

5 THINGS YOU NEED TO KNOW ABOUT CHANGING YOUR SMSF TRUSTEE

Changing the trustee of your SMSF is more than just preparing a trustee minute. This article outlines 5 key considerations to keep in mind.

Changing the trustee of your SMSF is more than just preparing a trustee minute. There may be additional parties required to consent to the trustee change or particular procedures that have to be met in order for the trustee change to be valid.

Further to this, there are many other considerations that have to be made in relation to the Tax Office, State Revenue Office, your client's personal estate planning requirements and what type of trustee should be appointed.

In this article, Michael Spakman, director in charge of documentation at Topdocs, outlines 5 key considerations that should be made when changing the trustee of your SMSF:

1. Individual Trustees or Corporate Trustee?
2. The Trust Deed is King!
3. Office of State Revenue and other governing body requirements
4. Tax Office requirements
5. Are your clients' estate planning needs being met?

1. Individual Trustees or Corporate Trustee?

No doubt you will have your own views as to whether an SMSF should have a corporate trustee or individual trustees. Often the choice of having individual trustees for an SMSF is based on a perception (often in the client's eyes) that the costs of incorporating and maintaining a corporate trustee outweigh the benefits...

But in the scheme of percentage of assets is this really true? A person's superannuation balance is often their largest asset. If the ATO recommends an SMSF should be established only if the member balances combine more than \$200,000, is \$659 a large expense for the benefits it provides?

This question is really based on your perception of this value – so let's take a look at the benefits of having a corporate trustee before you decide:

■ Administrative Efficiency

The assets of an SMSF must be held in the names of the trustees, and when it comes to the admission and removal of members over time, having a corporate trustee for the Fund provides a very big advantage over having individual trustees, as it means you never have to change the names in which the Fund assets are held, no matter

how many times you change the membership of the Fund.

■ Estate Planning

A Company never dies, but over time, the members will. With 2 member funds accounting for roughly 69% of all SMSFs (based on ATO figures for 2010-2011) ensuring the certainty of the trusteeship of an SMSF upon the death of a member is crucial. It is not only important from a compliance point of view, but from a death benefit payment and, at a time when a spouse has died, an emotional one.

Having a corporate trustee in place ensures the control of the Fund is always certain and in the case of when a member dies, especially when the fund consisted of two members, it ensures the Fund still continues to comply with the trustee/member rules without the need to appoint an additional trustee to the Fund. This is important for a number of reasons.

Firstly, it ensures that the remaining member can continue to manage the fund without having to admit an outside person to be a trustee, ensuring the remaining member can continue with full control of the Fund. It also ensures the names in which the assets of the Fund are being held won't need to be changed.

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From a death benefit point of view, it also provides more certainty in ensuring the deceased member's benefits will be paid in accordance with their wishes, as an external trustee won't need to be admitted (although the preparation of a binding death benefit nomination, or a binding death benefit rule would obviously further ensure this).

Finally, it provides the remaining member with one less issue they have to deal with from an emotional point of view, after the passing of their spouse.

■ Asset protection

One of the most important reasons to have a corporate trustee is litigation exposure. Individuals acting as trustee of an SMSF 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 does 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.

Whichever way your client decides to go please remember this – if you decide on a corporate trustee, **establish a new company**. The Trustee/Member rules of the *Superannuation Industry (Supervision) Act 1993* provide restrictions on who can be directors of the company at any given point in time, so if your client says 'let's use the same company as my family trust' or 'let's use my trading company' remember that that additional entity, whether it be the family trust or the trading company, will always be directly affected by the ongoing membership structure of the Super Fund if it is also its trustee, a less than ideal estate planning and management situation for all entities involved.

2. The Trust Deed is King!

A common way that many documentation providers, and accountants and financial advisers when they choose to prepare these documents, document the change of trustee for an SMSF is via a trustee minute. Unfortunately, this method of removing one trustee and appointing another very rarely satisfies the requirements set out in the Trust Deed for the Fund and correspondingly, many of these appointments are invalid.

The Trust Deed for an SMSF is essentially the governing rules of the Fund. It sets out, subject to the *Superannuation Industry (Supervision) Act 1993* and *Superannuation Industry (Supervision) Regulations 1994*, the procedure to remove and appoint the trustee of the Fund. If the procedures outlined in the Trust Deed are not met, then it could be determined at a later stage that the

appointment was invalid, and that the actions of the trustee were also invalid during the period of the 'appointment'.

Surprisingly, there are also a number of SMSF Trust Deeds in the SMSF arena that don't actually contain a clear trustee appointment provision! Poorly drafted deeds that do not clearly outline a procedure to change the trustee present a problem in appointing a new trustee validly, and the solution to this is to firstly have the Trust Deed updated before the trustee change, so you can rely on the provisions of the new governing rules to appoint and remove the trustee of the Fund.

In the same way it is crucial to ensure the procedures to vary a deed are met when a deed is updated. The procedures, and parties, required to facilitate a trustee change under the terms of the Trust Deed must be satisfied in order for the trustee appointment to be valid. For this very reason, all Topdocs change of trustee documentation is provided with legal sign off.

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3. Office of State Revenue and other government body considerations

It is important to consider the types of assets, and where these assets are located, before you change the trustee of an SMSF, especially if the Fund holds real property that has been contributed by a specific member of the Fund. Stamp duty issues can arise in some states, not from the admission of a new trustee, but from the admission of a new member as a consequence if the fund has contributed property that is held by a specific member in the Fund.

Another very interesting point is that SMSF changes of trustees in NSW, under of the *Trustee Act 1925*, are required to be made by 'registered deed' *so far as a contrary intention is not expressed in the instrument, if any, creating the Trust*. The effect of this literal reading of the *Trustee Act* is that, unless the Trust Deed for the Fund specifically states that the instrument changing the trustee of the Fund does not have to be registered, change of trustee documentation in NSW must be registered before it is effective. This is a largely overlooked requirement and, at Topdocs, we have overcome this by including specific provisions in our Trust Deed to forego the registration of change of trustee documentation for NSW Funds.

4. Tax Office Requirements

The Tax Office has placed a greater emphasis over the past couple of years on ensuring that trustees of SMSFs understand their rights and responsibilities in running their SMSF. So much so that the ATO is now calling some trustees of newly

established Super Funds before issuing the Funds Australian Business Number and interviewing them to determine if they understand their obligations.

The ATO has even cancelled ABN registration applications when the ATO has not been happy with the trustee responses.

Further to this, a proposed amendment to the *Superannuation Industry (Supervision) Act 1993* to introduce specific monetary fines for trustees should they breach specific superannuation regulations lapsed prior to the September 2013 federal election, but may be resubmitted to parliament.

Before a trustee is appointed to an SMSF they should understand their obligations and responsibilities in running the Fund. At the very least, every new individual trustee, or new director of the corporate trustee, is required to read and sign the ATO *Trustee Declaration* form within 21 days of their appointment. Further to this, the Trustee Declaration form must be kept in the records of the Fund for a minimum of 10 years.

The ATO has a number of resources you can provide Trustees to inform them of their responsibilities, and it would be beneficial for new trustees to be provided with the following ATO prescribed forms:

- [Self-managed super funds - key messages for trustees](#) (NAT 71128).
- [Running a self-managed super fund](#) (NAT 11032)

In addition to signing the Trustee Declaration Form, the Fund is also required to notify the Tax Office within 28 days of any trustee or

member change in the Fund, via the prescribed *change of details for superannuation entities* form (NAT 3036).

5. Are your clients' estate planning needs being met?

This really follows on from the debate of corporate trustee vs individual trustees, and the death of members of the Fund and what happens to the structure of the Fund at the time of death. Also consider who the client really wants to control the Fund when they die. We don't want a [Katz v Grossman](#) here, so really consider how the Fund will be managed on the death of the member before deciding not only the trustee type, but the actual people being admitted to the Fund.

More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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