

YOUR SMSF TRUST DEED: DO YOU NEED TO UPDATE IT?

The Importance of Your Trust Deed

A SMSF Trustee must act in accordance with its SMSF Trust Deed and the Law.

So, the **quality** and **currency** of the SMSF Trust Deed really matters.

Most SMSF Trust Deeds that we review for clients are well past their 'use by dates' - if, indeed, they were ever up to scratch. Very often these Deeds either do not reflect current law or are, quite simply, very badly drafted. Often both.

At best, this means SMSF Members are missing opportunities. **At worst**, it can result in breaches of the Law, additional tax and financial penalties, succession issues and disputes. These shortcomings are even more common in Trust Deeds provided 'off the shelf' or by 'mailbox' providers.

In addition to legislative changes, continual innovation in superannuation has tended to 'age' SMSF Trust Deeds which have not kept up-to-date with those innovations. These Innovations are often derived from an increase in case law (mainly from disputes over the distribution of superannuation death benefits).

Well-drafted SMSF Trust Deeds are continually reviewed to consider ways in which they can be enhanced. Therefore, Trust Deeds that have not been updated, or dated SMSF Trust Deeds, will often fall short of the expectations of trustees and their advisers.

In general terms, we suggest that any SMSF Trust Deed older than five years should be reviewed. And, when a significant change in law occurs, such as in 2017, the SMSF Trust Deed should be revised in any case.

Important Years of Change for Your SMSF

Although there have been a number of incremental changes over the years, there have been 3 important years of change for regulation of SMSFs:

- *1999 Reforms.* This is 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.
- *2007 Reforms.* This is when the *Simpler Super* measures were introduced.
- *2017 Reforms.* This is when, among other things, the *Transfer Balance Cap* measures 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 Reforms once again change the way in which SMSFs operate and represent another instance of when SMSF Trustees should **ensure their Trust Deeds are up-to-date**.

So – What is Missing?

Whether through case law or actual enhancements, some of the areas in which **older Deeds can cause difficulties** for Trustees and Members include:

- Unnecessarily linking the making of a Binding Death Benefit Nomination with the requirements in the SIS Legislation for non SMSFs, effectively making the nomination lapse after three years, unless renewed.
- No indication as to whether a Binding Death Benefit Nomination will be non-lapsing (n.b. the Trust Deed should specifically state that a nomination will not lapse, if that is the intention of the Member, due to passage of time).
- The ability for the SMSF Trustee to borrow in Limited Recourse Arrangements.
- The provision of appropriate powers for the payment of pensions, 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 to protect a Member's interests in the event of their incapacity or death.
- 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.

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In many instances, when attempting to vary a SMSF Trust Deed or change the Trustee of a 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 in a position to attend to the role assigned to it under the Trust Deed.

What About the 2017 Reforms?

With specific reference to the 2017 Reforms, older Deeds may **lack in a number of areas** including:

- The power to create and operate a Transfer Balance Account.
- The ability to *internally* 'roll back' pensions to the accumulation phase.
- The ability to grant a true reversionary pension and tie-breaker when pensions/ nominations are inconsistent.
- 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 that should not have been accepted.
- The Power for the Trustee to pay the various taxes that may be levied, such as the excess transfer balance tax, excess non-concessional contributions tax and similar penalties introduced under the superannuation reform legislation.
- Flexibility in establishing, changing the terms of, and commuting, pensions.
- Flexibility in reclassifying transition-to-retirement pensions.
- The power to transfer reversionary pensions to other funds without commuting to a lump sum.

The **adoption of a modern and well-prepared SMSF Trust Deed now** will provide all of the necessary provisions required by SMSF Trustees, not only in meeting the requirements of the 2017 Reforms, but also adopting other industry innovations.

What else?

Very often when we review a client's SMSF Trust Deed, we notice other very important deficiencies with **profound consequences**. These include:

- Original SMSF Trust Deeds that are **unexecuted or inadequately executed** years after establishment. This threatens the very existence of the SMSF.
- Change in Trustee documentation that is **unexecuted or inadequately executed** years after the change or **fails to comply** with the requirements under the SMSF Trust Deed for a valid change of Trustee. This raises questions of who owns what and in what capacity (as well as a number of other important issues).
- The **lack of complete, well prepared and signed Succession Planning Documentation** such as Death Benefit Nominations or Reversionary Pension Documentation. In addition to the stress and anxiety this can cause when a Member dies, this can result in additional tax, financial penalties, disputes and litigation.

The exercise of reviewing or amending a SMSF Trust Deed often uncovers, and allows us to redress, these far-reaching deficiencies.

About Us

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If you have any queries in relation to the above, or would like to discuss these types of documents and arrangements, please contact **Andrew Baggio** on **8132 5000** or at **andrew@baggiolegal.com.au**.

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