

Legal Oversight on SMSF Deed updates



Topdocs ensures your SMSF Deed update documentation is prepared correctly, and protects your firm and your clients, through our provision of legal oversight.

What is Legal Oversight?

Legal Oversight is the process of a lawyer examining the current Trust Deed of your Superannuation Fund, and confirming that documentation prepared for your Fund to update the trust deed has been prepared correctly.

Issues associated with preparing Trust Deed Updates

Updating an existing SMSF to a new deed is more than simply noting the variation clause. There may be additional parties required to consent to the update, conflicting clauses in the current deed, clauses that must be retained in an upgrade and many other issues that can complicate the deed update process.

These additional requirements have an effect on the way the documents to update the deed are drafted. Whilst some deeds may be easy to update, and can be done so via a standardised template, many deeds require drafting outside the 'norm' that requires legal expertise in order to be prepared correctly.

The preparation of SMSF deed updates therefore presents two main issues:

1. Legal expertise is required in the examination of the Trust Deed to determine how to update the deed; and
2. Specific drafting is often required to properly prepare the update, which needs to be done by a lawyer.

Issue One – Legal expertise is required in the examination of the Trust Deed to determine how to update the deed

The documentation that is required to update a trust deed is dictated by the terms of the current deed of the Fund. Therefore an interpretation of the current deed is required to determine the parties and procedures required to update the trust deed. This interpretation should either be done by a lawyer, or at the least confirmed by a lawyer.

This prerequisite creates issue for advisers who order their trust deed updates online and download their deeds without legal oversight of their documentation. Part of the process of ordering a deed update online is providing the parties who you believe, according to your interpretation of the trust deed, are required to update the trust deed. Without a lawyer at the other end looking at the trust deed to confirm these parties, your answers are therefore dictating how the documents are being drafted.

The issue is that if the documents end up being drafted incorrectly because of your interpretation of the trust deed, should anything go wrong as a consequence, you may be the one who the trustees of the fund take action against. And your Professional Indemnity insurance is not likely to cover you should this occur, because this situation has occurred as a consequence of you interpreting a legal document, which only a lawyer's PI insurance covers.

Topdocs allows you to order your deed updates online, but to only receive them as full service. This ensures ordering your documents is quick and easy, and also enables us to interpret your trust deed to confirm the information you have provided to us is correct.

Issue Two - Specific drafting is often required to properly prepare the update, which needs to be done by a lawyer.

Many deeds require specific drafting to be updated, due to reasons such as additional parties being required to consent to the update, conflicting clauses in the current deed, clauses that must be retained in an upgrade and many other issues.

For this reason, it is important to update your deed with a firm that has the ability to not only interpret your deeds for you, but to provide the specific drafting required to properly update your trust deeds.

Further, it is important to note that no matter how sophisticated an online deed update system is, it cannot cater for all types of trust deeds and circumstances on the market, and therefore, you are putting yourself and your clients at risk if you order and receive your deed updates online.

Topdocs not only interprets your trust deeds for you, but we ensure all required drafting to properly prepare the update is done to ensure each update we prepare for you is correct. We then have our lawyers sign off on our work.

What can happen if Legal Oversight is not provided?

If a deed update isn't carefully prepared, and consequently, is prepared incorrectly, a range of issues can arise. These issues range from nothing at all, if the error is not noticed by the auditors or the regulator, to major financial repercussions for the Fund, including

1. Loss of concessional tax status if the Fund is later deemed to be non-compliant by the regulator, as a consequence of an action taken by the trustee under the invalid deed;
2. Resettlement of the trust with CGT implications, if a new trust is deemed to have been created as a consequence of the error;
3. Challenges to assets held in the Fund, as a consequence of an action taken by the trustee under the invalid deed. For example, a disgruntled beneficiary challenging a Binding Death Benefit Nomination that was created under the invalid Trust Deed.

Should any of the above occur, and result in adverse financial consequences for your client as a result, and you have not received legal oversight of your documentation, then it may be you who the trustees of the fund will take action against.

Topdocs' Legal oversight service.

Topdocs manages the issues associated with updating trust deeds by:

1. Interpreting each deed we receive to properly determine the procedures and parties required to update the deed;
2. preparing any specific drafting required to ensure the deed update is done correctly;
3. providing you with a letter of legal oversight on all deed updates we prepare for you, stating the deed update has been correctly prepared.

Topdocs also provides for online ordering of deed updates, to ensure ordering your documents is quick and easy. To protect you and your client, we don't however allow you to instantly download your deed updates. Instead, we prepare them in house, after we have interpreted the Fund's Trust Deed, ensuring your documentation is prepared correctly.

For more information contact a Topdocs Consultant on 1300 659 242.