

Warning over lost documents

BIANCA HARTGE-HAZELMAN

DIY members who lost key records in the Queensland floods are likely to face an uphill battle ahead of their annual audit and could be closed down, a lawyer specialising in self managed superannuation funds warns.

The SMSF Professionals' Association of Australia said it has sought advice from auditing experts after being contacted by a Brisbane man who lost key compliance and investment records relating to his DIY fund after his home was inundated by floodwaters.

"We understand there is no precedence of this from the Australian Tax Office and we are seeking advice from auditors," SPAA technical director Peter Burgess said.

The man from St Lucia said the destroyed documents included the fund's trust deed, investment strategy, minutes of meetings and details of binding death nominations.

Each year trustees of DIY funds are required to make such key records available for an annual audit for compliance purposes.

Olivia Long, chief executive of DIY administrative provider Super Guardian, said without key documents trustees may be at risk of breaching super rules and face heavy penalties.

"If you don't have key documents and you are audited, a report will be sent to the ATO and the fund will be deemed non-compliant, which means penalties can apply or at worst the fund may have to be shut down," said Ms Long.

In order to prevent a breach, Burgess said that trustees could recreate key documents before the fund was audited.

"The advice we have from independent auditors is most documents can be recreated but there are legal arguments against replacing a trust deed," Mr Burgess said.

"To replace a trust deed you need to get a special order from a judge, which can be an exhaustive process because the fund needs to provide supporting evidence to prove the trust deed existed in the first place," said DBA Lawyer senior associate Bryce Figot.

Mr Figot added the cost and time in replacing a trust deed could be lengthy and expensive.

"That process might cost up to \$60,000 in legal fees and take up to a year after all of the relevant information is compiled and processed," Mr Figot said.

SPAA chairman and auditing specialist Sharyn Long said where there is a delay in receiving the recreated trust deed an audit can still be carried out.

"As part of the audit, the auditor would need to include a qualification paragraph acknowledging they've been unable to verify if the audit has been conducted in line with the absent trust deed," she said.

The other option is for a DIY fund to create a new trust deed, which involves closing the old fund and establishing a new scheme. This is a cheaper alternative but it can be more risky if a legal challenge is mounted.

"The new deed may not hold the same weight as the original deed and because of this the validity of the new deed could be questioned," Figot said.

In a cruel twist of fate, the Brisbane man who is now facing an exhaustive process, had been in the process of handing over his records for keeping at a professional administrative company which specialises in providing support to SMSFs.

"Had his records been transistioned earlier, we would have scanned copies of everything," Ms Long said.