

## SMSF DEEDS QUESTIONS AND ANSWERS

What a well drafted, up-to-date, self managed superannuation fund trust deed should and should not contain is considered in this article.

### Q. Who can be a member?

**A.** SMSF deeds should provide for the admission of up to four members in all. Because a 'disqualified person' cannot be a trustee or director of a corporate trustee, and all members must generally be trustees or directors of a corporate trustee, deeds should also provide that a 'disqualified person' cannot be a member.

While they cannot be trustees or directors of a corporate trustee, it is important that a deed confirms that children (i.e. minors) can be members of the fund. Note that trust deeds of 'employer sponsored' SMSFs might, inappropriately, make employment a condition of membership.

Although not so much a deed related issue, note also that prospective members should generally be provided with a product disclosure statement before being admitted. Members contemplating overseas travel should consider obtaining professional advice if there is a possibility of them becoming 'non-resident' while they are away. Technically, trustees or directors should be appointed before they are admitted as members.

### Q. How does someone become a member?

**A.** SMSF deeds should detail the process in accordance with which members may be admitted, e.g. On receipt of a completed application

form in the prescribed form (often incorporated as a schedule to the deed), at the discretion of the trustee. Once again, trust deeds of 'employer sponsored' SMSFs might include conditions for membership.

Note that trustees are prohibited from accepting non-concessional contributions from members who have not provided their tax file numbers.

### Q. When does membership cease?

**A.** SMSF deeds should detail the circumstances in which a member's membership will cease, e.g. when all of the member's benefits have been transferred or rolled-over to another fund or paid out (preferably, subject to the trustee's discretion to determine otherwise) or the member dies. While many deeds require members to have an account balance, we suggest an important confirmation in a deed is that nil account balance-holders (such as the spouse of a member) can, at the trustee's discretion, remain a member of the fund.

### Q. Who can be trustee?

**A.** SMSF deeds should generally provide for the appointment of each member as an individual trustee or director of a corporate trustee.

Some deeds only contemplate the appointment of individual trustees, while others only contemplate the appointment of a corporate trustee.

Deeds should generally also provide for the appointment of others, including non-members, as trustees or directors. If a member dies, is under a legal disability or a minor, if someone holds an enduring power of attorney in respect of a member or if the fund is to be converted to a small APRA fund are instances where a non-member may be a trustee or director. Also, so as to ensure SIS compliance, a deed should provide that a 'disqualified person' cannot be a trustee, or director of a corporate trustee.

### Q. How is a trustee appointed or removed?

**A.** SMSF deeds should generally detail the process in accordance with which trustees, whether individual or corporate, may be appointed and removed.

Appointment could be by the other trustees or by the members, in writing, and removal either by written resignation or by the trustees or members in writing.

The appointment and removal of directors of a corporate trustee will likely be governed by the constitution of the corporate trustee, rather than by anything contained in the SMSF deed. Power to appoint directors of a corporate trustee, therefore, will likely rest with the other directors or shareholders of the corporate trustee. Power to remove a director will likely rest with the director, personally, by resignation, or by

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resolution of the shareholders of the corporate trustee.

While not so much issues for the deed, note that individual trustees and directors of corporate trustees must consent to their appointment as a trustee of a SMSF or as a director of the trustee of a SMSF, in writing, and complete an ATO 'Trustee Declaration' form. That is usually a separate document to the normal consent to act as a director of the company.

The ATO must be advised of any changes of trustee and ASIC must be advised of any changes to the directors of a corporate trustee.

Note also that a change of trustee will likely involve the preparation of a legal document; legal work which must only be undertaken by an appropriately qualified legal practitioner. Non-lawyers who engage in legal practice risk imprisonment and are unlikely to be covered by any professional indemnity insurance if something goes wrong.

### **Q. What kinds of contributions can be made?**

**A.** SMSF deeds should generally give the trustee discretion to accept all kinds of contributions permitted by law (depending on a member's age), including employer contributions, self-employed contributions, personal contributions, spouse contributions, government co-contributions and in-specie (or "in kind") contributions.

Power to reject and return excess contributions, pay excess contributions tax and split a member's contributions with their spouse are also important inclusions.

Deeds drafted prior to the significant changes to the contributions rules, which took effect from 1 July 2007, are unlikely to properly cater for all contribution related actions required of the trustee.

### **Q. Can the trustee enter into a limited recourse borrowing arrangement?**

**A.** Many older SMSF trust deeds specifically prohibit borrowing by the trustee. Lenders generally require specific powers in the deed permitting the trustee to enter into a limited recourse borrowing arrangement.

Before purchasing an asset under a SMSF borrowing arrangement, the trust deed should be updated to provide the trustee, not only with the power to borrow, but also to permit the asset to be pledged, the appointment of a custodian, and related powers.

While not so much an issue for the deed, trustees should ensure that their investment strategy empowers them to enter into an SMSF borrowing arrangement.

Trust deeds prepared prior to the introduction of the exception to the general prohibition on borrowing, which took effect from 24 September 2007, are unlikely to have contemplated authorising the trustee to enter into a SMSF borrowing arrangement, even if providing authority to act in any way permitted under the SIS Act.

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*While not so much an issue for the deed, trustees should ensure that their investment strategy empowers them to enter into an SMSF borrowing arrangement before doing so.*

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### Q. Can the trustee establish and maintain investment reserves?

**A.** While more common in a large fund context, e.g. for smoothing the investment returns allocated to members' accounts, investment reserves can be useful in an SMSF context as well, e.g. for making anti-detriment payments to the dependants or legal personal representative of a deceased member. As the treatment of payments from reserves are often measured against concessional contributions caps, that limits the effectiveness of reserves in many instances.

Reserves should not, however, be established and maintained unless the deed empowers the trustee to do so and the trustee has a written investment reserving strategy (in addition to its regular investment strategy) in place.

### Q. What kinds of benefits can be paid?

**A.** SMSF deeds should generally empower trustees:

- to pay all of the kinds of benefits permitted by law, including account based pensions, transition to retirement income streams and terminal medical condition benefits;
- to commence market linked pensions in limited circumstances and continue to pay existing allocated, transition to retirement allocated, lifetime, life expectancy and flexi-pensions, but not commence new ones;
- to pay lump sums in-specie (or "in kind");
- to pay reversionary pensions;

- to convert allocated pensions to account-based pensions; and
- to commute pensions, where permitted by law, and roll them over internally into accumulation or into a new pension;

Some deeds continue to reflect the abolished compulsory cashing rules, meaning that trustees act contrary to the directions in the deed by not paying out benefits at a specified age.

Similarly, older deeds permit payment of a death benefit in the form of a pension to a wider range of people than is currently permitted. A death benefit pension can still be paid to certain dependants of the deceased member but, if to children of the deceased, it can only be paid to a child of the deceased if that child is:

- less than 18 years of age; or
- being 18 or more years of age:
  - is financially dependent on the member and less than 25 years of age; or
  - has a prescribed kind of disability.

When reviewing deeds, it may be helpful to note that significant changes to these rules took effect on 1 July 2007 and terminal medical condition benefits were introduced on 16 February 2008, so older deeds may not provide up to date powers.

### Q. Can pension assets be segregated?

**A.** SMSF deeds should generally empower the trustee to segregate pension assets.

### Q. Can members make binding death benefit nominations?

**A.** SMSF deeds should generally empower members to make binding and non-binding death benefit nominations, compel the trustee to comply with a valid binding death benefit nomination (BDBN) and clearly spell out how long a BDBN will be effective, e.g. for a set period such as 3 years or indefinitely.

If the intention is that the BDBN will continue indefinitely, the trust deed should not be worded so as to link the powers in relation to the BDBN to those provided under the SIS Act and Regulations.

The deed should generally empower members to nominate the full range of people to whom a death benefit can be paid (including a person with whom the member was in an interdependency relationship and a same-sex spouse).

When it comes to BDBNs, note that some deeds simply adopt the procedures outlined in the superannuation legislation and regulations, though in our opinion (and that of the Commissioner of Taxation), they don't have to. When reviewing deeds, it may be helpful to note not only that BDBNs were introduced on 31 May 1999, but also that the definitions of dependant and spouse were amended on 1 July 2004 and 1 July 2008, respectively.

Note also that the preparation of a BDBN will likely involve legal work, which must only be undertaken by an appropriately qualified legal practitioner. Non-lawyers who engage in legal practice risk imprisonment and are unlikely to be covered by any professional

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indemnity insurance if something goes wrong.

### **Q. Can super interests be divided on marriage breakdown?**

**A.** SMSF deeds should generally empower the trustee to act in accordance with the Family Law Act 1975 and the regulations which govern superannuation and family law on the breakdown of marriage, but also to elect that the deed will not have operation to permit the trustee to establish a new interest in the fund at the request of a spouse. The absence of this power to elect could prove problematic were a member with a non-member spouse to endure a marriage breakdown, particularly if the addition of that person as a member resulted in the SMSF exceeding the permitted number of members.

When reviewing deeds, it may be helpful to note that super splitting on marriage breakdown was introduced on 28 December 2002.

### **Q. Will benefits be available to creditors on bankruptcy?**

**A.** While the answer to this question is governed largely by bankruptcy law, i.e. generally, no, subject to some clawback provisions and pension payments above various thresholds, there are some subtle, but none the less, potentially very important strategies that should be incorporated into a well drafted SMSF deed. While they are beyond the scope of this article, please contact Topdocs if you would like to discuss.

### **Q. When should an SMSF deed be updated?**

**A.** There is no simple answer to this question - it really must be considered on a fund by fund (even member by member) basis.

Given the rate of change to the superannuation rules over recent years, and the relatively low cost of amending deeds, it is probably fair to say that deeds are likely to need to be updated more regularly now than in the past.

It is very important that the trust deed be reviewed before any major superannuation decisions are implemented, e.g. making a large contribution, commencing an income stream, splitting a contribution with a spouse, entering into a limited recourse borrowing arrangement, making a BDBN or paying a benefit.

That said, a well drafted SMSF deed would generally contain a provision not only requiring the trustee to comply with the minimum requirements of the law (even if inconsistent with the deed), but also empowering the trustee to do anything permitted by law, even if it would not otherwise have power to do so under the deed. Such a provision may add to the longevity of a deed, but express provisions will almost certainly be preferred.

### **Q. How do you update an SMSF deed?**

**A.** SMSF deeds should contain a power to vary, amend and/or update. The power generally rests with the trustee, sometimes with the consent of another or others, e.g. the members, a founder or a particular employer, and should ideally not be unduly complex or

onerous. It must, however, be read carefully and complied with in full. Failure to do so may render any purported changes ineffective.

Note that a deed update will likely involve the preparation of a legal document; legal work which must only be undertaken by an appropriately qualified legal practitioner. Non-lawyers who engage in legal practice risk imprisonment and are unlikely to be covered by any professional indemnity insurance if something goes wrong.

### **Topdocs SMSF Deed Review service**

Topdocs provides a range of services to review and amend Trust Deeds.

[You can see more information on the Topdocs website.](#)

### **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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