STARTING AN SMSF INCOME STREAM - WHAT DOCUMENTS DO YOU REALLY NEED?

Legislative requirements, audit issues even potential challenges from disgruntled beneficiaries need to be considered when preparing the documentation of an SMSF income stream.

With SMSF pension documentation, consideration needs to be given to legislative requirements, audit issues, and also ensuring that documentation is in order in the event of common law issues such as a challenge form a disgruntled beneficiary on death of a member.

This paper provides a list of documents needed at the commencement of the income stream, with an explanation as to why each of those documents is necessary.

The documents we will be reviewing in this paper include:

- the Trust Deed;
- an Application from the Member;
- Resolution of the Trustee;
- Pension Agreement; and
- Product Disclosure Statement.

Trust Deed

Before any other consideration in regards to the payment of an income stream to a member, the Trust Deed of the SMSF must be reviewed to ensure that the trustee has the authority to commence paying a pension to the member.

Additionally, the rules in the Trust Deed in respect to the payment of an income stream must meet the legislative standards set out in the SIS Regulations, at reg 1.06(9A). This requirement is set down in SIS reg 1.06(1)(a), which reads (inter alia):

(1) A benefit is taken to be a pension for the purposes of the Act if:

(a) it is provided under rules of a superannuation fund that:

(i) meet the standards of subregulation (9A); and

(ii) do not permit the capital supporting the pension to be added to by way of contribution or rollover after the pension has commenced;

Some advisers take the view that a 'catch all' phrase in the deed, which defers to the rules set down in reg 1.06(9A), will suffice for the purposes of meeting the requirements of reg 1.06(1)(a). As such an interpretation is not specifically covered in the regs, the wiser view is to ensure that the required power is contained in the Trust Deed of the SMSF.

Member Application

A written application by the member to the trustee basically initiates the process for the fund to pay an income stream to the member. In most circumstances, a trustee will not be empowered under the Trust Deed to automatically commence paying an income stream. Having the application in writing confirms that the member has made a request of the trustee, to consider the payment of an income stream.

The application can also include the nomination of a reversionary pensioner, in the event of the death of the member.

Trustee Resolution

Resolutions or minutes indicate that the trustee has considered the request and, if having made the decision to agree to the request, has considered matters such as whether the member has met a condition of release, the fund's ability to make the payments, details of the type of pension, commencement date of the income stream, the amount of member benefits being applied to fund the pension, and a review of the fund investment strategy.

The resolutions should also include reference to any reversionary pension nomination made by the member when applying for the pension. As a reversionary pension nomination uses the principles of s 59(1)(a) of the SIS Act, to provide the instructions to the trustee to continue a pension in favour of a new recipient, following the death of the initial pension recipient, the trustee must consent to the nomination of the reversionary pensioner.

By including the acceptance of the reversionary pension nomination in the resolutions, any suggestion at a later date that the nomination had not been properly accepted can be easily refuted.

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Pension Agreement

A pension agreement sets out the terms of the pension, including the restrictions set out in the SIS Regulations, as well as information such as the regularity of payments to be made, minimum and (if applicable) maximum payment amounts and additional details such as treatment of the pension amount in the event of the death of the recipient - in particular, the details of the reversionary pensioner nominated by the member, and any conditions in relation to the pension reversion.

Product Disclosure Statement

Most disagreement regarding the documentation required for the commencement of payment of an income stream from an SMSF revolves around the need for a Product Disclosure Statement, or PDS.

Apart from the regulatory requirements, a PDS can be a very important document in providing details to the member of the benefits, features and rules of the income stream they are commencing or have previously commenced. That includes details of the taxation of their income stream, and when they are entitled to access the capital of their pension.

However, it is the legislative aspect which dictates that a PDS should be issued at the commencement of an income stream from an SMSF.

The requirement to issue a PDS comes primarily from the provisions contained in the Corporations Act 2001. SMSFs are considered to be a 'financial product' under the Corporations Act, which means that all new members to an SMSF should receive a PDS on or before they become a member of the fund. That is because they are receiving a 'superannuation interest' at that time. A member also receives a further 'superannuation interest' when commencing an income stream from that fund.

Division two of Part 7.9 of the Corporations Act and regulation 7.9.04 and Part 17 of Schedule 10A of the Corporations Regulations deal with the requirements for disclosure to new members. This disclosure is required to be in the form of a PDS. The Corporations Act sets out the information which the PDS must contain.

Under subsection 1012D(2A) of the Corporations Act, a PDS does not have to be given to a new member of an SMSF where the trustee believes, on reasonable grounds, that the member has received, or knows they have access to, all of the information that a PDS would be required to contain.

In Regulatory Guide 168 (RG 168), ASIC provides guidance in respect of subsection 1012D(2A) as follows:

While each member of an SMSF must be either a trustee or a director of the SMSF (if the trustee is a body corporate), and as such has an obligation to know about the fund in order to fulfil their duties, this does not, in itself, give an issuer or adviser reasonable grounds to believe that a prospective member has, or has access to, all of the information required.

The issuer or adviser needs to make a decision about each prospective member and actively consider whether they have received, or have (and know they have) access to, all of the information that the PDS would need to contain.

In RG 168, ASIC refers to both the issuer (the trustee) and the adviser, stipulating that they each need to decide whether the prospective member has, or knows they have access to, the information which would otherwise be contained in a PDS. Although RG 168 refers to 'prospective members', subsection 1012D(2A) specifically covers a 'superannuation interest' which, in effect, relates to both joining an SMSF and commencing a pension from the SMSF (i.e. acquiring a 'superannuation interest').

For advisers and the SMSF trustee to be certain that the pension applicant has all of the information contained in a PDS, or knows where to access that information, they could apply the 'witness box' test and, if they were not confident that the individual would pass the test, then no exemption from the issue of a PDS on the commencement of an income stream would apply.

For the sake of a few extra documents, the compliance certainty which the issue of a PDS provides to advisers and trustees should overcome any suggestions or recommendations that a PDS is not necessary.

More information

Should you have any queries, or require assistance with your SMSF income stream documentation, please contact the team at Topdocs on 1300 659 242.

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