

Aspects of Financial Planning

SMSF trustee administrative obligations

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The role of trustee of a self managed superannuation fund (SMSF) is quite an onerous task as the trustee is legally responsible for all aspects of setting up, maintaining and winding up the fund. In addition, the trustee must ensure that the fund complies with superannuation, income tax and trust law which can be quite challenging.

Background

The enormous popularity and increasing usage of self managed superannuation funds (SMSFs) mean they now represent the fastest growing segment of superannuation. This popularity is evidenced by the fact that the number of SMSFs has grown from approximately 187,000 in 1999 to over 420,000 in March 2010.

Before commencing a SMSF, it is important to realise that though there are benefits in achieving a level of control over your retirement savings, there are numerous compliance and administrative functions that trustees must attend to.

Being a trustee of a SMSF can be a time consuming and involved task. Trustees are bound to act in accordance with the *Superannuation Industry (Supervision) Act 1993* (SIS Act), *Income Tax Assessment Act 1936* (ITAA 1936), *Income Tax Assessment Act 1997* (ITAA 1997) and their associated regulations, trust law and the SMSF's trust deed. The Australian Taxation Office (ATO) is responsible for ensuring SMSFs comply with the legislation.

This Aspect addresses only the administrative functions of a SMSF trustee. Please talk to your adviser about other Aspects available for trustees of SMSFs.





Becoming a trustee

Trustee declaration

All new trustees, and directors of corporate trustees, of a SMSF are required to sign a declaration within 21 days of becoming a trustee. This requirement applies equally to trustees of newly established funds as well as to existing funds altering their trustee structure.

By signing the declaration, new trustees are effectively acknowledging that they understand their obligations and responsibilities in acting in the role of trustee of a SMSF. The declaration is required to be witnessed and retained on file for at least 10 years and must be made available to the ATO for review if requested.

Trustee covenants

Under the SIS legislation, the governing rules, in most cases the trust deed, of all superannuation funds are deemed to contain certain minimum obligations on trustees. These are known as trustee covenants and are:

- To act honestly in all matters concerning the fund
- To take the same degree of care, skill and diligence as an ordinary prudent person would in dealing with the property of another for whom that person felt a moral obligation
- To ensure that the trustee's duties are performed in the best interests of fund members and beneficiaries
- To keep assets separate from any assets held by the trustee personally
- Not to enter into any contracts or do anything else that hinders the trustee in properly performing or exercising the trustee's functions and powers
- To formulate and implement an investment strategy having regard to liabilities, risk and return, diversification and liquidity considerations
- Where the fund maintains a reserve, to formulate and give effect to a reserving strategy for the prudential management of such reserves in accordance with the fund's investment strategy; and
- To allow a beneficiary access to prescribed information or documents.

Any member who suffers loss or damage as a result of a trustee breaching these obligations may be able to take legal action against the trustee.





Trust deed

The first task the trustee must perform is to read the trust deed of the fund and understand its contents. This document is very important as it evidences the existence of the trust and establishes the rules for the operation of the fund. If the deed is too restrictive or is out of date the trustee should ensure that it is amended. The deed should be checked regularly and should be updated for legislative changes (eg. contribution rules, changes in investment restrictions, form of benefit payments).

The trustee of a fund is bound by the trust deed and responsible for any contravention of the rules set out in the deed. For this reason it is very important that you know the contents of your fund's trust deed.

Holding trustee meetings and preparing minutes

Trustees of a SMSF should convene meetings when a decision about the fund is to be made or a significant matter is to be discussed. The trust deed usually sets out the parameters for when trustee meetings should be held. If the deed is silent on this matter, it should be tabled and ruled upon in the first trustee meeting.

For all meetings the trustees should prepare minutes, which outline the main points tabled and summarises the relevant decisions that were made. The minutes should contain sufficient detail for audit purposes.

Keeping records

Trustees need to pay particular attention to this area as the ATO have identified that poor and inadequate record keeping is a major problem for SMSFs. Trustees are required to keep certain records for set periods of time as outlined below:

- Annual operating statement and an annual statement of the fund's financial position must be kept for at least five years
- Accounting records explaining the transactions and financial position of the fund must be kept for at least five years and must be accurate and easy to access
- Copies of annual returns must be kept for at least five years
- Copies of all reports given to members must be kept for at least 10 years; and
- Minutes of trustee meetings, records of changes to trustees and member's written consent to be appointed as trustees must be kept for at least 10 years.





Accepting contributions

It is very important that trustees do not automatically accept all contributions to a member's superannuation account. Trustees need to ascertain that the contribution is permissible under both SIS and the fund's trust deed.

Under SIS legislation, the ability for a fund trustee to accept a contribution may depend on one or more of the following factors:

- Age of the member
- Employment status
- Type of contribution being made
- Who is making the contribution
- Quantum of the contribution; and
- Disclosure of a member's Tax File Number (TFN) to the fund.

A SMSF trust deed may impose further restrictions on the form and type of contributions which can be accepted by the trustee. Particular caution should be exercised when accepting contributions from members over age 65 and contributions of assets other than money (i.e. 'in-specie'), especially when acquired from a related party. An example of a permitted in-specie contribution is a member transferring listed shares or business real property into their SMSF.

Trustees must not accept non-concessional contributions where the member's tax file number has not been provided. Non-concessional contributions that exceed the non-concessional cap may also not be accepted by the SMSF.

When accepting contributions the trustee is required to determine if the contribution is a taxable contribution of the fund.

Investment of fund assets

Superannuation legislation has always contained investment restrictions designed to protect superannuation savings for members' retirement, and to prevent practices which access superannuation savings for 'current day purposes' for either the member, their associates or the employer-sponsor.

One of the trustee covenants outlined above requires trustees to formulate and give effect to an investment strategy for investing the funds assets which has regard to the whole circumstances of the fund. The investment strategy should ideally be a separate written document which is a form of protection for the trustees provided that it is adhered to.





Further, if the SMSF holds reserves, trustees are required to formulate and implement an investment reserves strategy for their prudential management. This needs to be consistent with the SMSF's investment strategy and its capacity to discharge liabilities, whether actual or contingent, as and when they fall due.

The specific investment rules, contained in SIS legislation include:

1. Sole purpose test
2. Lending and financial assistance to members or their relatives
3. Acquisition of assets from members or their relatives
4. Fund borrowings and charging fund assets
5. In-house assets
6. Arm's length dealing

These rules are designed to limit the risks associated with superannuation fund investments and to ensure that personal savings are preserved until retirement. They also reflect the objectives of the Government's retirement income policy. These are covered in more detail in a further Aspect titled 'Investment restrictions for superannuation funds'.

Paying benefits

Trustees need to ensure that superannuation benefits are paid in accordance with SIS legislation and regulations and the rules set out in the SMSF trust deed. They should have an understanding of when benefits can legally be paid to members, for example upon reaching preservation age and permanently retiring, termination of an employment arrangement after age 60 or reaching age 65. Trustees of the fund must not pay a superannuation benefit to a member who has not met a condition of release, as this will breach the sole purpose test and preservation standards. It is important that SMSF trustees understand these rules prior to making a benefit payment to a member as illegal early release of member benefits is an area of concern for the ATO.

When paying a benefit, trustees are required to calculate the taxation and preservation components of a member's superannuation balance. The trustee must then pay the benefit to the member or rollover the benefit to another fund, in accordance with the member's instructions.

If the member elects to receive the benefit as a lump sum, the trustee, depending on the age of the recipient, may be required to withhold tax from the payment, remit this tax to the ATO and issue a PAYG payment summary in respect of the payment.





If the member elects to receive their balance in the form of a superannuation income stream, the trustee obligations increase dramatically. The trustee needs to be aware of the following requirements:

- The member needs to request that a benefit be paid
- The trustee needs to ensure that the type of income stream requested by the member is permissible under the terms of the trust deed, if it is not allowed the deed may need to be amended
- The trustee needs to ascertain the features of the income stream that the member requires (e.g. income payments, frequency of income payments, beneficiary nominations, indexation of payments)
- The trustee should issue a Product Disclosure Statement (PDS) to the member in respect of the income stream being commenced
- The trustee needs to determine the value of the assets that will be backing the pension
- The trustee may need to obtain an actuarial certificate where the fund is paying an income stream and also has an accumulation account or where the fund pays other types of complying or defined benefit income streams
- Where there is a requirement to withhold tax from the superannuation income stream, the trustee needs to register for PAYG taxation
- Depending on their age, the member needs to complete a Tax File Number Declaration and possibly a Withholding Declaration; and
- The trustee may be required to provide the member with a PAYG payment summary in respect of the income stream.

Where the member elects to rollover the benefit to another fund, the trustee, within seven days of making the rollover, must give the receiving fund a Rollover Benefits Statement. A copy is also required to be given to the member within 30 days of the rollover being paid.

Annual reporting

Self managed superannuation fund annual return

For the year ended 30 June 2008 and onwards, trustees of SMSFs are required to lodge one annual return in respect of the entirety of the fund's operations for the year.

This return requires specific information with regard to contributions such as personal and employer contributions received, directed termination payments and rollovers from other superannuation funds, amounts transferred out of the fund and allocations to member accounts from fund reserves.





Such in-depth contribution reporting is required in order to monitor the concessional and non-concessional contributions caps as well as to allow the ATO to calculate a member's Government co-contribution entitlements and to assist in ensuring that Superannuation Guarantee obligations are being met.

The annual return also requires disclosure of the type of income and expenses incurred by the fund, an outline of the fund's assets and liabilities as well as various questions regarding the fund's compliance with superannuation prudential legislation such as related party transactions and in-house assets.

Commencing from the 2007/08 financial year, the SMSF annual return levy is \$150 per annum. The levy is collected as part of the fund's income tax liability rather than as a separate payment.

Annual audit

Trustees are obligated on an annual basis to appoint an approved auditor to audit the fund's financial accounts and statements. The auditor must also conduct a compliance audit of the fund to ensure that the fund continues to comply with SIS legislation. When the audit has been completed, the auditor will provide the trustee with an audit report confirming that the fund has been audited and must notify the trustee about any concerns that have arisen in regards to the fund's financial position and compliance.

Auditors must also report certain breaches of the SIS Act and regulations to the ATO. This includes breaches that have occurred or may occur and that are likely to affect the member's benefits or if the financial position of the fund is deemed unsatisfactory. For audits conducted after 1 July 2008, where the superannuation fund is less than 15 months old, the auditor is required to report all identified breaches of the SIS Act and regulations, regardless of how minor the breach is.

The ATO have advised that the same person should not prepare the fund's financial report as well as conduct the audit.

Delegating responsibilities

Trustees may delegate certain responsibilities to a service provider such as an accountant, financial planner, superannuation fund administrator or tax agent. However, the trustee must be mindful that they are ultimately responsible for ensuring that the fund is run in a prudent manner. Therefore, if the ATO detects breaches via an audit, the trustees could not blame the service provider as they themselves bear the ultimate responsibility.

The trustees of the fund are responsible for ensuring that these obligations are met even though they may not be personally performing the task. If these obligations are not met, a fund





could possibly lose the tax concessions they receive and the fund assets be taxed at the highest marginal rate of tax.

Winding up the fund

If trustees decide to wind up their SMSF they must hold a trustee meeting to ratify the decision to wind up the fund and prepare minutes accordingly. They must also notify the ATO of their intention via their income tax and regulatory return. The self managed superannuation fund annual return has a question that relates to winding up the fund and requires trustees to advise of the date of the wind up.

When winding up the fund, the following requirements must be met:

- Advise the ATO within 28 days of the fund being wound up
- Finalise members' benefits in accordance with super legislation and the trust deed – this may require making a payment from the fund or rolling benefits to another fund
- A final audit of the fund must be undertaken and a final annual return must be lodged (including payment of the supervisory levy if required)
- Make or account for all expenses of the fund (eg accounting fees, insurance premiums and adviser fees); and
- If the fund is registered for PAYG or GST these registrations must be cancelled.

Conclusion

It is very important before anyone considers being a trustee of a SMSF, that they carefully contemplate the many responsibilities that such a role entails. It is also worth considering how those responsibilities would be met, if they should be delegated, and if delegated how supervised.

Possible consequences of breaching the trustee responsibilities include disqualification, suspension or removal of you as trustee, freezing of funds assets, or in some cases prosecution leading to fines and possible gaol terms. It is also possible that the fund will lose its complying status resulting in significantly higher taxation for the fund. It is therefore important to consider carefully your role as superannuation fund trustee.

For further information on the administrative tasks of SMSF trustees, please see the ATO SMSF guide for trustees entitled 'Role and Responsibilities of Trustees'. A copy of this publication can be obtained through your adviser.





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