



YOUR GUARDIAN

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Individual vs Company Trustee

In general, there are two choices as to how to appoint a trustee to your super fund:

- Individual trustees; or
- Company trustee (with members acting as directors).

We are often asked by clients to outline the main differences between these two choices. There are benefits of both, and we outline below some issues you should consider when making a decision.

Individual Trustees

Approximately 65% of SMSFs have individual trustees, and, as most funds have husband and wife as members, then it is these people that act as the trustees of the fund.

The balance mainly use a Pty Ltd company as trustee, and appoint themselves as directors of the company.

Often, when a fund has only one member, a company trustee is the only choice, as the law does not allow a single member fund to have a single individual as trustee.

Although a two, three or four member fund could use a company as trustee, the choice to use individuals is often made to avoid extra costs, as there are additional fees associated with setting up and running a company.

However, there are significant advantages in using a company, which may end up costing less in the longer term, as indicated below.

Advantages of Individual Trustees

Setting up a SMSF with individual trustees is quick and simple.

Appointing individual trustees is inexpensive – there are no additional establishment costs, less ongoing annual fees and less paperwork associated with setting up the SMSF.

Single Member Funds

As mentioned above, a single member fund cannot have a single, individual trustee. If a choice is made not to use a company, the member must appoint a second trustee.

From 1 July 2007, the Australian Taxation Office now require SMSF trustees to sign a 'Trustees Declaration'. This is a formal document designed to make trustees accountable for their responsibility to –

- abide by the law;
- fulfill their trustee duties;
- understand investment restrictions in a SMSF;
- understand and adhere to administrative requirements.

This declaration must be retained for 10 years and made available to the ATO upon request (failure to do so may result in penalties).

This increased accountability to the ATO may make finding a relative willing to take on this responsibility difficult.

Trustee Powers

Assuming you can find a relative to take on the responsibilities of a trustee for your fund, then another issue to consider is the control this person will have over your SMSF if you die.

Unless a binding, valid and current death benefit nomination is in place, the trustee is responsible for deciding what to do with your superannuation funds which might include insurance proceeds.

Whilst they should give consideration to your wishes – they are not legally forced to – and in fact, may be able to pay the sum of money to themselves if they wish!

It is important to consider what happens to your super when you die and to know that you can trust your surviving trustee to 'do the right thing'. Unless you have specified that your super to go to your estate, it is not dealt with in your will.

There is certainly an issue of trust that should be considered before selecting your second SMSF Trustee.

Company Trustee

As mentioned, the majority of SMSFs steer away from utilising a company trustee structure due to the costs associated with it.

The cost to establish a company to act as Trustee for a fund varies from \$800 - \$1400, depending on who you engage to assist you. How quickly the company can be established may also vary.

The Company is required to prepare and lodge an Annual Review with ASIC each year at a cost of approximately \$220 per annum, and pay an ASIC lodgement fee of \$212. (The lodgement fee is reduced from \$212 to \$40 for companies who are utilised solely as SMSF Trustee companies).

Occasionally clients ask if they can utilise an existing trading company to act as the SMSF Trustee, to save on cost.

However, we recommend against this as:

- The accounts for the trustee company inevitably become much more complex, having to account for its trading activities separately from its activities as a trustee. This in turn results in higher accounting fees;
- If the company gets into financial difficulty and a receiver or liquidator is appointed – the SMSF fund assets could be at risk;
- There are potential issues associated with identifying the owner of the assets. If all of the company/SMSF assets are held in the same name, how does one distinguish between assets held in capacity of trustee compared with those held beneficially for the company?

In the past, it was considered that a super fund must have a company as trustee to enable retirement benefits to be paid as a lump sum instead of a pension. However, the Tax Office have confirmed that provided the Trust Deed allows, the members can direct the trustees to pay their benefits as a lump sum instead of a pension, regardless of whether there is a company or individuals as trustee.

Advantages of a Company Trustee

Administration

One advantage of having a company trustee is the ability to add/remove members to the fund without changing the names in which the assets are held.

Consider for example a fund that owns many different shares. If the fund has two members and individual trustees, then if a third member is introduced (a son or daughter) then the names that the shares are held in must all be changed to show the third person. If a company acts as trustee, no change is required.

Control for Sole Members

In the case of a single member fund, if a company is used as trustee, the member can be the sole director of the company, and does not need to appoint a relative to act as a joint trustee. 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. Note that the fund assets still 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 super fund balance must be paid to their estate.

Ease for Property Investors

A Company Trustee may be preferred by SMSFs that invest in property.

This is because the company, rather than the Individuals are named on the Certificate of Title. In the event that you need to change the trustee or members of the SMSF (such as on the death of a member or marriage breakdown), there is no need to amend the certificate of title which means you avoid the related costs to register the change of name.

We recommend when selecting your SMSF structure that you speak to your Financial Adviser, for considered advice about your individual situation. If you feel that a change of trustee of your fund would be advantageous, we can arrange that for you.

Can my children be members in my SMSF?

Essentially, anyone 18 years of age and over, who is not under a legal disability can be a trustee of a superannuation fund, unless they are a disqualified person.

If a member of a SMSF is a minor (under the age of 18) and does not have a legal personal representative, the member's parent or guardian may act as a trustee of the fund on the member's behalf.

A parent acting as a trustee on behalf of a minor must also be a member of the same fund. In this scenario, the child is considered a 'member' when determining the number of SMSF members (maximum of 4).

An individual is considered a disqualified person if they:

- Have ever been convicted of an offence involving dishonesty;
- Have ever been subject to a civil penalty order under the SIS Act;
- Are insolvent under administration;
- Are an undischarged bankrupt or;
- Have been disqualified by the regulator.

For more information about trustee rules and regulations, visit <http://www.ato.gov.au/super/content.asp?doc=/content/00102316.htm>

For further information about the articles in this newsletter, please call **Phil Jaquillard** or **Ed Bernard** of our office on **1300 787 576**.

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