



## Lost trust deed? Your options

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Lost trust deeds are an increasing problem. Many businesses or investments, including SMSF's, are operated through or by trusts which are controlled by a Deed. Losing a trust deed has significant implications for the Trustee and the beneficiaries of the trust. In this article, we look at how to protect your trust deed and what your options are if it has been lost.

### Creation and use of a trust deed

Trusts are created by a Deed prepared by a solicitor or obtained by accountants from commercial document providers.

Annual decisions are usually made as to income distributions with the aid of tax advisers, without actually referring to the trust deed to ensure the decision is in accordance with the terms. This is unwise. It is important to refer to the terms of the deed to ensure that those to whom distributions are to be made, are actually beneficiaries.

Having the trust deed is essential to the proper administration of the trust. It sets out the terms and conditions of the trust. The primary obligation of the trustee/s, whether an individual or a corporation by its directors, is to be thoroughly acquainted with the terms of the trust and all documents associated with it and to adhere to those terms.

The trustee owes fiduciary duties to all the beneficiaries and potential beneficiaries of the trust, so making the correct decisions is critical.

### Lost a trust deed?

A growing number of court decisions reveal that many people have been unable to locate the original trust document or even a copy. Frequently with intergenerational changes, the younger generation members cannot locate the document created by their parents.

Sometimes an original, and sometimes a copy, of the trust deed may need to be produced to beneficiaries, banks, the ATO or to state revenue authorities.

Here are some of the scenarios we receive from clients regarding location of a trust deed:

1. No original of the trust deed can be located;
2. No original of the trust deed can be located but a photocopy or digital copy of the signed trust deed is available;
3. No original of the trust deed can be located but an unsigned photocopy or digital copy is available;
4. No original and no photocopy or digital copy of the trust deed can be located;
5. If the Deed was amended or the trustee/s changed since the original trust deed, no original amending or supplemental Deed can be located but there is evidence that such a Deed was created or the trustee/s have been changed;
6. No original but only a photocopy or a digital copy of a signed amending or supplemental Deed can be located;
7. No original but only an unsigned copy of a photocopy or digital copy of an amending or supplemental Deed can be located; or
8. No original and no photocopy or digital copy of an amending or supplemental Deed can be located but there is evidence that such a Deed was created (e.g. a minute authorising the affixing of a seal or other execution).

## Protecting your trust deed

### Storing the original executed Deed

Always ensure you place the trust deed in safekeeping. This should be the original with “wet” signatures. It can then be produced if required.

In 2020, a bank was conducting a “Know Your Customer” (“KYC”) exercise and wanted to sight an original of the Deed. Because the original Deed could not be produced, the bank threatened to freeze all the bank accounts of a major trading business. The trustees had to make an urgent application to the Supreme Court to authorise the use of a copy.

### Copy your trust deed

If you cannot locate an original signed copy, then having a copy with signatures may be beneficial in many situations.

In 2021 a family, wishing to wind up the trust and distribute the assets, could not locate even a copy of the deed. An application was made to court and a copy of the solicitor’s own trust deed prepared around the same time, using the same precedent, was produced to show what would have been the terms. This was accompanied by a letter from another solicitor in the 1980’s giving advice about the trust.

In a Victorian case in 2021, involving a family dispute, where no original or copy Deed could be produced, the court ordered that the trust failed and that the substantial assets all be vested back in the Settlor (the deceased mother) under a resulting trust.

## Make copies of your Deed

It is wise to make multiple copies of a trust Deed, including digital copies and record where or to whom copies are sent. It is also suggested that the photocopies be “certified copies” to add further weight to their authenticity.

## Searching for a lost trust deed

If you cannot locate a trust deed, it is important to search for it thoroughly and to record what searches you have made by retaining copies of emails or letters. This would include all family papers.

Amongst the external enquiries to be made, are requests to:

1. current and former solicitors who prepared the deed;
2. current and former accountants, tax agents or financial advisers/planners who may have arranged the establishment of the trust or retained a copy;
3. financial institutions with whom the trust may have had dealings and to whom a copy may have been provided;
4. former trustees or directors of trustee companies (all family members);
5. any beneficiaries who may have a copy;
6. the ATO (in the 1970's there was a requirement to provide a copy to the ATO on establishment of a trust).

The courses open to you if the original Deed cannot be found may depend on whether you have a photocopy, signed or unsigned, or no copy at all.

## Options if you have lost a trust deed

### 1. Ignore the problem and continue without a Deed

This is not a wise move because the primary duty of the trustee is to know the terms of the Trust and act in accordance with the terms.

### 2. Execute a new trust deed

This can trigger adverse tax consequences for capital gains tax and stamp duty as it may be a “re-settlement” of the trust assets.

### 3. Execute a deed of confirmation

If there is a copy, signed or unsigned, of the critical Deed or any amending Deed, it is possible for the trustee and others to execute a deed of confirmation. But there is no guarantee that a third party, excluded potential beneficiary, a financial institution or government agency such as the ATO, will accept it.

### 4. An approach to a court

This is clearly the safest but most expensive option. In South Australia, because of the provisions of Section 59C of the *Trustee Act*, the court has wider powers to remedy the situation than in other states.

## Get help

If you are unable to locate the original trust deed or any copy of it, or for further about any issue to do with your trust deed, please contact us.

### Contact Daenke Lawyers

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