

## **Vincents** *Insights*

### **Individual vs corporate trustee**

In general, there are two choices as to how to appoint a trustee to your super fund:

- Individual trustees; or
- Company trustee (with members acting as directors).

There are benefits of both; however there are significant advantages in using a company, which may end up costing less in the longer term. We outline below some issues you should consider when making a decision.

### **Individual trustees**

#### ***Advantages of individual trustees***

- Individual trustees are less costly to establish as they are regulated under the pension powers within Australia's Constitution and are subject only to the SMSFs' trust deed and the superannuation law. Therefore, there are no Australian Securities and Investment Commission (ASIC) forms to complete, no ongoing ASIC reporting and no need to comply with a company constitution. There are also less ongoing annual fees and less paperwork associated with the Fund.

## ***Disadvantages of individual trustees***

- A single member SMSF with individual trustee structure must have a minimum of two trustees, where one is the sole member and trustee with another person being the second trustee (over the age of 18).
- If the SMSF has two members with two individual trustees and then if one dies, the surviving member will not be able to continue with the SMSF as the sole trustee and sole member. Another individual would need to be appointed as the second trustee.
- All assets must be held in the names of all individual trustees as trustees for the SMSF (e.g. Allie Smith, Bob Smith and Colin Smith as Trustees for the ABC Super Fund). If there is a change in individual trustees, the ownership documents of the assets need to be re-registered. Therefore, every time an SMSF member leaves the fund, the remaining individual trustees need to engage a solicitor to prepare relevant documents. The documents must formally remove the departing trustee and change the ownership of all SMSF assets.
- The SMSF must pay superannuation benefits in the form of a pension. The SMSF can pay superannuation benefits as lump sums, if it specifically allows for it in its trust deed
- In most Australian states and territories, only legal ownership of real estate can be recorded with the titles office. This means, individual trustees are typically registered with the titles office in the same way they would be registered if they owned the land personally. Therefore, where an individual becomes a bankrupt, creditors may attempt to gain access to the property. The individual will have to prove the property held in their name is actually held in their capacity as a trustee and therefore it is off limits to creditors. Proving this can be a difficult and time-consuming process.
- An individual who acts as trustee exposes their personal assets to risk if they incur any liability as trustee of an SMSF. For example, if the SMSF owns a property and a personal injury claim is made against the owner of the property, and then all assets of the individual owner are potentially at risk to meet that claim.

## **Company trustee**

The majority of SMSFs steer away from utilising a company trustee structure due to the costs associated with it.

The cost to establish a company to act as Trustee for a fund is approximately \$1,100, and Vincents can arrange a company for you within 24 hours.

The Company is required to prepare and lodge an Annual Review with ASIC each year at a cost of approximately \$220 per annum, and pay an ASIC lodgement fee of \$236. The lodgement fee is reduced to \$44 for special purpose companies. A special purpose company is a company which has the sole

function of being the trustee of a regulated SMSF and it does not perform any other function. A trading company or multi-purpose company, on the other hand, performs other functions such as running a business or acting as trustee of a discretionary family trust. There is also no need for financial statements to be prepared for a special purpose company – only the SMSF needs to prepare financial statements. ASIC also provides a discount for paying company fees ten years in advance. The fee is, however, non-refundable. ASIC also imposes penalties if the annual ASIC fee is paid past the due date

Occasionally clients ask if they can utilise an existing trading company to act as the SMSF Trustee, to save on cost.

**However, we recommend against this as:**

- The accounts for the trustee company inevitably become much more complex, having to account for its trading activities separately from its activities as a trustee. This in turn results in higher accounting fees;
- If the company gets into financial difficulty and a receiver or liquidator is appointed – the SMSF fund assets could be at risk;
- There are potential issues associated with identifying the owner of the assets. If all of the company/SMSF assets are held in the same name, how does one distinguish between assets held in capacity of trustee compared with those held beneficially for the company?

***Advantages of a corporate trustee***

- A single member SMSF with a corporate trustee structure does not require a second director. It can operate with the sole member being the sole director and member of the SMSF.
- All assets belonging to the SMSF must be in the name of the corporate trustee as trustee for the SMSF (e.g. ABC Pty Ltd as Trustee for the ABC Super Fund). If there is a change in directors of the company, the ownership documents of assets do not need to be changed. However, ASIC needs to be advised when directors' details are changed.
- If the SMSF has two members with a corporate trustee where both members are directors of the company and one director dies the surviving member can continue with the SMSF as the sole director and member.
- A corporate trustee makes it easier to add, or remove, a member to the SMSF by simply adding or removing them as a director. This means there is no need to make a change to the trustee of the SMSF
- The SMSF can pay superannuation benefits in the form of a lump sum or pension.
- As a corporate trustee is subject to limited liability, it may provide greater protection for its members' personal assets. For example, if the SMSF owns a property and a personal injury claim is made against the owner of the property; the claim would be limited to the assets of the

SMSF. However, the corporate structure will not necessarily provide protection from penalties under the SISA as the ATO is able to pursue any person involved in a breach of the superannuation legislation.

- As a company has an indefinite lifespan — that is, it will not come to a natural end by itself — a corporate trustee is more reliable in controlling the SMSF in the circumstances of the death or incapacity of a member.
- A Company Trustee may be preferred by SMSFs that invest in property.
- This is because the company, rather than the Individuals are named on the Certificate of Title. In the event that you need to change the trustee or members of the SMSF (such as on the death of a member or marriage breakdown), there is no need to amend the certificate of title which means you avoid the related costs to register the change of name.
- If an SMSF wishes to borrow money under a limited recourse borrowing arrangement, most major lenders will generally insist that the SMSF has a corporate trustee, even though it is not a legislative requirement.

### ***Disadvantages of a corporate trustee***

- The costs of establishment and annual fee.
- If you are using a company to act in multiple capacities (e.g. acting as a trustee for the SMSF as well as running a business) and the business goes into receivership or liquidation, creditors may sue the company if the assets of the SMSF appear as the company's assets. Convincing liquidators and creditors that an asset is held as part of an SMSF can be time-consuming and expensive unless the company is a special purpose company.

## **Single member funds**

As mentioned above, a single member fund cannot have a single, individual trustee. If a choice is made not to use a company, the member must appoint a second trustee.

From 1 July 2007, the Australian Taxation Office now require SMSF trustees to sign a 'Trustees Declaration'. This is a formal document designed to make trustees accountable for their responsibility to:

- Abide by the law;
- Fulfill their trustee duties;
- Understand investment restrictions in a SMSF;
- Understand and adhere to administrative requirements.

This declaration must be retained for 10 years and made available to the ATO upon request (failure to do so may result in penalties). This increased accountability to the ATO may make finding a relative willing to take on this responsibility difficult.

## Trustee powers

Assuming you can find a relative to take on the responsibilities of a trustee for your fund, then another issue to consider is the control this person will have over your SMSF if you die.

Unless a binding, valid and current death benefit nomination is in place, the trustee is responsible for deciding what to do with your superannuation funds which might include insurance proceeds.

Whilst they should give consideration to your wishes – they are not legally forced to – and in fact, may be able to pay the sum of money to themselves if they wish!

It is important to consider what happens to your super when you die and to know that you can trust your surviving trustee to 'do the right thing'. Unless you have specified that your super to go to your estate, it is not dealt with in your will.

There is certainly an issue of trust that should be considered before selecting your second SMSF Trustee.

## Conclusion

From the above points it appears that SMSF trustees have no other choice but go straight to a corporate trustee, BUT, I can appreciate the view of setting up an SMSF for a husband and wife or even a family with individual trustees due to one simple point – the number of times a change of trustee for a SMSF of this nature should occur is minimal — which means the cost and efficiency advantages of having a corporate trustee would not be an issue. Which leads me to my final point.... the trustee should consider the overarching purpose of their SMSF before deciding on how it should be structured because as with most decisions in life – most often than not — common sense prevails.

## How to change your SMSF trustee?

If you have decided to change the trustee of your SMSF, then contact us and we can arrange the change for you.

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