5 key decisions in choosing a SMSF Trustee

Individual vs. corporate trustee

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EVERY STEP OF THE WAY

Introduction

When establishing a self-managed super fund (SMSF), one the most important decisions to be made is the type of trustee for your fund. To qualify as a SMSF you can have either individual trustees or a company act as trustee of the fund.

Whichever choice you make, each fund member must play an active role in managing the SMSF because:

- With individual trustees, all members must be trustees; and
- With a corporate trustee, all members must be directors of the company

Watch the Australian Taxation Office's video – SMSF trustees: individual or corporate:

URL: https://youtu.be/YzY8kifTeG4

In making this decision, there are **five key factors** for you to consider when contemplating between individual trustees or a corporate trustee:

1. Understand the fund's member and trustee requirements

The superannuation laws outline very specific requirements that define a SMSF. It is important to note that there are key differences between a fund with individual trustees and a corporate trustee in order to comply with the definition.

Individual trustees	Corporate trustees
Can have a maximum of four members.	Can have a maximum of four members.
Each member of the fund must be a trustee, and each trustee must be a member of the fund (except for single-member funds – see below).	Each member of the fund must be a director of the company, and each director of the corporate trustee must be a member of the fund (except for single-member funds – see below).
A member cannot be an employee of another member (unless they are relatives).	A member cannot be an employee of another member (unless they are relatives).
Trustees cannot be remunerated for their services (except in limited circumstances)	Trustees cannot be remunerated for their services (except in limited circumstances)

Single-member funds

There must be two trustees, meaning you will need to appoint another individual to act as trustee of the fund – they are not a member.	Subject to the rules of the company, the trustee company can have either one or two directors, but no more. The fund member must be either the sole director or one of the two directors.
If the fund member is an employee of the other trustee, the fund member and the other trustee must be relatives.	If there are two directors and the fund member is an employee of the other director, the fund member and the other director must be relatives.

2. Understand the costs with each trustee structure

Regardless of which way you go, there are costs and fees involved in establishing your SMSF. Whilst it may cost a more to set up a corporate trustee, it is important to note that it might be a small price to pay compared to the cost and effort involved in making changes to the ownership of fund assets when there is a change to the membership within the fund (i.e. a new, departed or deceased member).

Individual trustees

This structure is initially suited to those who are more cost conscious as it is typically cheaper to establish a fund with individual trustees.

It is a simpler structure as it does not require a company to be established, not put any additional obligations upon the members as directors to comply with the corporations laws.

Additional costs will be incurred for individual trustees where there is a change in fund membership (adding or removing a member) as the ownership of the fund assets must continue to reflect to names of the registered trustees.

In this instance, the potential fees and hassle associated with such changes may outweigh the upfront cost savings.

Corporate trustees

In addition to the costs of setting up the SMSF, there is also a fee payable to ASIC for the company incorporation.

Each year the company will also have an annual review fee – this is relatively low where the company acts solely as a trustee of the SMSF, but will be higher if the company also performs another function, such as acting as the trustee of a family trust or runs a business.

Where there is a change in fund membership, there is no requirement to alter the ownership of the fund assets as the new and/or departing member will simply be added/removed as a director of the company. This can save on costs at the point in time where any membership change would occur.

Example – changing members

John and Jane are members and trustees of their SMSF. Due to a marriage breakdown, Jane departs the fund and rolls over her benefits to another complying super fund. In addition to considering the trustee structure of his fund, once this decision has been made, John will be required to make changes to the ownership details of all fund assets (e.g. bank accounts, shares, property), along with advising the ATO of the changes to the trustee and member records of the fund. Undertaking these changes is likely to incur costs and a significant amount of time and paperwork.

Where John and Jane were directors of a corporate trustee, no change would be required to the ownership of the fund assets as the company would remain as trustee. In this instance, Jane would resign as a director of the corporate trustee and John would continue to act as a sole director. Whilst there is an initial and ongoing cost of the corporate trustee, having this company in place has saved John significant time and potentially money now in not having to make any further changes to his fund's affairs. The trustees would notify the ATO and ASIC of the change in directors and fund membership.

> *In deciding between individual trustees or a corporate trustee, think about whether you may be expecting a change of members within the fund, such as through marriage, adding children, divorce, incapacity or death.*

3. Ownership and separation of your fund's assets

The title of fund assets must be recorded in the name of the current trustees 'as trustees for' the fund. This is a key legislative requirement to ensure that the money and assets of the SMSF are kept separate from any personal money and assets.

Individual trustees	Corporate trustees
If an individual trustee is removed or another added, you must change the titles of the fund's assets. This can be costly and time-consuming. State government authorities may charge a fee for title changes. On top of this cost, most financial institutions charge fees for amending the titles of the assets within the SMSF (e.g. completing standard transfer forms for changes to listed shares).	Recording and registering assets can be simpler, particularly for changes in membership. When a person starts or stops being a member of the SMSF, they become, or cease to be, a director of the corporate trustee. ASIC and ATO must be notified of the change in director but the corporate trustee itself doesn't change, so the title to the SMSF's assets is unchanged.
There is a risk that fund assets may be intermingled with personal assets. As an individual trustee there is no protection against liability claims which can expose the member's personal assets.	Having a separate corporate trustee reduces the risk of personal assets becoming intermingled with fund assets. As companies have limited liability, a corporate trustee offers greater protection if the trustee is subject to a liability claim. As a director or the company, the individual's liability is typically limited to the assets held within the fund.
Example – correct naming convention John & Jane Smith ATF Smith Family Super Fund	**Example** – correct naming convention Smith Super Pty Ltd ATF Smith Family Super Fund

4. How penalties can apply to the fund

Where a fund has a compliance breach, the ATO has a range of powers to enforce remedial action by trustees along with imposing administrative penalties.

Individual trustees	Corporate trustees
If super laws are breached, administrative penalties are levied on each trustee.	If super laws are breached, administrative penalties are levied on the corporate trustee.
For example, for failing to prepare financial accounts and statements, each trustee would be liable for a $1,800 penalty (10 penalty units), which would amount to $7,200 if there were four trustees.	For example, for failing to prepare financial accounts and statements, a corporate trustee would be liable for a $1,800 penalty (10 penalty units) to which each director is joint and severally liable. This would mean a penalty of $450 each if there were four directors of the corporate trustee.
The value of a penalty unit is currently $180.	The value of a penalty unit is $180.

Individual trustees and directors of corporate trustees are personally liable to pay an administrative penalty from 1 July 2014 if there is a contravention of the various provisions of the Superannuation Industry (Supervision) Act 1993 (SISA).

The ATO may in certain circumstance wholly or partially remit any administrative penalty depending on the circumstances of each case. Administrative penalties may also be imposed on SMSF trustees if they make false and misleading statements to the ATO.

5. Thinking about succession within your fund

There are a range of important issues about the succession of your SMSF, in particular with the death of a member or where they become incapable of making decisions. As a result, the fund should have an appropriate succession plan in place that includes consideration of the fund's trustee structure that deal with various life events that you may be impacted by.

Individual trustees

A fund with individual trustees is not likely to continue to operate as usual when changes in trustees occur, unless an appropriate succession plan has been prepared.

For example, where a member is incapacitated and unable to continue as an individual trustee, their legal personal representative (LPR) needs to be appointed as a replacement trustee to act in their stead.

This will require changes to the ownership of the fund assets and need these changes reported to the Australian Taxation Office (ATO).

Where a member dies, consideration must be given to the appointment of an additional trustee as a single surviving member cannot remain as a sole individual trustee. Super laws allow the fund a period of 6 months following the death of a member to ensure that it continues to qualify as a SMSF.

Corporate trustees

A company continues in the event of a member's death. With a corporate trustee, control of an SMSF and its assets is more certain in the event of the death or incapacity of a member.

In the event of a member becoming incapacitated, the legal personal representative (LPR) will be appointed as a director of the corporate trustee. No change is required to the ownership of the fund assets. The appointment of this replacement director must be reported to the Australian Taxation Office (ATO) and Australian Securities and Investment Commission (ASIC).

Where a member dies, the surviving member can typically remain as the sole director of the corporate trustee or alternatively appoint one other director (non-member).

Example – death of a member

Greg recently passed away and was a trustee and member of his SMSF. He is survived by his wife, Vicki who remains as a member. Following the payment of Greg's death benefit, Vicki will have six months to ensure that the fund continues to qualify as a SMSF.

This means that Vicki needs to consider the existing trustee structure of the fund, by either:

1. Appointing another individual trustee (such as an adult child); or

2. Appointing a new corporate trustee where Vicki could act as the sole director

As a result of having individual trustees, any change above will require a change to the ownership of fund assets along with reporting the necessary changes to the various Regulators. This would incur a range of costs associated with the various changes required.

Where a corporate trustee existed instead of individual trustees, there would be no changes required to the ownership of fund assets and the fund would continue to qualify as a SMSF. There would be very little costs associated with the continued operation of the fund.

> *It has been acknowledged through Government reviews into SMSFs and via the Regulators that a corporate trustee can have distinct advantages of individual trustees from a succession viewpoint.*

Frequently Asked Questions

Can I change from individual trustees to a corporate trustee at a later stage?

Yes, a fund can change their trustee structure at any stage. It is important to remember that the ownership of fund assets and reporting of these changes must occur within the prescribed timeframes.

I already have a company in existence; can I use this to be a corporate trustee of my SMSF?

Yes, however you need to consider various risks involved in utilising an existing company. This includes increasing the exposure of liability risk through dual capacities of the entity, along with ensuring that the rules of the company allow circumstances that are typically unique to a company acting solely as a super fund trustee (e.g. incapacity of a director).

Whilst it may save you money by not incorporating another company, the cost of getting it wrong could far outweigh the cost of establishing a new special purpose trustee company for your SMSF.

What trustee is better when buying property?

Some states do not recognise the existence of a trust (i.e. SMSF) on title, so where the fund has individual trustees exist it will only show the names of those individuals. This could cause future risks for the asset should any of these individuals be exposed to any liability risk, such as defaulting on loans or being sued.

Where the fund has a special purpose corporate trustee this entity will show on the title to the property and remove any risk as to ownership of the property.

I want to borrow to buy property in my SMSF?

If you are looking to borrow to purchase property using a limited recourse borrowing arrangement, it is important to note that most banks will require a company to act as trustee of a SMSF. In some circumstances they may allow for individual trustees, but will reduce the amount that the fund would be allowed to borrow (i.e. reduce loan-to-value (LVR) ratio).

For more information on establishing or administering an SMSF, contact us on 0393701989 or visit http://www.pag-group.com.au.

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