

Keeping your SMSF Deed up to date

Trustees are responsible for ensuring that their fund complies with the Superannuation Industry (Supervision) Act 1993 (SISA) and other relevant legislation. In accordance with the Trustee declaration, made when becoming an individual trustee or director of a corporate trustee, they must keep informed of changes to the legislation relevant to the operation of their fund and ensure that the trust deed is kept up to date in accordance with the law and the needs of the members.

Why trustees have an obligation to keep their deed up to date.

A trust deed is a legal document that sets out the rules for establishing and operating your SMSF – such things as the fund's objectives, who can be a member and how benefits are paid. The trust deed and super laws together form the fund's 'governing rules'.

A trust deed needs to be regularly reviewed and updated as necessary. A question we are often asked, is "how often should the deed be updated?"

Out-of-date provisions guiding the actions of trustees could result in significantly adverse effects on members' benefits and, with the recent introduction of administrative fines for SMSF trustees, potential monetary penalties.

1 July 2007 saw the introduction of new "Simple Super" legislation where trustees of SMSF's generally updated their superannuation trust deed incorporating the new legislative provisions. Included in these new provisions was a trustee responsibility to keep themselves informed of changes to the legislation relevant to the operation of the fund and ensure that the deed is kept up to date in accordance with the law and the needs of the members. (An extract from the SMSF trustee declaration)

Legislative changes to the audit provisions and increased audit requirements add further pressure to advisers to ensure the trustees keep their SMSF documentation up to date.

Following changes to superannuation legislation since the introduction of Simple Super in 2007, SMSF Works has undertaken a number of reviews to our trust deed incorporating the following changes that have occurred since that date:

Inclusion of the Super Excess Balance Act, including:

- Transfer balance cap
- Transfer balance account
- Excess transfer balance
- Excess transfer balance tax
- Changes to process -Members to appoint and remove trustee, and
- Person being replaced by his attorney holding an enduring power of attorney granted by that person;

Further amendments to

- Legal Personal Representatives with Enduring Power of Attorney upon the death of a member (estate planning and trustee control and management)
- Legal Personal Representatives with Enduring Power of Attorney upon a member losing capacity (estate planning)
- LPR of a member with a legal disability
- Amendments to provision of Quorum for meeting of trustee and voting rights
- Triggering event for Cessation of membership to comply with the ACT
- Amendments to types of accounts, including
- Pension account
- Transfer balance cap
- Changes to -pension account to include transfer balance cap/account
- Refund of Ineligible contributions
- Contributions or other transfers that involve NSW dutiable property
- Changes to binding nominations and members LPR
- Death of a pensioner
- Nominated reversionary beneficiary
- Transfers from UK pension schemes
- Changes to the amendment clause post the death of a member pre the death benefit payment

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- Amendment to have no impact of beneficiary nominations
- Compliance statement included in the deed
- Issues of non-lapsing binding nominations allowable under deed but not under SIS Act
- Expansion of Death Benefits and Beneficiary Nominations
- Reimbursement of the member for excess contribution taxation liability
- Entitlement of Benefits for Terminal Medical Condition
- Accepting a member application with nil balance
- Expansion of Pension Agreement
- Spouse to include same sex partners
- Acceptance of government co-contributions (an ATO requirement)
- Borrowing provisions
- Confirming value of assets to be transferred at current market value

Out-of-date provisions guiding the actions of trustees could result in significantly adverse effects on members' benefits, and with the recent introduction of administrative fines for SMSF trustees, potential monetary penalties.

For example, one of the provisions not covered in older trust deeds is non-lapsing binding death benefit nominations, meaning that some SMSF members may have inadvertently created three-year lapsing nominations.

The implication of this is that many SMSF members may either already have an invalid nomination, or may die without a valid nomination if three years has passed since it was last updated.

We often hear of situations where there has been some form of relationship or marriage break down, where the remaining trustee gains control of the death benefit by default and ignores the wishes of the deceased. Imagine working your entire life and contributing to your super – only to have it accessed inappropriately when you die due to a technicality.

The SMSF Works deed has also been modified to provide members and trustees with specific requirements in relation to the completion and record keeping related to binding nominations

The role of the legal personal representative (LPR) of a deceased SMSF member has also changed, with the acknowledgement now that the role of the LPR in protecting a member's death benefits as the governing rules of the SMSF Works deed requires the appointment of the members LPR before the trustee can pay out the deceased's benefit.

The governing rules also make provision in circumstances where a member may lose capacity allowing the members Legal Personal Representatives with Enduring Power of Attorney to act on their behalf.

We recommend that your trust deed is reviewed on regularly in order to keep the deed up to date with the members need and SISA legislation.

Factsheets on various SMSF topics are available on our website at www.smsfworks.com.au

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