

Why you should update your Self Managed Superannuation Fund

The ATO in its "Setting up a self-managed super fund" states on page 12: "As a trustee, you need to make sure the trust deed is regularly reviewed and updated so that it complies with the super laws (including changes to the law) and the members' needs."

What to look out for:

SMSF pre 2009

- compliant with Auditing and Assurance Standards Board (AUASB) Guidance Statement GS 009.
- allowing you to borrow money on a limited recourse basis (Instalment Warrants) under section 67(4A) SIS Act. Sadly, many regimented deeds (even some new ones we have seen lately) actually go out of their way to stop borrowing and charging of SMSF assets. (See the ATO's view here: <http://www.ato.gov.au/superfunds/content.asp?doc=/content/00132054.htm>).
- allowing death benefit nominations to be typed into the trust deed so that they don't expiry every 3 years.
- don't restrict membership – there should be no restriction in your deed as to who can become a member – the rules change and you don't want to miss out.
- don't restrict contributions – old regimented deeds prohibit many classes of people from contributing to your Super. What a waste of time to put in such restrictions. The government, fearful of people running out of superannuation and collapse of the age care pension, are increasing the classes of contributors.

SMSF pre 1 July 2007

- "Plan to Simplify and Streamline Superannuation", from 1 July 2007, once you turn 60 you can take out your Super tax-free, unless you Deed states otherwise (2007).
- New strategies allow you to turn off and then turn on pensions. Some can be converted to accumulation mode. However, some trust deeds require rollovers be paid to other funds, even if you want to continue to hold them in your fund.
- Account-Based Pensions and Transition to Retirement Incomer Streams were released in April 2007. Your deed must allow for their payment. Sadly, many older deeds don't allow for them.
- Compulsory cashing rules are mostly abolished, except for death. However, many deeds still enforce compulsory cashing.
- Estate Planning – more people will now retain wealth in their Superannuation until their death. The Superannuation may well be lost to the wrong people or the tax man. Binding Nominations are required.
- What if by mistake you put in too much money into your Super? Unless you can reject or return the excess funds you suffer a high tax rate. The deed must allow the power to reject and return funds.

SMSF pre 2006: Since 2006, SMSF Deeds need updating because of:

- Thanks to the 2006 Budget SMSF deeds will become shorter and simpler over time. The pension payment sections of old SMSF Deeds are long and laborious. Such complexities are being phased out in the deeds. A lot of complex rules can be removed.
- SMSF deeds less than 6 years old: Many SMSF deeds have a deeming provision to include all the new SIS rules. This helps. Sadly, these provisions operate only on those mandatory issues that SIS requires a SMSF to follow. What if a SIS change is not mandatory? What if the Deed applies stricter terms than required by SIS?
- Since 12 March 2004 it has been considered courageous to operate a SMSF without a complying Product Disclosure Statement (PDS). The PDS contains everything that a trustee is expected to know. If you act for a SMSF (as an accountant, auditor, adviser or lawyer) and there is no PDS then the trustee has a higher chance in successfully suing you. This is based on negligence for your failure to bring everything the trustees needed that the trustee needed to know. The PDS protects the professional advisers as much as it protects each trustee from each other.
- Contribution Splitting – Spouses can split super contributions between accounts or Funds. Your Deed needs to allow this to happen. (November 2005)
- Your Deed should be able to permit minors (people under 18) as fund members.
- What happens if a member is totally disabled? This can be permanent or temporary. You need to have a right to that payment. Power needs to be in the deed so that if a member is totally disabled, then the trustee can pay a benefit provided there are funds available from the member's account or from the proceeds of the insurance policy.

SMSF pre 1999: Since 1999, SMSF Deeds need updating because of:

- New market-linked pensions. (2004)
- Interdependent relationships for beneficiaries. (2004)
- Acceptance of government Co-contributions. (2003)
- Changes to compulsory cashing of benefits rules.
- Changes to contribution acceptance rules. (2004 - Changes to over 65 contribution and benefit payment rules)
- Divorce and super splitting. (2003)
- All members must be trustees. (1999)

When the Australian Taxation Office took over supervising the SMSF funds the most deeds were updated – but not all. Without updates the concessional tax treatment may be lost. (October 1999)

SMSF pre 1995: For deeds last updated from 1995-1999 you need to address these additional issues (as well as the ones above):

- Accepting your wonderful spouse as a member and for contributions. (1997)
- Expanding the in-house asset rules to related parties. (1999)
- Providing for complying lifetime and term pensions. (1998)
- Binding nominations for death benefits (otherwise your son in the SMSF can direct your Super goes to him and not evenly to all your children). If you don't have a "binding" nomination then the nomination form you sign merely expresses your wish to the trustee. The Trustee can decide who gets your super when you die. Sadly some deeds stop the member having any choice. (1999)
- Full preservation of your Superannuation. No taking back out your undeducted contributions. (1999)
- New regulation - ATO takes over looking after SMSFs.(1998)
- Need to include complying term and life-time pensions. (1998)
- Ensuring you get the CGT retirement component. Up to \$500,000 can go into your superannuation CGT free from the sale of business assets. (1997)
- The ever useful expanding of acquisition of asset rules to related parties. (1999)

SMSF pre 1994: Don't point out the "old age" to your auditor. Just update it. You need the above plus:

- Uses of Pensions or Corporations powers.
- Election to become regulated.
- Covenants by the Trustees.
- Allowing you to adopt rules under the SIS Act for compliance.