

Setting up a Self Managed Superannuation Fund Individual v Corporate Trustee

When you establish a superannuation fund for a client, one of the first issues to consider is whether the trustee should be a company or a group of individuals. There is no right or wrong answer and this article sets out some of the issues to consider in helping your client to make a decision.

Why is it relevant in the first place?

In order to be eligible for all the tax concessions traditionally associated with superannuation funds, a new fund must formally elect to be regulated by the Superannuation Industry (Supervision) Act 1993 (SIS). This legislation empowers the regulator to impose a number of different types of penalties for breaches (including gaol terms and fines for trustees). Under our constitution, the government only has the power to legislate in relation to particular matters – two of which are “constitutional corporations” (companies) and old-age pensions.

Thus, in order to be regulated under SIS, a superannuation fund must either:

- have a trustee that is a company (and under SIS, the trust deed must actually *require* the trustee to be a company); **OR**
- have the primary purpose of providing old-age pensions (in which case the trustee can be either a company or a group of individuals).

Note that this *doesn't* mean that clients who opt for the second approach (ie, a primary purpose of providing old-age pensions) necessarily have to take their benefits in pension form from their SMSF. The fund can provide the full range of benefits, it must simply ensure that its trust deed states that the primary purpose is to provide old-age pensions.

Note also that clients who decide on one approach initially can change their minds in the future. Sometimes this will require a change to the trust deed but not necessarily. Under our trust deeds, for example, no change is required as both options are accommodated.

However, as with any change in members or trustees of SMSFs, it will be necessary to report the change to the regulator.

Advantages of using a corporate trustee

In some circumstances, it may be appropriate to use a corporate trustee. Corporate trustees have the advantage of:

- *administrative ease when a new member joins.* If a new member joins an SMSF, that person must become a trustee (either by joining the board of the trustee company or becoming one of the group of individuals that acts as trustee for the fund). With a corporate trustee this is straightforward – the relevant ASIC forms are completed, resolutions prepared and the change takes effect. When the trustee is a group of individuals, there is an extra step involved – the names in which all the Fund’s investments are held should be changed to reflect the change in trusteeship. This can be time consuming if the Fund owns a great number of investments. One practical alternative if the Deed permits is to continue to hold the assets in the name of the old trustee as nominee for the new trustee. (Note that our deeds permit this.) This avoids the administrative complexities of changing investment details but can become confusing if there are a number of changes in trustee;
- *single member funds.* A corporate trustee can have a single director which is ideal for clients wishing to establish a fund with only one person involved. If they have individual trustees instead, they must have another person share the trustee responsibilities as it is not possible to have a single individual trustee of a superannuation fund. Whilst that second person does not have to be a member, they do have to be actively involved in the trustee decisions made in relation to the fund;
- *easier to ensure super fund assets are kept separate from individual affairs.* An important requirement of superannuation law is to maintain a clear division between personal and superannuation assets. This can be made easier when the assets are actually owned by different entities (eg, personal assets are owned by the individuals and super fund assets are owned by the trustee company) rather than by the same group of people in different capacities. The issue is particularly relevant where property holdings are involved because the land titles office only records the **owner** of the property, not the capacity in which it is held. It is therefore not possible to tell whether a property is owned by a couple in their own right or as trustees of their SMSF simply by looking at the title deeds.
- *some protection of personal assets in the event of a claim against the trustee.* One of the common arguments in favour of a corporate trustee is asset protection – ie, problems within the Fund which result in a claim on the trustee cannot extend to a claim on the directors’ personal assets (whereas an individual trustee’s assets would be at risk). However, there are two points to note on this issue. Firstly, most deeds (including ours) permit trustees to be indemnified from the assets of the Fund under certain circumstances. This means that the assets of the Fund would be used first in the event of any relevant claim. Secondly, the corporate structure will not necessarily provide protection from the various penalties that can be levied by the courts under SIS (fines, gaol terms etc). SIS is specifically worded to ensure that the regulator is able to pursue any “person” (where person includes a company) involved in a breach of the legislation.

Where a \$2 corporate trustee was involved, the regulator would no doubt pursue the directors of the trustee company rather than the company itself.

Advantages of individual trustees

In other circumstances a group of individuals will be more appropriate:

- *fewer statutory forms and less reporting.* With a group of individuals, there is no need to complete ASIC forms (say, in the event of a change in the trustee group) and ASIC annual returns. Note, however, that these tasks are not particularly onerous and a reduced annual ASIC fee applies for companies which only act as the trustee of a superannuation fund;
- *fewer procedural issues to consider.* The trust deed of a superannuation fund will often set out any particular procedures which must be followed in relation to decision making (for example, any notice periods for the calling of meetings, what constitutes a quorum, whether resolutions can be passed by circulation rather than attendance at a meeting etc). A company will usually also specify these in its Memorandum and Articles. Consequently, when a fund has a corporate trustee, the trustee must ensure that it complies with both the Memorandum and Articles of the company **and** the requirements of the trust deed.
- *less costly to establish.* Unless the client already has a company available to act as the corporate trustee they will need to establish one. This will be an additional expense at the time of establishment although it will not be a significant additional ongoing cost;
- *different penalty unit regime.* Under SIS, fines imposed on trustees, advisors etc are defined in terms of “penalty units”. Each penalty unit is currently worth \$110 – ie, a fine of 1,000 penalty units equates to a fine of \$110,000. In the case of some breaches, SIS gives the courts the ability to levy a higher fine on companies than individuals (the company fine is five times the individual fine). It is unlikely that the regulator would ask the courts to impose a higher fine on a \$2 trustee company (it is more likely to pursue the directors individually). However, in the event of a serious breach, the courts may well fine the corporate trustee directly (at the higher level) if the trustee is (say) a trading entity with significant assets.

Regardless of the trustee structure, the responsibilities of those acting in trustee capacities for a superannuation fund (either individually or as a director of a company) are the same. As a general rule, the choice between corporate and individual trustees will be a matter of personal preference.