

WHY YOU SHOULD UPDATE YOUR SMSF DEEDS SOONER RATHER THAN LATER

SMSF Trustees are approaching the biggest change to the operation of their SMSF since 2007, when Simpler Super was introduced.

Prior to the 2007 changes, 1999 was a time of major change, when the term 'Self Managed Super Fund' took over from 'Excluded Fund', preservation and in-house asset changes were made, and the trustee/member rules were introduced.

In both 1999 and 2007, most SMSF Trustees amended their trust deeds to ensure they provided the necessary powers (and reflected the restrictions) introduced at that time. The 2017 Superannuation Reform changes represent another instance of when SMSF Trustees should ensure their trust deeds are up to date.

The Superannuation Reform legislation, which received assent in November 2016, will once again change the way in which superannuation funds operate. Therefore, prudent SMSF trustees will ensure that their trust deeds cater for the ongoing evolution of superannuation law.

In addition to the legislative changes, continual innovation in superannuation has tended to 'age' SMSF trust deeds which have not kept up to date with those innovations. Innovations which come to mind, particularly in the SMSF environment, are derived partly from an increase in case law, mainly from disputes over the distribution of superannuation death benefits, as well as the recognition of matters such as the incapacity of a member/trustee of an SMSF.

Well drafted SMSF trust deeds are continually reviewed to consider

ways in which they can be enhanced. Therefore, trust deeds which have not been updated by the provider, or dated SMSF trust deeds, will often fall short of the expectations of trustees and their advisers.

With specific reference to the Superannuation Reform legislation, older deeds may lack in a number of areas which could include:

- the ability to internally 'rollback' pensions to the accumulation phase;
- the ability to segregate assets between accumulation and pension phases;
- powers and instructions to the trustee regarding the inability to accept contributions in certain circumstances;
- the ability to refund contributions which should not have been accepted;
- power to the trustee to pay the various taxes which may be levied, such as the excess transfer balance tax, excess non-concessional contributions tax and similar penalties introduced under the Superannuation Reform legislation.

Referring to some of the innovations mentioned above, whether through case law or actual enhancements, some of the areas in which older deeds can cause difficulties for trustees and members include:

- the linking of a Binding Death Benefit Nomination to the SIS legislation, effectively making

the document lapse after three years, unless renewed;

- no indication as to whether a Binding Death Benefit Nomination will be non-lapsing - our opinion is that the trust deed should specifically state that a Nomination will not lapse, if that is the intention of the member, because of the passage of time;
- the provision of appropriate powers for the payment of income streams, given that many trust deeds we see do not provide for an Account Based Pension, even though it has been the predominant pension paid by an SMSF since 2007;
- incorporating safeguards, such as a Member Benefit Guardian, to protect a member's interests in the event of their incapacity or death; and
- the removal of unnecessary parties to the deed. Those parties include roles which have become irrelevant over time, such as the Principal, Principal Employer (and other employer roles), Founder and similar positions.

In many instances, when attempting to vary an SMSF trust deed, or change the trustee of an SMSF, the power to do so rests with one of those 'unnecessary parties' referred to above. A significant complication arises when it is discovered that the party, which is often a company, has been deregistered because it was no longer required, and is therefore not

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in a position to attend to the role assigned to it under the trust deed.

The removal of those unnecessary parties is one of the reasons why trustees should update their SMSF deed sooner rather than later.

Considering once again the Superannuation Reform provisions, one other area of uncertainty which has been created as a result of the legislative change is the position regarding the resetting of pensions, particularly from the perspective of managing the timing of contributions and the tax components of the various pensions paid to a member.

Under the Simpler Super rules, it was relatively easy to manage multiple pensions which had differing taxable and tax-free components, within a fund. Basically, so long as the accumulation account had been cleared, through commencement of a separate pension, a contribution could be paid to the fund and quarantined into a pension, either an existing pension or a new pension, without the tax component being diluted through mingling with funds in the accumulation account.

However, under the Superannuation Reform provisions, many members will have funds in an accumulation account which are unable to be moved to commence an income stream.

Where a problem will arise is if, for any particular reason, there is a need to change the nomination of a reversionary pensioner. Once again, prior to the Superannuation Reform provisions, that could be managed through the resetting of the pension following the clearance of the

accumulation account balance. Given that such action may have adverse consequences from a tax component perspective, the provisions in a trust deed empowering the pension recipient to amend the reversionary beneficiary nomination, and for the trustee to accept that amendment, is one of the innovative enhancements referred to above. Without such provisions, tax and estate planning may be negated through the adverse consequences mentioned previously.

Given the fact that the Superannuation Reform Provisions will result in much work needing to be done regarding:

- CGT relief;
- dealing with segregated and unsegregated assets;
- determining whether to retain or cease Transition to Retirement Income Streams;
- calculating member balances, across multiple funds, if applicable; and
- calculating the amounts to internally rollback of pension accounts to accumulation.

One matter that can be attended to, sooner rather than later, is the variation of the trust deed of the SMSF so as to provide all of the necessary provisions required by trustees, not only in meeting the requirements of the superannuation reform provisions, but also adopting the innovations made within the SMSF industry over the years.

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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