

HOW TO VOTE - SMSF TRUSTEES

The rules for voting by individual SMSF trustees vary from one trust deed to another. For corporate trustees, the voting by directors will be determined by the rules of the constitution.

This article considers some of the options provided by the relevant trust deed or constitution.

Understanding is vital

Whether acting as an individual trustee of an SMSF, or director of a corporate trustee, of vital importance is an understanding of the rules surrounding voting by an individual in their role as trustee or director.

The role of trustee of an SMSF is a very important one and the performance of that role potentially impacts both the performance of the SMSF and, importantly, the ultimate aim of the fund - the eventual retirement benefits of the members.

Because trustees and members are usually one and the same, trustee voting is often considered to be of little importance - until problems develop in the relationship between members.

Deed or Constitution?

SMSF trust deeds should contain directions and guidance for meetings by individual trustees.

They do not (at least should not) direct how the meeting of a corporate trustee is conducted.

The constitution of the company should contain the relevant directions and guidance for the conduct of meetings of directors.

Different voting structures

Voting rules for meetings of directors of the corporate trustee of an SMSF may provide that:

- each director has one vote; and
- each shareholder has one vote.

SMSF trust deeds differ in the voting rules for meetings of individual trustees of an SMSF. Generally deeds provide that:

- each trustee has a single vote; or
- each trustee, initially, has a single vote but, in the event that a trustee is dissatisfied with the outcome of a vote, they may call for the vote to be conducted along the lines of the balance held in the SMSF for that trustee/member*; or
- each trustee has one vote per dollar held in the SMSF for that trustee/member*.

* for all voting situations, each trustee would have one vote per \$ of their member balance in the SMSF.

Although trustees are required, under general trust law and superannuation law, to act impartially and in the best interests of all beneficiaries (members), the option of voting in accordance with their member balance does not exclude that requirement from occurring.

Why vote on equity?

There can be significant reasons why trustees or directors wish to have a structure which allows voting to be conducted, if necessary, on either the balance of a member's account in the SMSF or, with a corporate trustee, on the number of shares they hold.

The basic reason is to ensure that ultimate control over the decision making remains with the person who has a significant proportion of the balance in the SMSF.

Example

Consider the example of a couple who have their own SMSF, of which they are individual trustees, and each has a balance in the fund of \$500,000.

Subsequently, one spouse passes away and the surviving spouse resolves to add their 3 children as trustees of the SMSF. Those children contribute minimal sums to become members of the fund and ensure the trustee/member rules are met.

A decision needs to be made in regards to the superannuation death benefit of the deceased member, and the children decide they would appreciate receiving those benefits now, rather than having to wait until the surviving parent passes away.

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PRESERVATION - THE END OF AN ERA

However, the parent, as you may expect, takes a different view and wants the funds to remain in the SMSF and be paid to them in the form of a superannuation death benefit income stream.

Effectively, when the trustees meet, the decision will be determined in accordance with the voting procedures set out in the SMSF trust deed.

If the deed provides only for the one vote per trustee option, the wishes of the children will prevail and they will receive the deceased parent's benefits earlier than both parents most likely anticipated.

On the other hand, if the deed provided a mechanism for a dissatisfied trustee to call for the vote to be conducted along the lines of the trustee/member balance in the SMSF, the wishes of the surviving parent will prevail.

Whilst the above example provides another reason for having a corporate trustee of an SMSF (i.e. the surviving parent could have continued as sole director) the same scenario could evolve if the parent decided to add the children as members of the SMSF.

In the case of a corporate trustee, it would be at a meeting of directors that the decisions are made and, once again, one director could potentially be outvoted by the other directors.

If the company is structured so that the parent is the only shareholder, that person could remove the directors at any time but, in doing so, the SMSF would cease to meet

the trustee/member rules (i.e. it has 6 months in which to rectify).

The alternative is that a director/shareholder could call for a poll, which would be determined based on shareholding and, if the parent holds most or all of the shares, their vote will direct the outcome - provided the company constitution permits such a voting procedure.

What about trustee responsibility?

The example used above can be considered to be somewhat extreme, but there are other circumstances which could see decisions potentially being made which are contrary to the interests of the member with the most significant superannuation balance.

With the prevalence of blended families, such examples could arise.

Another potential issue arises when considering proposed investments of the fund, where the appetite for risk varies significantly between the surviving parent and the children.

In the instances of superannuation death benefits and investment decision making, the parent would have a responsibility to consider the interests of all beneficiaries (i.e. the members) in reaching a decision but, as the parent's interests are more significant than those of the other beneficiaries, there would most likely be no breach of trust in them deciding to their own advantage.

Which option is best?

The Topdocs SMSF trust deed provides for a 2 step scenario:

- each trustee, initially, has a single vote; but
- in the event that a trustee is dissatisfied with the outcome of a vote, they may call for the vote to be conducted along the lines of the balance held for them in the SMSF.

The benefit of that option is administrative efficiency - if all are in agreement, one vote per trustee is much simpler than needing to determine each member's entitlement to vote but, if necessary, that is the fallback position.

The Topdocs company constitution also contains similar provisions for votes of directors, with shareholders able to call an extraordinary meeting.

Conclusion

Apart from trustees or directors needing to know how to vote, determining what voting rules are most appropriate for their situation is an important consideration for advisers and their clients.

In particular, having appropriate voting powers contained within the particular documents can avoid unforeseen problems occurring in future.

More information

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

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