

The very nature of a family SMSF means that members and trustees may come and go from the fund. Parents may introduce adult children as members until such a time as the child has enough superannuation or their own family to commence their own SMSF. Members of an SMSF will pass away. There may be member disputes leading to splitting of the fund, a change of residency status, divorce or medical issues that may require changes to trustees and members of the Fund. An executor may also need to be appointed as a trustee for a short period of time from the death of the fund member until the death benefits exit the fund.

Changing the trustee in an SMSF however, is not necessarily a simple process. To change an SMSF trustee there are four parts to the story that need to be considered:

1. Type of trustee
2. Making changes in accordance with the terms of the trust deed and corporate trustee constitution
3. Reporting changes to the ATO and ASIC
4. Administration

1. Type of trustee

Essentially there are two SMSF trustee options – the members themselves as individual trustees or a special purpose SMSF corporate trustee. The documentation to change the trustee for each will differ.

In the case of individual trustees, new member additions or removals result in both a change of membership of the Fund, as well as a change in trustee of the Fund. A change in membership for a Fund with individual trustees requires:

1. Change of membership documentation;
2. Change of trustee documentation;

and this documentation needs to be prepared to the specific provisions of the Fund's Trust Deed and the SIS Act.

In the case of a corporate trustee, new member additions or removals result in a change of membership of the Fund, but not a change in trustee of the Fund, as the corporate trustee itself is not changing, only the directorship of the company.

There is however, documentation that is required to appoint/remove the member as a director of the corporate trustee, which is likely to be governed by the constitution of the company, rather than the trust deed for the Fund. The Power to appoint directors of a corporate trustee, therefore, will likely rest with the shareholders of the corporate trustee and the power to remove them will likely rest with the directors themselves or the shareholders of the corporate trustee. A change in membership for a Fund with a corporate trustee requires:

1. Change of membership documentation, governed by the Fund's Trust Deed and the SIS Act;
2. Appointment/Removal of director documentation, governed by the Company's Constitution and the Corporations Act.

Where individual trustees wish to change to a corporate trustee structure or vice versa, change of membership and trustee documentation is required, all of which will be governed by the Trust Deed for the Fund and the SIS Act. There may also be directors of a corporate trustee being appointed or removed during this process, in which case relevant documentation, generally governed by the company constitution as well as the Corporations Act, will need to be prepared.

In addition, there are other considerations when a trustee leaves a super fund as a consequence of death. Some important things to consider are:

1. Does a Legal Personal Representative (LPR) have to be appointed to the Fund, to act on behalf of the deceased for any period of time?
2. What are the implications in the company structure – if an LPR is appointed as a member of the Fund for a period, then that LPR must also be appointed as a director of the trustee company for that period. Similarly, the LPR must be appointed as an individual trustee for the Fund if the trustee structure is individuals.

3. When does a member cease to be a member according to the trust deed? Is it when death benefits have been paid out of the Fund, or at the death of the member?
4. Is the Fund's trustee structure, after the death of the member, still a compliant trustee structure for the purposes of the SIS act, or does an additional trustee have to be appointed in the deceased's place?
5. The timing of all of the above after the trustee has died.

Given the above, there should be some careful consideration given to the type of trustee chosen and the deed selected in an SMSF.

For example:

- Do you know who would take over your role as trustee of your SMSF if you were unable to perform it for medical reasons?
- Do you know who would take over your role of trustee of your SMSF if you passed away?
- Does your SMSF have a trustee that easily caters for membership changes at minimal and with few administration headaches?
- What will happen if your residency status changed?

2. Making changes in accordance with the terms of the trust deed

The rules for documenting changes of trustee are contained both in a Fund's specific governing rules (Trust deed) as well as in the SIS Act.

There is a large array of SMSF deeds in the market and each deed has different methods and rules for changing trustees. Some may require the consent of other parties such as a founder, principal or employer sponsor. Some may only require the consent of members or the trustees. One popular online deed required the deed to be varied in full if there is a change from corporate to individual trustees or vice versa.

In addition, the SIS Act provides that a person is not eligible to be appointed as a trustee (or director of a trustee) of a super fund unless the person has consented in writing to the appointment. If any trustee (or director of a trustee) has not consented in writing to their appointment, they are not eligible to hold that office. This is case regardless of whether they were appointed before or after 1 July 2007.

So what does it matter if these rules aren't complied with? Recent court cases have shown that incorrectly prepared change of trustee documentation can lead to the change of trustee being invalid and trustee actions questioned. This may result in financial exposure to the trustees (or the adviser that prepared the documentation). Review of the trust deed and subsequent preparation of the change of trustee documentation should be prepared or reviewed by a legal practitioner. The PI insurers for accountants or financial planners are unlikely to cover them for legal document preparation if something goes wrong.

3. Reporting changes to the ATO and ASIC

From 1 July 2007, the trustee of a SMSF must notify the ATO within 28 days of changes in the:

- fund membership;
- fund trustees;
- fund address;
- name of the fund;
- contact details;
- directors for the corporate trustee (where applicable).

From 1 July 2007, expanded administrative penalties may be applied where funds fail to advise the ATO of a change of trustee, or other changes to the fund.

Further, the Australian Securities and Investments Commission (ASIC) must be notified of any director / shareholder changes occurring within a SMSF trustee company within 28 days of the change. Failure to do so will result in monetary penalties for the company.

SMSF trustee declaration

From 1 July 2007, all new trustees and directors of corporate trustees of a SMSF must sign a declaration, in the approved form, stating that they understand their obligations and responsibilities as a trustee of a SMSF. The declaration contains key information about:

- general trustee duties;
- investment restrictions;
- sole purpose test;
- record keeping; and
- reporting and lodgment obligations.

The declaration must be signed within 21 days of becoming a trustee or director of the corporate trustee. Although the form is not required to be lodged with the Tax Office, the declaration must be retained for at least 10 years and made available to the Commissioner on request.

4. Administration

When an SMSF changes trustee the new trustee must also notify all relevant share registries and banks of a change in trustee to reflect the new ownership in assets on behalf of the fund.

Topdocs Change of Trustee packages

Due to the complexity of changing the trustee of a SMSF, and the legal risk attached to this type of documentation, Topdocs recommends advisers do not complete these documents themselves. As in incorporated legal practice, Topdocs can prepare a complete change of trustee package that documents the member/trustee change, as well as notifying the ATO and ASIC (where required) of the relevant changes.

Most importantly, all Topdocs change of trustee documentation comes with lawyer sign off, stating the provisions of the trust deed that outline how to change the trustee have been correctly met, ensuring your clients receive complete, correct documentation. Lawyer sign off confirming the provisions of the trustee company constitution, (for director appointments and removals) is also provided.

The Topdocs Self Managed Superannuation Fund (SMSF) Change of Trustee Pack contains the following documentation:

- Full Legal Oversight of the Trustee change;
- Deed of Appointment and Removal of Trustee;
- Minute by the appropriate party to change the Trustee of the Fund;
- Trustee consent forms;
- Detailed information on how to have the Change of Trustee documentation stamped by the local Revenue Office including a covering letter (for applicable states);
- Fully completed Tax Office form notifying the Tax office of the change in Trusteeship (and Membership where applicable).

If you are admitting or removing any Members at the same time, your package will also include;

- Trustee minute removing or admitting the Members to or from the Fund;
- Product Disclosure Statement(if the Fund has a Topdocs Deed) and Member Application form for each New Member;
- Sample Binding Death Benefit Nomination form, and explanatory notes for each New Member admitted (if the Fund has a Topdocs Deed).