

SMSF DEED UPDATES - DO I REALLY NEED TO UPDATE MY SUPERFUND'S DEED?

The Trust Deed of a Self Managed Superannuation Fund governs the operation of the Fund. If the Trustee of a SMSF is permitted under the Superannuation legislation to undertake particular actions, it is still generally not able to do so unless permitted by the Trust Deed.

Therefore, it is extremely important to ensure that the Trust Deed remains current and that the Trustee has the authority under the Trust Deed to act to the extent permitted by the legislation and be able to comply with any changes.

The ATO also makes it clear that the Trustee must regularly review and update the Fund's Trust Deed in accordance with the law.

What are my risks if I don't keep my deed up to date?

There are numerous instances of when particular Trustee actions have not been permitted due to an outdated trust deed. A list of some of those actions is shown at the back of this brochure. If the Trustees were to undertake such actions without the authority of the Trust Deed they could risk:

- Audit exceptions because of invalid powers (breach of trust) that could lead to ATO investigations and sanctions;
- Loss of tax benefits - for example if they attempt to commence a particular pension without the power in the deed;
- The wrong beneficiaries receiving Death Benefits because of invalid documentation (eg BDBNs being deemed invalid etc);
- If a member or trustee endures a loss as a result of a contravention through not updating the Trust Deed super law provides they may make a claim against others involved which could leave their professional adviser at risk.

There is also the risk that Trustees may inadvertently act on out-dated powers contained in an old Trust Deed. These could be powers which had been removed by a legislative change. Similar risks to the above may apply in such a circumstance.

How do I know if my deed needs updating?

Pre 2007 Deeds

Generally speaking, any SMSF Deed prepared before 2007 needs to be amended to bring it into line with the raft of changes that occurred in the Simpler Super reforms.

Post 2007 Deeds

You should speak to your adviser regarding specific deeds prepared after that date. You may not necessarily require these to be amended although there have been a myriad of legislative instruments, tax determinations, court cases, tax office rulings and legislative changes during this period. The latest version of the Topdocs SMSF Trust Deed is also enhanced with many additional innovations that could benefit the members of your Fund, including the ability to:

- initiate Automatic Reversionary Pensions;
- complete multi-layered Binding Death Benefit Nominations, which do not lapse;
- appoint an additional layer of oversight to ensure the correct disbursement of their benefits, in the form of a 'Member Benefits Guardian';
- hold Property for a particular member in a manner that assists with stamp duty exemptions in various states;
- accept certain overseas pension transfers.

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Some instances where particular Trustee actions may not be able to be undertaken due to an outdated Trust Deed include:

- Complying with the new Transfer Balance Cap requirements including:
 - internal rollbacks from pension to accumulation; and
 - eligibility for additional time to restructure death benefits for a recipient to comply;
- Allowing for CGT relief;
- The mechanics for a Trustee to act when a member reaches the Total Super Balance Cap which prevents any further Non-Concessional Contributions to be made by that Member;
- Adding people (e.g. Spouses and Children) as Members when not permitted under the Trust Deed;
- Commencing (or converting to) Pensions of a type not in existence at the commencement of the Trust Deed;
- Ceasing Pensions when 'internal rollback' is not permitted;
- Commencing Transition to Retirement Income Streams when the Trust Deed stipulates the earliest date for receiving benefits is age 65;
- Entering into a SMSF Borrowing arrangement without the required authorities under the Trust Deed;
- Allowing Members to complete non-lapsing Binding Death Benefit Nominations when either:
 - not provided for under the Trust Deed; or
 - limited in the Trust Deed to lapse after 3 years;
- Accepting Contributions from Members of an amount or type not permitted under the Trust Deed;
- Rejecting or refunding contributions and dealing with excess transfer balance tax, excess contributions, and release authorities;
- Calculating a member's total balance;
- Contribution splitting when not authorised under the Trust Deed;
- Acting in accordance with Judicial Orders (e.g. Family Court) when not empowered to do so; and
- Continuing the Fund although the Deed stipulated a wind up because of 'trigger events' contained in the Trust Deed.

Some instances where the Trustee may inadvertently act on out-dated powers contained in an old Trust Deed where powers have been removed by legislative change include:

- Allowing a Member to remain in the Fund past age 65, when the Trust Deed requires their Benefits to be paid out;
- Using out-of-date standards for the in-house assets test;
- Paying a reversionary pension, on the death of a Member, to an adult child;
- Commencing a Pension of a type no longer permitted;
- A requirement that a Total and Permanent Disability benefit be paid if the Member meets the 'own occupation' definition rather than the 'any occupation' definition for a Condition of Release to be met; and
- A requirement that a Temporary Disability benefit be paid from the total of the Member's balance in the Fund.

More information

Should you have any queries or require more information about SMSF deeds, please contact the team at DMG Financial on 03 5144 4422.