



SMSF

Company Trustee vs Individual Trustees

Selecting the right type of trustee is an important step in establishing a Self Managed Superannuation Fund (SMSF). There is no right or wrong answer as what may suit you may not suit your neighbour! So it is important to look at your options and make an informed decision that is right for you! It is also important to note that you can change the trustee of your fund if needed in the future.

The Cooper Review statistics show a growing trend for SMSF's to be established with individual trustees rather than a corporate trustee. These statistics suggest that for a growing number of clients, the disadvantages of a corporate trustee outweigh the advantages, *but* they may also suggest that the advantages of a corporate trustee are not well understood or may not be properly considered when an SMSF is established.

The major disadvantage of a corporate trustee is the up-front cost of establishing the company, however there are longer-term benefits of having a company which may outweigh the extra cost. Recognising the benefits of a corporate trustee and being able to determine which trustee structure best suits your circumstances is important and there are a number of issues which should be considered when deciding on this matter.

Issues to Consider:

- Administrative Efficiency
- Liability Issues
- Borrowing
- Cost
- Control
- Perpetual Succession & Estate Planning
- Minor Members
- Governing Rules of the SMSF

Administrative Efficiency

Fund assets are required to be held in the name of the trustee of the fund. Where a fund has individual trustees, this means in the name of ALL individual trustees as trustee for the fund. If there is a change in one or more trustees, then the name shown on the ownership documents (such as the title deed) for each fund asset will need to be changed and all of the relevant authorities/registries notified. This can be time consuming and costly if the fund owns many assets, such as a wide range of shares, or if often changing individual trustees.

However, if the fund has a corporate trustee, then there is no need to change these ownership documents for each asset as there has been no change to the trustee. All that is needed is for the company's directors to be updated.

However, with individual trustees, there are fewer statutory forms & less reporting as there is no need to complete the annual ASIC form.

Liability Issues

If an individual trustee suffers any liability, the trustee's personal assets may be exposed. Trustees of SMSF's are generally prohibited from borrowing but liabilities can still arise – for example, where a contractor engaged to repair a rental property suffers an injury and sues the trustee for damages. As companies are subject to limited liability, a corporate trustee will remove the risk that an individual trustee suffers a personal liability in these cases.

However, it should be noted that as with any company, the courts may still impose penalties that may be attributed to the directors instead of the company and the director can still be found personally liable in some cases.

It should also be noted that there is a different penalty regime under SIS, which is harsher to corporate trustees. However, if there are no serious breaches of the legislation then you are not going to incur these penalties!

Borrowing

Often if an SMSF wishes to borrow under an instalment warrant arrangement, the lender will insist that the SMSF has a corporate trustee

Cost

Compared to an SMSF with individual trustees, it can be more expensive to set up & maintain an SMSF with a corporate trustee. The cost to establish a company initially ranges from around \$600-\$1200 including the ASIC fee to register the company. Then there is an annual fee of \$41 to lodge the annual return with the ASIC as well as any other fees in relation to the cost involved in preparing this documentation.

The initial establishment cost for a company do not apply when an existing company is used, however this is rarely the best option for the following reasons:

- The accounts for the existing company inevitably become more complex due to the need to account for its trading activities distinctly from its activities as trustee, which can result in higher fees
- All of the company/SMSF assets are held in the same name and this can make it difficult to distinguish easily between assets held in trust for the fund and the other assets of the company
- If the company experiences financial difficulty and a receiver or liquidator is appointed, the fund's assets could be at risk
- The *Superannuation Industry (Supervision) Act 1993* (SIS Act) imposes strict rules on who can and must be a director of a company which acts as trustee of an SMSF. This may be undesirable or inappropriate given the company's non-related SMSF activities

As was noted above, it can be costly to arrange for the change of all of the fund's investments upon change of trustees where there are individual trustees. This is avoided by the use of a corporate trustee. There is not only the possible monetary cost of getting this completed but there can also be an emotional cost – the joy of dealing with the various Registries and government agencies (where applicable) to have the details changed can be most painful!

In addition, it should be noted that where the fund has individual trustees and there is a change to the trustees, this usually requires a change to the trust deed and a solicitor would usually prepare a deed of appointment and removal of trustees for the fund – which is not free!

Of course, ALL changes to a fund's trustee must be reported to the regulator – which in the case of SMSF's is the ATO.



Control

In the case of a single member SMSF, if a company is the trustee, the member can be the sole director of that company. This provides the member with total control over the signing of documents and the investment decisions of their fund.

In the event of death, control of the fund passes to the executor or the member's legal personal representative (LPR). This is important as the assets of the fund do **not** form part of the estate of the person and will be administered separately, unless the member has a binding death benefit nomination (BDBN) specifying that their superannuation balance must be paid to their estate.

In the case of single member funds with individual trustees, the member not permitted to act as sole trustee of the fund. Another person who is not the employer or an employee of the member (except if they are related) must be appointed as the trustee of the fund and this person has equal control and responsibility for the investment decisions and activities of the SMSF.

In the event of death and in the absence of a BDBN, the surviving trustee together with the deceased trustee's executor or LPR, will be responsible for the administration of the deceased member's superannuation account balance. In some instances it is possible that the LPR could also be the surviving trustee acting in their capacity as LPR for the deceased trustee.

Succession & Estate Planning

In a two- member fund that has a corporate trustee, upon the death of one member, the fund can continue as a single member SMSF (subject to the constitution of the company). There is no requirement to appoint another person as a director or to join the fund as a member.

Contrast this to a two-member SMSF with individual trustees, where upon the death of one member, the surviving member cannot remain as the sole trustee. Another person must be appointed as trustee who is not an employer or employee of the other person (unless they are related). In some situations, it may be difficult to find another individual who is willing to take on the responsibility as trustee of an SMSF.

As a large number of fund's are two-member fund's comprise of husband & wife, the need to restructure the trustee upon the death of a member is potentially a significant issue.

Companies and SMSF's have an indefinite life span and a corporate trustee can make control of the fund more certain and the company shares can be arranged to ensure that control of the company is passed in line with the deceased shareholders estate planning goals.

Minor Members

The ATO considers that a fund with a corporate trustee with one or more members under the age of 18, will not satisfy the definition of an SMSF in section 17A of the SIS Act unless an LPR has been appointed as a director of the corporate trustee in place of the member who is under 18.

An individual is **not** automatically an LPR of another individual simply because they are a parent or guardian of that individual; this means that the parent or guardian will have to go through the formal process of appointing an LPR for any minor members. Once appointed as LPR, they are then appointed as director of the company on behalf of the minor.



In contrast, an SMSF with individual trustees with minor members will satisfy the definition of an SMSF by virtue of paragraph 17A(3)(c) of the SIS Act, which allows a parent or guardian of a member who is under 18 years of age to be a trustee in the place of that minor member.

Governing Rules

In the case of an SMSF with individual trustees, the governing rules typically comprise of the fund's trust deed and the superannuation legislation. However, a corporate trustee adds an extra layer of complexity with the directors of the trustee to also comply with the *Corporations Act 2001*.

Lump Sum vs Pension

An SMSF with a corporate trustee can pay benefits as either pensions or lump sums. Where the fund has individual trustees, lump sums are only payable on commuting a pension. The member must surrender their pension entitlement if they wish to obtain a lump sum (as an SMSF with individual trustees must have its primary purpose of paying a pension). You cannot simply pay a lump sum benefit where there are individual trustees and extra paperwork is needed to evidence the pension entitlement first being requested and then being surrendered. This is a controversial issue and currently the regulator has indicated they will accept lump sum payments from individual trustee funds, however, should the regulator interpret this section of the legislation literally, it may indicate that if a member wants to take lump sum payments, that the trustee of the fund would need to be a company.

It is important to understand the advantages & disadvantages of each type of trustee to ensure you make the right decision. Too often the direct cost involved is the determining factor rather than the administrative, operational and circumstances involved. Only by considering all of the pros & cons can an informed decision be made.

Regardless of the trustee structure chosen, the responsibilities of those acting in a trustee capacity (either individually or as a company director) are the same. As a general rule, the choice between corporate and individual trustees will be a matter of personal preference. Once you have decided on a trustee structure that suits your circumstances, you may find the Trustee Decision Tree & Compliance Check flowchart (below) useful.

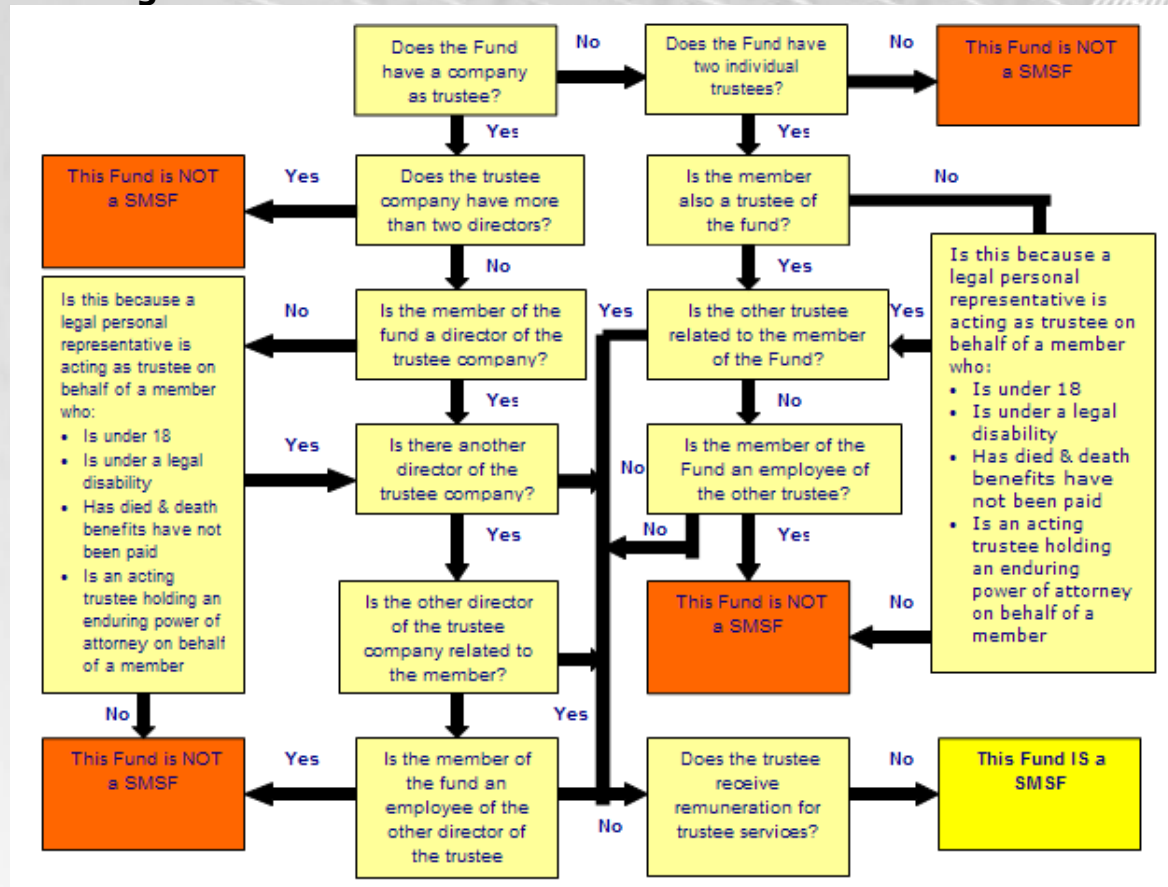
Please note that the information above is of a general nature and is not intended to be comprehensive nor does it constitute specific advice. Always seek independent financial advice before making decisions.



Always remember that we are available to assist our clients with any questions regarding self managed superannuation funds. Please feel free to email your questions to our office or to give us a quick call if you are unsure of any actions surrounding your fund. Please also inform us of any topics you would particularly like to see in future newsletters!

Trustee Decision Tree & Compliance Check

For Single Member Funds



For Funds with more than one member

