

Over the years, changes to the superannuation rules have had a dramatic impact not only on who can contribute, the ability of trustees to borrow to invest and when, how and to whom benefits can and must be paid, but also on what a well drafted, up-to-date self-managed superannuation fund trust deed should and should not contain. In this article, experienced superannuation lawyer, Ian Waters answers key questions in this regard.

Q. Who can be a member?

A. SMSF deeds should provide for the admission of up to four members in all. Because a “disqualified person” cannot be a trustee or director of a corporate trustee and all members must generally be trustees or directors of a corporate trustee, deeds should also provide that a “disqualified person” cannot be a member either. While they cannot be trustees or directors of a corporate trustee, we would like to see confirmation in a deed that children (ie minors) can be members of the fund. Note that trust deeds of “employer sponsored” superannuation funds might, inappropriately, make employment a condition of membership.

While not so much issues for the deed, note also that prospective members should generally be provided with a product disclosure statement before being admitted, members contemplating overseas travel should consider obtaining professional advice if there is a possibility of them becoming “non-resident” while they are away and, technically at least, trustees or directors should be appointed before they are admitted as members.

Q. How does someone become a member?

A. SMSF deeds should detail the process in accordance with which members may be admitted, eg on receipt of a completed application form in the prescribed form (often incorporated as a schedule to the deed), at the discretion of the trustee. Note that trust deeds of “employer sponsored” superannuation funds might, inappropriately, make employment a condition of membership.

While not so much issues for the deed, note that prospective members should generally be provided with a product disclosure statement before being admitted and trustees or directors should be appointed before they are admitted as members.

Q. When does membership cease?

A. SMSF deeds should detail the circumstances in which a member’s membership will cease, eg when all of the member’s benefits have been transferred or rolled-over to another fund or paid out (preferably, subject to the trustee’s discretion to determine otherwise) or the member dies. While it may be prudent for all members to have an account balance, we would like to see confirmation in a deed that nil account balance-holders (eg the spouse of another member) can, at the trustee’s discretion, remain members of the fund.

Q. Who can be trustee?

A. SMSF deeds should generally provide for the appointment of each member as an individual trustee or director of a corporate trustee. Surprisingly, perhaps, some deeds only contemplate the appointment of individual trustees, while others only contemplate the appointment of a corporate trustee.

Deeds should generally also provide for the appointment of others as trustees or directors, eg of a single member fund, if a member dies, is under a legal disability or a minor, if someone holds an enduring power of attorney in respect of a member or if the fund is to be converted to a small APRA fund. Also, that a “disqualified person” cannot be a trustee or director of a corporate trustee.

While not so much an issue for the deed, note that trustees or directors should generally be appointed before they are admitted as members.

Q. How is a trustee appointed or removed?

A. SMSF deeds should generally detail the process in accordance with which individual and corporate trustees may be appointed, eg by the members in writing, and removed, eg by resignation in writing or by the members in writing.

The appointment and removal of directors of a corporate trustee will likely be governed by the constitution of the corporate trustee, rather than by anything contained in the SMSF deed. Power to appoint directors of a corporate trustee, therefore, will likely rest with the shareholders of the corporate trustee and power to remove them will likely rest with the directors themselves or the shareholders of the corporate trustee.

While not so much issues for the deed, note that individual trustees and directors of corporate trustees must consent to their appointment in writing and complete an ATO "Trustee declaration" form, that the ATO must be advised of any changes of trustee and that ASIC must be advised of any changes to the directors of a corporate trustee. Note also that a change of trustee will likely involve the preparation of a legal document; legal work which must only be undertaken by an appropriately qualified legal practitioner. Non-lawyers who engage in legal practice risk imprisonment and are unlikely to be covered by any professional indemnity insurance if something goes wrong.

Q. What kinds of contributions can be made?

A. SMSF deeds should generally give the trustee discretion to accept all kinds of contributions permitted by law (depending on a member's age), including employer contributions, self-employed contributions, personal contributions, spouse contributions, government co-contributions and *in specie* (or "in kind") contributions, reject and return excess contributions, pay excess contributions tax and split a member's contributions with their spouse.

When reviewing deeds, it may be helpful to note that significant changes to the contributions rules took effect on 1 July 2007.

Q. Can the trustee enter into an instalment warrant-type borrowing arrangement?

A. The vast majority of SMSF deeds will not contain the specific provisions required to enter into an SMSF instalment warrant-type borrowing arrangement. Many deeds specifically prohibit borrowing of this kind, lenders tend to be quite specific about what they are looking for and the consequences of getting it wrong can be serious. Before purchasing property to be the subject of an SMSF borrowing arrangement or entering into such an arrangement, therefore, we strongly recommend you consult a lawyer experienced in this relatively new, somewhat unsettled area of law.

While not so much an issue for the deed, trustees should ensure that their investment strategy empowers them to enter into an SMSF instalment warrant-type borrowing arrangement before doing so. When reviewing deeds, it may be helpful to note that this exception to the general prohibition on borrowing took effect on 24 September 2007.

Q. Can the trustee establish and maintain investment reserves?

A. While more common in a large fund context, eg for smoothing the investment returns allocated to members' accounts, investment reserves can be useful in an SMSF context as well, eg for making anti-detriment payments to the dependants or legal personal representative of a deceased member, but should not be established and maintained unless the deed empowers the trustee to do so and the trustee has a written investment reserving strategy (in addition to its regular investment strategy) in place.

Q. What kinds of benefits can be paid?

A. SMSF deeds should generally empower trustees:

- to pay all of the kinds of benefits permitted by law, including account-based pensions, transition to retirement income streams and the recently introduced terminal medical condition benefits;
 - to commence market linked pensions in limited circumstances and continue to pay existing allocated, transition to retirement allocated, lifetime, life expectancy and flexi-pensions, but not commence new ones;
 - to pay lump sums *in specie* (or "in kind");
 - to pay reversionary pensions;
 - to convert allocated pensions to account-based pensions; and
 - to commute pensions, where permitted by law, and roll them over internally into accumulation or into a new pension,
- but should not, inappropriately, reflect the abolished compulsory cashing rules.

Note that while a death benefit in the form of a pension can still be paid to a *dependant* of the deceased member, it can now only be paid to a *child* of the deceased if that child is:

- less than 18 years of age; or
- being 18 or more years of age:
 - is financially dependent on the member and less than 25 years of age; or
 - has a prescribed kind of disability.

When reviewing deeds, it may be helpful to note that significant changes to these rules took effect on 1 July 2007 and *terminal medical condition benefits* were introduced on 16 February 2008.

Q. Can pension assets be segregated?

A. SMSF deeds should generally empower the trustee to segregate pension assets.

Q. Can members make binding death benefit nominations?

A. SMSF deeds should generally empower members to make binding and non-binding death benefit nominations, compel the trustee to comply with a valid binding death benefit nomination (BDBN) and clearly spell out how long a BDBN will be effective, eg for 3 years or indefinitely.

They should generally also empower members to nominate the full range of people to whom a death benefit can now be paid (including a person with whom the member has an *interdependency relationship* and a same sex spouse).

When it comes to BDBNs, note that some deeds simply adopt the procedures outlined in the superannuation legislation and regulations, though in our opinion (and that of the Commissioner of Taxation), they don't have to. When reviewing deeds, it may be helpful to note not only that BDBNs were introduced on 31 May 1999, but also that the definitions of *dependant* and *spouse* were amended on 1 July 2004 and 1 July 2008, respectively.

Note also that the preparation of a BDBN will likely involve legal work, which must only be undertaken by an appropriately qualified legal practitioner. Non-lawyers who engage in legal practice risk imprisonment and are unlikely to be covered by any professional indemnity insurance if something goes wrong.

Q. Can super interests be divided on marriage breakdown?

A. SMSF deeds should generally empower the trustee to act in accordance with the *Family Law Act 1975* (Cth) and the regulations which govern superannuation and family law on the breakdown of marriage, but also to elect that the deed will not have operation to permit the trustee to establish a new interest in the fund at the request of a spouse. The absence of this power to elect could prove problematic were a member with a non-member spouse to endure a marriage breakdown.

When reviewing deeds, it may be helpful to note that super splitting on marriage breakdown was introduced on 28 December 2002.

Q. Will benefits be available to creditors on bankruptcy?

A. While the answer to this question is governed largely by bankruptcy law, ie "broadly, no, subject to some clawback provisions and pension payments above various thresholds", there are some subtle, but none the less, potentially very important strategies that should be incorporated into a well drafted SMSF deed. While they are beyond the scope of this article, please contact the author if you would like to discuss.

Q. When should an SMSF deed be updated?

A. Unfortunately, there is no simple answer to this question. It really has to be considered on a fund by fund (even member by member) basis. I used to say that every four to five years was a good rule of thumb. Given the rate of change to the superannuation rules over recent years, however, it's probably fair to say that deeds are likely to need to be updated more regularly now than in the past. I would certainly recommend that a deed be reviewed before any major super decision is implemented, eg making a large contribution, splitting a contribution with a spouse, entering into an instalment warrant-type borrowing arrangement, making a BDBN or paying a benefit.

That said, a well drafted SMSF deed would generally contain a provision not only *requiring* the trustee to comply with the minimum requirements of the law (even if inconsistent with the deed), but also *empowering* the trustee to do anything permitted by law, even if it would not otherwise have power to do so under the deed. Such a provision may add to the longevity of a deed, but express provisions will almost certainly be preferred.

Q. How do you update an SMSF deed?

A. SMSF deeds should contain a power to vary, amend and/or update. The power generally rests with the trustee, sometimes with the consent of another or others, eg the members, a founder or a particular employer, and should ideally not be unduly complex or onerous. It must, however, be read carefully and complied with in full. Failure to do so may render any purported changes ineffective.

Note that a deed update will likely involve the preparation of a legal document; legal work which must only be undertaken by an appropriately qualified legal practitioner. Non-lawyers who engage in legal practice risk imprisonment and are unlikely to be covered by any professional indemnity insurance if something goes wrong.

Topdocs can review SMSF deeds and update them if required. Please contact us on 1300 659 242 with any queries that you may have.