved how the distributions of income will be paid, applied or set aside to or for the beneficiary.

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