

Trustees Roles and Responsibilities

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- This is not advice. Readers should not act solely on the basis of the material contained in this presentation. Items herein are general comments only and do not constitute or convey advice. Also, changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas covered in this presentation.
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Introduction

- Introduction
- ATO Update
- Sole Purpose Test
- SIS Act Requirements
- Investment Strategy
- Investment Restrictions
- Contributions
- Access to Benefits
- Record Keeping
- Audit Requirements

Introduction

- Continual Education Process
 - Assist Clients utilize the benefits of Self Managed Super Funds
 - Assist clients understand their responsibilities as Trustees of Self Managed Superannuation Funds
 - Compliance
 - Investment options
 - Control & Estate Planning
- ATO / Treasury / Government Review
 - Trustees understanding of responsibilities
 - Protection of retirement savings
 - Regulation / Education of Trustees

Introduction

- Cost of Non-Compliance
 - Fines & Penalties
 - Disposal / realization of assets
 - Becoming a non-complying fund
 - 46.5% tax on taxable components of Fund
 - Imprisonment
 - Disqualified as Trustee of a SMSF
 - Wind up Fund
 - Appoint an Approved Trustee
 - Increased Regulation

ATO Update

- Recent survey conducted found:
 - 21% of trustees have low or low to medium knowledge of their obligations as trustee
 - 30% could not explain what the sole purpose test was
 - 15% of trustees didn't have an investment strategy
 - 25% of trustees were not aware of the investment restrictions that apply to acquiring assets from related parties

Sole Purpose Test

- Question – what is the sole purpose test
 - Fundamental reason for the existence of Super Fund
 - provide superannuation benefits to members on retirement, or to members' dependants when they die.
 - Dual capacity of Trustee & Member
 - Strict standard of compliance
 - Requires exclusively of purpose
 - Higher standard than dominant or principle purpose

Sole Purpose Test

- Contravention
 - Fines
 - Imprisonment
 - Non-Compliance Status

Sole Purpose Test

- Must maintain a SMSF in a manner that complies with the Sole Purpose Test at all times taking into account:
 - Accepting contributions
 - Acquiring and Investing Fund assets
 - Administering the Fund
 - Employing and using Fund assets
 - Paying benefits

Sole Purpose Test

- Concluding that the Test has not been satisfied:
 - The Trustee negotiated for, or sought out a benefit
 - The benefit influenced the decision-making process
 - The benefit is provided by the SMSF to a member / related party at the cost or financial detriment to the SMSF

Sole Purpose Test

- Concluding that the Test has been satisfied:
 - The Benefit is an inherent or unavoidable benefit
 - The Benefit is remote or insignificant
 - The Benefit is provided by the Trustee on arm's length commercial terms
 - All the activities of the SMSF are in accordance with the covenants set out in section 52.
 - All the SMSF's investments and activities are undertaken as part of or are consistent with a properly considered Investment Strategy

Sole Purpose Test

- Linked to Investment Strategy
 - The Sole Purpose Test is particularly concerned with how a Trustee of a SMSF came to make an investment, or undertake an activity.
 - a contravention of the sole purpose test is likely to arise if there is no retirement purpose behind a fund's investments.
 - if the funds investments are undertaken as part of a properly considered and formulated strategy and the investments comply with the arm's length and other investment rules, it is unlikely to cause the fund to fail the sole purpose test unless exceptional circumstances exist.

SIS Act Requirements

- Act honestly in all matters concerning fund
- Exercise same degree of care, skill and diligence as an ordinary prudent person in managing the fund
- Act in best interest of fund beneficiaries
- Keep money and assets of the fund separate from other money and assets



SIS Act Requirements

- Section 17A defines a SMSF
- A fund is a SMSF if:
 - It has a trust deed that meets SIS Act
 - Has four or less members
 - Each member is a trustee/or director of corporate trustee
 - No member is an employee of another member unless related
 - No trustee / corporate trustee receives any remuneration for services

SIS Act Requirements

- If individual trustees, must have at least two trustees who also must be members of the fund
- Single Member Funds
 - Corporate trustee - sole director of company

Investment Strategy

- The trustees are required to formulate an investment strategy that regards the whole circumstances of the fund to include the following under s52(2)(f):
- The *risk* involved in making, holding and realising the asset and the likely return from the funds investments having regard to the funds objectives and cash flow requirements;

Investment Strategy

- The composition of the funds investments as a whole, including the extent to which the investments are *diverse*, or involve the fund being exposed to the risks from inadequate diversification;
- The *liquidity* of the funds investments having regard to the cash flow requirements, i.e. pension phase; and
- The ability of the fund to discharge its existing and prospective liabilities.

Investment Strategy

- Important when formulating the investment strategy that it meets the sole purpose test
 - providing retirement benefits for members
- Investment strategy must be monitored
- Penalties for not having investment strategy in place
 - Fund will be in breach of SIS Act (Reg 4.09)
 - Fined, non complying status

Investment Restrictions

- In House Assets
- Restrictions on lending and providing financial assistance
- Acquisition of assets from related party
- Restrictions on borrowings
- Investments to be made and maintained at arms length
- Trustees not to give charge over an asset

In House Assets

- An asset that is a loan to, or investment in a related party of fund, an investment in related trust, or asset subject to a lease, or lease arrangement between trustee and related party
- Exemptions:
 - Business Real Property (lease between trustee and related party)
 - Widely held unit trust
 - Property owned by SMSF and related party as tenants in common that is not subject to lease between trustee and related party
 - Non geared entities

In House Assets

- The Trustees must:
 - Limit in house assets to maximum of 5% of market value of total assets at year end
 - Are prohibited from making or acquiring an in house asset that would cause total in house assets to exceed 5% in house asset ratio limit
- If exceed 5% will be a reportable breach
 - To rectify, trustees must set out a plan to dispose of the asset

Lending

- SIS Act includes two provisions that restrict when a SMSF can provide loans to a related party:
 - prohibits funds from providing loans or financial assistance to a member of a fund or a relative
 - In house asset provisions in Part 8 providing loans to related entities
- SMSF Ruling 2008/1 provides ATO view of lending restrictions

Related Parties

- Section 66 of SIS Act prohibits trustee from acquiring assets from a related party
- Definition of related party are members of super fund, relatives of the members and any partnership, company or trust a member or relative controls
- Exceptions
 - Can acquire listed securities at market value
 - Can acquire business real property (refer ruling SMSFR 2008/D3)
 - Non Geared Unit Trust

Borrowing

- SMSF must not borrow except in limited circumstances:
 - To make a payment to a beneficiary - limited to 10% of fund assets and period must not exceed 90 days;
 - To meet settlement of security transactions - limited to 10% of fund assets and the period must not exceed 7 days
 - Borrowing via the instalment warrant arrangement

Arms Length

- Investments by fund must be made and maintained on a commercial basis:
 - Purchase and sale of funds assets must be at true market value;
 - Income from assets should always reflect true market rate of return

Contributions Limits

- Concessional Contributions
 - \$50,000 per year (transitional arrangement if over 50 \$100,000 per year up to 2012)
- Non concessional Contributions
 - \$150,000 per member per year or \$450,000 over three years
 - After 65 \$150,000 per year provided pass work test
- Pass work test over 65
 - 40 hours in 30 days



Contribution Limits

- Self employed can claim a full deduction provided they satisfy
 - 10% rule (less than 10% assessable income and reportable fringe benefits is attributable to employment)
- If contributions made in specie must be at market value (arms length)
 - Risk of excess contributions - assessed greater than transfer value
- Also, be careful of payments made on behalf of super fund (contributions)

Excess Contributions

- Concessional - Excess Concessional Contributions Tax of 31.5%
 - Gross contribution will be assessable toward non concessional cap
 - For fund to pay tax they need to have received authority within 90 days from date of notice;
 - Fund has 30 days to pay tax;
 - If fund doesn't receive notice they can't release money and individual would be required to pay tax

Excess Contributions

- Non concessional- Excess Non Concessional Contributions Tax of 46.5%
 - Super Fund must pay tax
 - Must receive authority within 21 days to release money to pay tax

Access to Benefits

- Must meet preservation age and condition of release to access benefits Reg. 6.01
 - Retirement
 - Death
 - Permanent incapacity
 - Attaining age 65
 - Termination of gainful employment
 - Temporary incapacity
 - Severe financial hardship
 - Compassionate grounds

Access to Benefits

- ATO will penalise for early access to super
 - Reported as a breach in fund return
 - Penalties for individual/member
 - Fully assessed in individual return and marginal tax rate plus medicare levy
 - Penalties for tax shortfall if not correctly reported
 - Penalties for a trustee
 - Trustees can be disqualified
 - Penalties of up to \$220,000 and jail term of up to five years for individual trustees, or fines of up to \$1.1m for corporate trustees
 - Penalty SMSF - face non complying status - fund taxed at highest marginal tax rate

Access to Benefits

Individual Born

Preservation Age

Before 1 July 1960	55
01/07/60 to 30/06/61	56
01/07/61 to 30/06/62	57
01/07/62 to 30/06/63	58
01/07/63 to 30/06/64	59
After 30/06/1964	60

Pensions

- Account Based
 - From 19th September can no longer commence allocated pensions and market linked pensions
 - Minimum amount to pay based on age
 - No Maximum
 - Pension over 60 tax free
 - Cannot add capital to account
 - Deductible amount proportioned based on percentage tax free

Pensions

- Transition to Retirement
 - Can commence pension from age 55 whilst still working and contributing to fund
 - Maximum amount of 10%
- Convert Allocated to Account Based Pensions (not classed as commutation)
 - Need to be documented

Pensions

<u>Age</u>	<u>Percentage Factor</u>
Under 65	4%
65-74	5%
75-79	6%
80-84	7%
85-89	9%
90-94	11%
95 or more	14%

Pensions

- Must meet minimum requirements - pension must be paid by cash
- Consequences of not meeting minimum requirement:
 - Fund not in pension phase and pension payment treated as lump sum
 - Lump sum may be taxable
 - Earnings in fund taxable
 - Caution- TRIP not allowed to take lump sums

Death benefits

- Can be paid to death benefit tax dependant and non tax dependant death benefit, or estate in accordance with SIS Act and trust deed;
- Some points to consider:
 - Is there a valid binding nomination in place;
 - What form is current benefit: accum. v pension;
 - What are the taxation components;
 - Is benefit being paid to death benefit dependant
 - If paid as lump sum what assets need to be sold, or transferred;

Death Benefits

- A dependant for super law purposes is:
 - A spouse
 - A child
 - An interdependent
 - Any financial dependent
- A death benefit dependant for tax law purposes is defined in ITAA 1997 Section 302-195 is a:
 - Spouse or former spouse;
 - A child aged less than 18;
 - Any person where an inter dependency relationship existed prior to death;
 - Any person who was financially dependent on the deceased just prior to death

Death Benefits

- Non tax dependant can only receive benefit in form of a lump sum and not a pension
- Lump death benefit paid to non tax dependant:
 - Exempt Components: - tax free
 - Taxable component: 16.5%

Record Keeping

- Assets held in correct name
 - trustees atf name of super fund
- Require:
 - All bank statements
 - Holding Statements
 - Dividend Statements
 - Tax Statements
 - Invoices in relation to any expenses
 - If purchase property
 - Purchase documentation
 - Transfer forms
 - Title
 - Declaration of trust

Record Keeping

- Minutes in relation to large investments made in accordance with investment strategy
- Updated investment strategy
- Records of change of trustees etc
- Updated Deed

2008 Tax Returns

- New ITR Questions
 - Has SMSF had financial dealings with related parties
 - Have in specie contributions been made
 - Has SMSF lent money to members or relatives
 - Have investments been made on arms length basis
 - Has SMSF allowed access to benefits before retirement
 - Have trustees paid themselves for services
 - Have any of the trustees become disqualified during the year
 - Have all assets been appropriately secured through appropriate documentation as owned by the SMSF

Financial Reports – Trustee Responsibilities

- The accounting records are to be kept in such a way as to enable statements and returns to be conveniently and properly audited (S35A(1)(d))
- Must ensure that the fund lodges a return with the ATO within the prescribed period:
 - New Funds by 28 February
 - Funds that did not lodge prior year by 30 June – due 31 October
 - Most other Funds by 15 May

Penalty for contravention \$5,500 up to \$11,000



Audit – Trustee Responsibilities

Appointment of an Auditor

- Section 35C(1) requires each trustee to ensure that an approved auditor is appointed for each year of income. Appointment must be made no later than 30 days before the due date for provision of an audit report which is the day before the return is due to be lodged with the ATO

Compliance with Auditors request for Documents

- Documents **must** be supplied within 14 days of written request by the auditor

Penalty for contravention – Imprisonment for 2 years



Auditor Responsibilities

Completion of Audit

- The auditor *must* give the report to each trustee of the entity within the specified period after the end of the year of income i.e. day before the return is due

Penalty for contravention – Imprisonment for 6 months and/or a penalty of \$5,500

Note: The annual return to the ATO for 2008 requires the date of issue of the audit report.



What is Audited?

The audit of a superannuation fund has two components being:

- The provision of an opinion on the financial statements
- Review of compliance with the Act and Regulations

What is Audited?

Audit of Compliance with the Act includes review of:

- Structure of the fund (members/trustee's etc.)
- Sole Purpose Test
- Investment Strategy and Investment restrictions
- Contributions and Benefit Payments
- Administrative Obligations (record keeping, minutes etc.)



Contraventions

Contraventions of the Act

As soon as practicable after becoming aware of the contravention the auditor must:

- (a) tell a trustee of the entity about the matter in writing; and
- (b) if the contravention is of such a nature that it may affect the interests of members or beneficiaries of the entity — tell the Regulator (ATO) about the matter in writing.

Contraventions

- New Funds (less than 15 months old) – all contraventions must be reported to the ATO
- For other funds a materiality test is required as prescribed by the ATO

ATO Review of Contraventions

ATO Superannuation Compliance Results to 31 December 2006

Auditor Contravention Reports

- Over 10,000 received
- 50% rectified when lodged

Breaches reported

- Loans to Members and relatives (18%)
- Assets not in the name of the Fund (16%)
- In-house assets (14%)
- Documents requested by auditor not provided (11%)
- Borrowings (9%)
- Sole Purpose Test (8%)



Audit of SMSFs

ATO views of SMSF auditors

- Financial audit are conducted well
- Compliance review is not sufficient
- Knowledge of SIS deficient in some auditors
- Some are not issuing engagement letters or obtaining representations

Tax Office Reviews

2007 Financial Year

- Removed complying status from 4 funds
- Disqualified 9 trustees
- Wound up 4 funds
- Accepted 72 enforceable undertakings from trustees to rectify breaches

ATO Auditor Reviews

- Expect to review around 7% of approved auditors on an annual basis
- Review to include examination of working papers of one to three self managed superannuation funds
- Minor breaches to be subject of ATO phone audit
- Funds with significant breaches will be subjected to a detailed investigation

