

# Corporate Trustees vs Individual Trustees in SMSFs



Whilst establishing your SMSFs with individuals acting as trustees may save your client a few dollars in the short term, the benefits of registering a corporate trustee for your new SMSFs far outweigh the short term savings. Below are the key reasons to establish all of your new SMSFs with a corporate trustee.

## Reason 1 – Succession upon death

A company is an indefinitely continuing entity. Consequently, having a company as trustee for the Fund ensures control of the Super Fund is always certain – an especially important factor when a member of the Fund dies.

### Example:

Jack and Jill are members of a SMSF, and both are individual trustees. Jack dies, leaving Jill as the sole remaining member and individual trustee for the Fund. In order for the Fund to remain compliant, Jill must appoint a second individual trustee in Jack's stead. Whilst Jill may assume the role of second individual trustee for the Fund temporarily (in her capacity as Legal Personal Representative of Jack – depending on the terms of the Trust Deed) when Jack's death benefits have been paid out, she will need to appoint another person to act as an individual trustee. This means Jill will relinquish full control of the Fund.

The above scenario may have a number of outcomes. Jill may have children that she wishes to appoint as trustees of the Fund in which case a suite of documentation to appoint the children as members and trustees of the Fund would be required to be completed. She would also have to change the name in which all of the Fund's assets are held.

Jill may also not have any children, or close relatives that she trusts to share control of her fund with. In this case, Jill may decide to establish a corporate trustee company, and act as the sole director, to ensure she retains full control of the Super Fund. In this scenario, she would need to set the company up, and prepare relevant documentation to change the trustee of the Fund. She would also have to change the name in which all of the Fund's assets are held.

Had Jack and Jill established the Fund with a corporate trustee in the first instance, none of the above would be an issue. After his death benefits were paid out, Jack would simply cease to be a member of the fund, and Jill would continue as the sole member of the Fund, without having to appoint another trustee, prepare any change of trustee documentation or change the name in which the Fund assets are held. She would also automatically maintain full control of the Fund.

## Reason 2 – Trustee litigation exposure

One of the most important reasons to have a corporate trustee is litigation exposure. Individuals acting as trustee of the Fund are jointly and severally liable for any actions taken against the Fund, as they hold the assets of the Fund in their individual names. Should litigation against the Fund exceed the assets held in the name of the trustees as trustees for the Fund, the personal assets of the individuals personally may become at risk.

Companies on the other hand have limited liability. This ensures litigation against the Fund is limited to the assets held in the name of the company and do not stretch to the directors of the company. If the company is a sole purpose SMSF Trustee Company, this will ensure any claim against the Fund is limited to the assets held by the company as trustee for the Fund, and no director's assets will be at risk.

### Reason 3 – Administrative Efficiency

One of the key benefits of a SMSF is its fluidity; allow multiple generations of a family to come and go from the Fund. Instances of changes in membership to a SMSF may include:

- (i) Parents admitting their children into the Fund;
- (ii) The marriage of an existing member of the Fund to a non-member of the Fund, or the divorce of members within the Fund;
- (iii) Upon the death or incapacity of a member of a SMSF, where an external Legal Personal Representative is appointed to temporarily participate in the Fund in the existing members stead.

Whenever a change in membership occurs, a change in trusteeship is also required to occur. The fact that trustees and members can come and go easily to and from a SMSF raises a time consuming and costly administration problem for SMSFs with individual trustees. This is because the law requires the SMSFs assets to be held in the names of all of the trustees of the Fund.

Consequently, whenever a new trustee is appointed to the Fund, or an existing trustee leaves the Fund, the Fund is required to notify all relevant registries and offices of a change in the name of the assets held by the Fund. Furthermore, legal advice as to the procedures to remove / appoint the trustee and member, as determined by the Fund's Trust Deed, must also be taken. Overall, the admission and removal of individual trustees can be a costly and time consuming exercise.

In contrast, when a new member joins a SMSF with a corporate trustee, the corporate trustee itself does not change, only the underlying directorship of the company changes. Therefore, there is no requirement to change the name in which the assets of the Fund are held. The assets are still held in the same name - that is the name of the company. Furthermore, there is reduced documentation required to appoint a new member to a corporate trustee Fund than there is to admit a new member to a Fund with individual trustees, as deeds of appointment and removal of trustee are not required.

### Reason 4 - Lump Sum Payments

For a SMSF to receive its concessional taxation status it must elect to be regulated by the Australian Tax Office (ATO) and comply with the laws and regulations outlined in the Superannuation Industry (Supervision) Act 1993 (SIS Act) and Superannuation Industry (Supervision) Regulations 1994 (SIS Regs). Section 19 of the SIS Act is very specific in its determination of what constitutes a regulated SMSF, in part stating that the "Trustee must be a constitutional corporation or (the) fund must be a pension fund".

The consequence of this is that the Fund must either have:

- i. a Corporate Trustee; or
- ii. Individual Trustees, in which case, the fund must be a pension fund. That is, the sole or primary purpose of the fund must be to pay old age pensions.

The effect of this legislation is that a Fund with a corporate trustee may pay benefits as either a lump sum or a pension. However, Funds with individual trustees can only pay benefits in the form of pensions, as their sole or primary purpose is the payment of old age pensions. Strictly speaking, in order for a Fund with individual trustees to compliantly pay a lump sum benefit, the member receiving the benefit would first have to commence a pension, then commute the pension and pay the remaining benefit as the lump sum benefit.

### Reason 5 – Sole Member Funds

If a Fund with individual trustees has a sole member, the SIS Act requires that the Fund must have a second individual trustee in order to be a compliant SMSF. If that sole member has no spouse or children, this will mean that the member will have to relinquish some control over the Fund to another person.

Alternatively, the SIS Act provides that a sole member SMSF can have a company as trustee with either **one or two** directors, one of which must be the member. In this case a sole member can assume total control over the SMSF by appointing themselves as the sole director of the corporate trustee.

## **Other Considerations**

### **Costs in establishing a Company as Trustee**

Some advisers are put off by the initial cost involved in establishing a company to act as trustee of the fund. However, the actual costs associated with a Sole Purpose SMSF Trustee Company are low compared to the extra costs that can be associated with individual trustee Funds, especially in documenting trustee changes.

In addition, if you also consider the succession and litigation advantages of a company over individuals, the overall cost effectiveness of a company will generally outweigh the initial incorporation costs.

Further to this, should you establish a Sole Purpose SMSF Trustee Company, the only ongoing fee you will be liable for is the \$45 yearly ASIC levy. The company will not have to register with the tax office, or lodge a tax return (all returns are done through the super fund).

**Topdocs prepares a full suite of SMSF and Corporate documentation, including SMSF Establishments, Trust Deed updates, Sole Purpose SMSF Trustee Companies and Standard Companies. For more information, visit our website at [www.topdocs.com.au](http://www.topdocs.com.au) or call a Topdocs consultant on 1300 659 242.**