

Webinar:

# The SMSF Deed



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# Disclaimer

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Today's session

**Trust and SIS laws**

**Rules to manage and operate the fund**

**Keeping up-to-date**

# Trust & SIS laws



# Trust law

An SMSF **must** abide by:

- General trust law
- Legislation, including SISA, SISR, Corporations Act 2001, ITAA 1997 (and earlier), TAA 1953 and other tax and general laws
- The fund's trust deed or governing rules



**'Trust Deed'** not specifically defined within the SIS Act.

## Section 10, SIS Act

Includes a definition of governing rules which implies the trust deed for the purposes of establishing and operating the fund.

*governing rules*, in relation to a fund, scheme or trust, means:

- (a) any rules contained in a trust instrument, other document or legislation, or combination of them; or
- (b) any unwritten rules;

governing the establishment or operation of the fund, scheme or trust.

# Trustee obligations

- Primary obligation of a trustee is to act in accordance with the terms of the trust (i.e. deed)
- Deed sets out **how** the trustee should operate and manage the trust
- Importantly, it **cannot** expand the operation of the law; any statutory provisions, such as legislation, provides information on what a trustee is permitted to do or prohibited from doing by law.



## Trustee liability

*Trustees can be held liable for any wrong doing, particularly where beneficiaries have suffered loss as a result of trustee actions (s.55)*



# Deed requirements

Section 19 of SIS Act outlines the only requirements that must be included within a SMSF deed

## 19 Regulated superannuation fund

### *Definition*

- (1) A regulated superannuation fund is a superannuation fund in respect of which subsections (2) to (4) have been complied with.

### *Fund must have a trustee*

- (2) The superannuation fund must have a trustee.

### *Trustee must be a constitutional corporation or fund must be a pension fund*

- (3) Either of the following must apply:
  - (a) the trustee of the fund must be a constitutional corporation pursuant to a requirement contained in the governing rules;
  - (b) the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions.



## Compliance with super laws

Typically see Deeds stating that the fund must operate in accordance with the 'superannuation laws' or 'relevant laws'.

- 1.10 In accordance with Rule 1.7 and the requirement for the Trustees of the Fund to ensure that the Fund remains a Complying SMSF, the Rules are written as being subject to the Superannuation Laws. Where the Trustee or any other person enters into a transaction, undertaking, agreement, understanding or any other arrangement that has the effect of the Trustee breaching the Superannuation Laws or being deemed a non-complying SMSF by the Regulator as a consequence of the Trustee's or other person's action, the transaction, undertaking, agreement, understanding or any other arrangement is to be rendered to the extent it has breached the Superannuation Laws void ab-initio subject to and conditional upon the Superannuation Laws allowing.

# Covenants

- Statutory covenants exist within s.52B & 52C of the SIS Act that are to be **included** within a fund's governing rules, even where they are not expressly included in the deed or are in conflict of an existing deed
  - e.g. 1 July 2021 change to best financial interest duty (previously best interest duty).

## 52B Covenants to be included in governing rules—self managed superannuation funds

*Governing rules taken to contain covenants*

- (1) If the governing rules of a self managed superannuation fund do not contain covenants to the effect of the covenants set out in this section, those governing rules are taken to contain covenants to that effect.



SISA also goes further to specifically **void** terms of the deed if they are inconsistent with the laws. Therefore, recommended that terms in the deed do not conflict with the statutory provisions.



# General provisions

To ensure the smooth running of the fund, a number of provisions should generally be included (but not limited to):

- Establishment date
- A definition of the 'superannuation laws' or 'relevant laws'
- A compliance clause that stipulates that the deed is to be read in conjunction with the super laws, that the deed is deemed to include any governing rules in order for the fund to be a complying fund, and in the event of any inconsistencies between the governing rules and the law, that the relevant law takes precedence (**Rule 1.7**).
- Details for appointing trustee(s) and members of the fund (**Rule 2 & 3**).
- Details on how proceedings are to be conducted (e.g. unanimous vote, majority, etc)



**Superannuation Laws** means the Commonwealth of Australia Constitution Act 1900, Superannuation Industry (Supervision) Act 1993, the Superannuation Industry (Supervision) Regulations 1994, the Income Tax Assessment Act 1936, the Income Tax Assessment Act 1997, the Income Tax Regulations, the Corporations Act 2001, the Corporations Regulations, the Treasury Laws Amendment (Fair and Sustainable) Act 2016, the Superannuation (Excess Transfer Balance Tax) Imposition Act 2016, the Social Security Act 1991 (C'th), the Social Security Regulations, the Veterans Entitlement Act 1986 (C'th), the Veterans Entitlement Regulations, the Family Law Act 1975, the Family Law Regulations, the Bankruptcy Act 1966, Superannuation (Departing Australia Superannuation Payments Tax) Act 2006, Superannuation (Excess Concessional Contributions Tax) Act 2006, Superannuation (Excess Non-concessional Contributions Tax) Act 2006, Superannuation (Self-Managed Superannuation Funds) Supervisory Levy Amendment Act 2006 and any other law dealing with an Australian Superannuation Fund as amended from time to time.

1.7 Where there is conflict between the Rules and the Superannuation Laws, the Superannuation Laws are paramount unless, at the discretion of the Trustee a breach of the Superannuation Laws by the Trustee of the Fund or Member does not result in a fine, penalty or non-compliance certificate or adverse determination delivered to the Regulator for the Trustee, Fund or Member.

**Smarter SMSF deed**

# Rules to manage & operate the fund





# Trustee responsibilities

## Responsibilities include (but not limited to):

- Remains a complying SMSF
- Hold all assets in behalf of the fund and requirements surrounding the entering into contracts in respect to the acquisition and disposal of fund assets
- Access to member's benefits only where allowed under super laws
- Prepare and regularly review an investment strategy for the fund
- Retain fund records for the prescribed period of time
- Notify the Regulator of changes and events where required by the law
- Not to seek delegation of trustee powers and responsibilities under governing rules unless otherwise permitted.



# Trustee powers

## Details of powers should include (but not limited to):

- Express powers to allow the trustee to lend money or borrow
- Rules for accepting contributions, including in-specie contributions
- Rules for paying benefits, including income streams
- Rules for making different types of death benefit nominations
- Details of who may become a trustee and under what circumstances
- Details on admission or removal of members
- How a fund may be wound up and in what circumstances
- How a deed may be amended or other changes to be made, including any specific requirements of that change/amendment.



**Some older deeds may have references to trustee powers that may have been superseded or removed via current legislation.**



# When do you consult the deed?

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There are a number of key stages of an SMSF that will require the trustees to consult the deed (and possibly consider amending the deed). These include, but are not limited to:

- Any structural changes to the fund, including adding a member, changing the trustee, or winding up a fund
- When a fund wants to borrow to acquire an asset (i.e. LRBA)
- When a member is looking to commence an income stream
- When benefits are to be paid from the fund (e.g. lump sum, rollover)
- When a member wants to complete a binding death benefit nomination
- When considering a member's estate and succession plan



# Structural changes

A fund's deed provides the operational framework for the SMSF. When making any structural changes, it's important to refer to the Deed to ensure that the desired change(s) are permitted.

## Adding a member

- A deed may have **prescriptive rules** in relation to the appointment of additional members
- It may require a potential new member to complete an application in a specific form, sign a product disclosure statement (PDS) or provide a written statement that they agree to be bound by the fund rules.
- If the new members do not comply with the trust deed requirements, the membership may be void.
- Age restrictions within deed required – e.g. QROPS

## Winding up a fund

- There are generally specific requirements for winding up a fund
- Deed may require that written notification to be given to the members, or that members must unanimously agree to wind up the fund.
- It may specify that a fund must automatically be wound up in certain circumstances.

# Structural changes

## Trust Deed amendments

- Some deeds are very specific in relation to when and how they can be amended
- Some deeds may have additional parties that may require approval for any amendment to be made – employer sponsor, founder
  - **NB.** can be removed as part of process
- Failure to obtain approval from all parties may result in any amendments being void – flow on effect to supporting documents too (e.g. BDBNs)
- Deficiencies may also exist due to lost deeds or unsigned, undated deeds.



# Borrowing

## Limited recourse borrowing arrangement

- Initially allowed since September 2007, with legislative amendment required from 7 July 2010 to enter into a LRBA.
- Ability to enter into an arrangement that complies with s67A & 67B of SIS Act.
- Trustee powers to borrow and allow for asset to be held on trust, using custodian arrangement to comply with super laws.
- Specific lenders may also require additional powers and/or provisions to meet the lender requirements.



# Pension commencement

- Changes have occurred to the operating of income streams in July 2007 and again in July 2017.
- Deed will specify the types of pensions that can be paid and the requirements for the income stream to be valid – i.e. trustee resolutions, pensions agreement, etc.
- How prescriptive are the deed rules to pay income streams? Importance of lining up with the pension commencement documentation to avoid challenge in event of death.
  - e.g. Special Rule of Fund – allows for changes to income stream without need commutation
- Important to check deed has provisions for the commutation of pensions, including limitations with death benefit income streams.



Proposed Federal Budget measures on legacy pension conversions are likely to require a deed update due to commutation restrictions that currently exist within the super laws.



# Benefit payments

- Where benefit payments are to be paid out of the fund, it is important that the Deed is checked to ensure that the benefit is permitted.
  - E.g. COVID-19 early release lump sum (compassionate grounds)
- Also important to check the method of payment is permitted – i.e. transfer via in-specie transfer of an asset.
  - **Beware!** Old rules on payment treatment – elections to treat pension payment as lump sums
- May be specific requirements that a member must have ceased employment or attained a particular age prior to a benefit being paid.
  - E.g. QROPS membership age limitat



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# Estate and/or succession planning

- One of the likely areas for litigation involving SMSFs is the payment of super death benefits.
- Significant amount of case law surrounding payment of death benefits.
- Critical that deed for alignment of BDBN with SMSF deed – clear rules that state when the BDBN is binding, whether it needs to be in a particular form, whether additional decisions must be made (i.e. acceptance) or information must be provided to the member, and whether the BDBN is to expire or to be review every 3 years.
- Some deeds continue to mirror the requirements with the super laws (SISR 6.17A), which don't apply to SMSFs ([SMSFD 2008/3](#))





# Voting & decision making

Various options across SMSF deeds regarding the decision making powers of trustees (and voting level for resolution to be passed):

1. Equal voting - one vote per trustee
2. Proportional voting - \$1 dollar of account balance = one vote
3. Other?

**Is the SP constitution aligned in decision making (corporate trustee)?**

- Refer to shareholding within constitution (which may align to above)



***How does the trust deed deal with deadlock in decision making?***

- Does someone have a casting vote (e.g. Chair)?
- If equal voting and deadlock, does voting shares /account balance play a role to break the deadlock



# How a fund deals with these key decisions?

- Getting decision making right is becoming ever more important!
- Smarter SMSF Deed building into deed the concept of **Key Decision** (*defined term*)
- Allows for Trustee(s) & Member(s) to define what a key decision - Smarter SMSF to include a list of items for consideration including:
  - Who can be a Member?
  - Assets to be held within the fund
  - Starting & stopping income streams
  - An event – e.g. loss of capacity (if a member loses capacity, then any decision thereafter is a Key Decision)
  - Any changes of a super interest
  - Death of a Member
  - Appointment of a Replacement Trustee
  - **Will be able to add own options**



# Key decision making for trustees

- A Key Decision will likely require a higher % of approval from the Members (e.g. 75% or unanimous)
  - *Deed default* – resolution passed where more than 50% of votes are in favour of the resolution
- Option to contemplate an alternate voting mechanism (currently votes equal to \$1 per vote based upon Member's Super Interest).
- New form to be added to create Special Rule & Paramount Document to be read in conjunction with the Fund Rules.
  - Allows for existing Funds to amend clause without whole of replacement
- Not just unique to 6 member funds – applies broadly to all SMSFs
- *Similar framework used for Lost Pension Deed, QROPs and Fund Guardian documents*



Drafting currently underway by Chris Hill, Hill Legal - est. September 2021 release

# Keeping the deed up-to-date

- Changes to legislation do not automatically result in a deed requiring amendments to be made.
- Look for prescriptive references within the deed that may be impacted by law changes – e.g. membership limits increasing from 4 to 6 members, or downsizer contribution age changes (proposed).
- Furthermore, the trustee may not have any need to use the resultant opportunity that has arisen from the legislative change.
- However, a regular review of a deed will ensure that the fund remains up-to-date with strategic and investment opportunities, and to best manage any potential risks within the fund.
- Consider reviewing for changes every 3 to 5 years to ensure that the deed remains relevant.



# Key tips for when reviewing a deed

- Ensure that you are familiar with the powers of the Trustee with the deeds being used within your SMSF clients (uniformity of deeds helps!)
- Ensure that you check any death benefit nominations are exactly in accordance with the deed
- Prior to paying a benefit from the fund, or commencing a pension, check the deed to ensure that the type of payment can be made
- Ensure that you are familiar with the successor rules for the fund – who becomes trustee when a member dies or via incapacity
- Arrange for regular reviews of the fund's deed, which may not result in an amendment.



# Smart people learn together



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