



## Individual vs Corporate Trustee

Statistics released with the Cooper Review show a growing trend for Self Managed Superannuation Funds (SMSFs) to be established with individual trustees rather than a corporate trustee.

According to these statistics, as at 30 June 2009, around 29% of all SMSFs had a corporate trustee. However, for the 2008 and 2009 financial years, nearly 90% of new SMSFs were established without a corporate trustee.

These statistics seem surprising given the many tangible benefits of a corporate trustee and suggest that for a growing number of clients the disadvantages of a corporate trustee continue to outweigh the advantages.

It may also suggest that the advantages of a corporate trustee are not well understood or are not being properly considered by clients and practitioners when a SMSF is established.

Recognising the benefits of a corporate trustee and being able to determine which trustee structure best suits the individual circumstances of your client is an important consideration for SMSF practitioners. In this article we outline a number of issues which should be considered.

### Administrative efficiency

Fund assets are required to be held in the name of the trustee of the fund as trustee for the SMSF. This means that in the case of individual trustees, fund assets should be held in the name of all individual trustees as trustees for the fund.

If there is a change in one or more individual trustees (such as death or divorce), the name shown on the ownership documents (e.g. a title deed) for each fund asset will need to be changed and all the relevant authorities/registries notified.

This can become time-consuming and costly if the fund owns many assets such as a wide range of shares or is often changing individual trustees.

In contrast, if the fund has a corporate trustee and there is a change in directors, there is no need to change the name on the ownership document for each fund asset as there has been no change in the trustee of the fund.

## Cost

Compared to a SMSF with individual trustees, it can be more expensive to set up and maintain a SMSF with a corporate trustee. The cost of establishing a company and registering with ASIC normally ranges between \$600 - \$1200. There is also an ongoing annual cost in the preparation of the company annual review, and the ASIC lodgment fee of \$41.

The costs associated with establishing a corporate trustee do not apply if the client is able to use an existing company as the trustee of the SMSF, although this is rarely in the client's best interest for the following reasons:

- The accounts for the trustee company inevitably become much more complex due to the need to account for its trading activities distinct from its activities as a trustee. This in turn can result in higher accounting fees.
- If all of the company/SMSF assets are held in the same name it may be difficult to distinguish between assets held in the capacity of trustee and assets held beneficially for the company.
- If the company experiences financial difficulty and a receiver or liquidator is appointed, the SMSF fund assets could be at risk.

The definition of a SMSF in section 17A of the Superannuation Industry (Supervision) Act 1993 (SIS Act) imposes strict rules on who can and must be a director of a company which acts as the trustee of a SMSF. The composition of directors for the purposes of complying with section 17A of the SIS Act may be inappropriate or undesirable given the company's non-related SMSF activities.

## Control

As mentioned above, in the case of a single member SMSF, if a company is used as the trustee, the member can be the sole director of the trustee company. Hence the member can have complete control over the signing of documents and investment decisions.

In the event of death, control of the fund passes to the executor or the member's legal personal representative. Importantly, the assets of the fund do not form part of the estate and will be administered separately unless the member has in place a binding death benefit nomination specifying that their superannuation fund balance must be paid to their estate.

In the case of a single member SMSF with individual trustees, the member is not permitted to act alone as the sole individual trustee of the fund. Another individual who is not the employer or employee of the member (unless they are related) must be appointed as the trustee of the SMSF and this individual, has equal control and responsibility for the investment decisions and activities of the SMSF.

In the event of death and in the absence of a binding death benefit nomination, the surviving trustee together with the deceased member's executor or legal personal representative will be responsible for deciding who should receive the deceased member's superannuation balance. In some instances it is possible that the legal personal representative could also be the surviving trustee acting in the capacity of legal personal representative for the deceased trustee.

## Perpetual succession and estate planning

In a two member SMSF with individual trustees, on the death of one member, the single surviving member cannot remain as the sole trustee of the SMSF. Another individual who is not the employer or employee of the surviving member (unless they are related) must be appointed as a trustee of the fund. In some situations it may be difficult to find another individual who is willing and able to take on the responsibility as trustee of a SMSF.

As a large proportion of SMSFs are two member funds comprising a husband and wife, the need to restructure the trustee on the death of one spouse by finding another individual to act as a trustee, is potentially a significant issue for many SMSFs with individual trustees.

In contrast, in a two member SMSF with a corporate trustee, on the death of one member and subject to the constitution of the company, the SMSF can continue as a single member SMSF with a single director trustee company. There is no requirement for another individual to be appointed as a director or join the SMSF as a member.

## Minor members

The ATO considers that a fund with a corporate trustee with one or more members under the age of 18 will not satisfy the definition of a SMSF in section 17A of the SIS Act unless a legal personal representative has been appointed as a director of the corporate trustee in place of the member who is under age 18.

As an individual is not automatically a legal personal representative of another individual simply because they are the parent or guardian of that individual, in the case of a SMSF with a corporate trustee the parent or guardian will need to go through the formal process of appointing a legal personal representative for minor members.

Once appointed, the legal personal representative must then be appointed as a director of the corporate trustee of the SMSF in place of the member who is under age 18.

## Governing rules

In the case of a SMSF with individual trustees, the governing rules which need to be followed by the trustees typically comprise the fund's trust deed and the superannuation legislation. However, in the case of a SMSF with a corporate trustee, an extra layer of complexity is added with the need for the directors of the corporate trustee to also comply with the company's constitution and the Corporations Act 2001.

## Summary

It is important for SMSF practitioners to understand the advantages and disadvantages of each type of trustee structure and be able to apply this knowledge to the individual circumstances of the client. In some situations, for example where there will be minor members in the fund, the only option available to clients will be an individual trustee structure.

In other situations, for example where there is a single member who wants sole control over their fund, the most likely option available to the client is a corporate trustee. However, in most situations practitioners will need to properly identify and assess the advantages and disadvantages of each option before deciding on which option best suits the needs of the client.

Too often the direct costs associated with establishing a company to act as the corporate trustee of a SMSF is the overriding reason why individual SMSF trustees are appointed.

The administration, operational and estate planning benefits of a corporate trustee are often not fully identified or considered. While the set up costs of a SMSF with individual trustees will always be less than a SMSF with a corporate trustee, the administration and estate planning complications and costs which may be incurred by the trustees later on also need to be considered. Only once all of these costs have been considered can the most cost effective option truly be identified.

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