FACT SHEET

SMSF trustee structure – individual or corporate?

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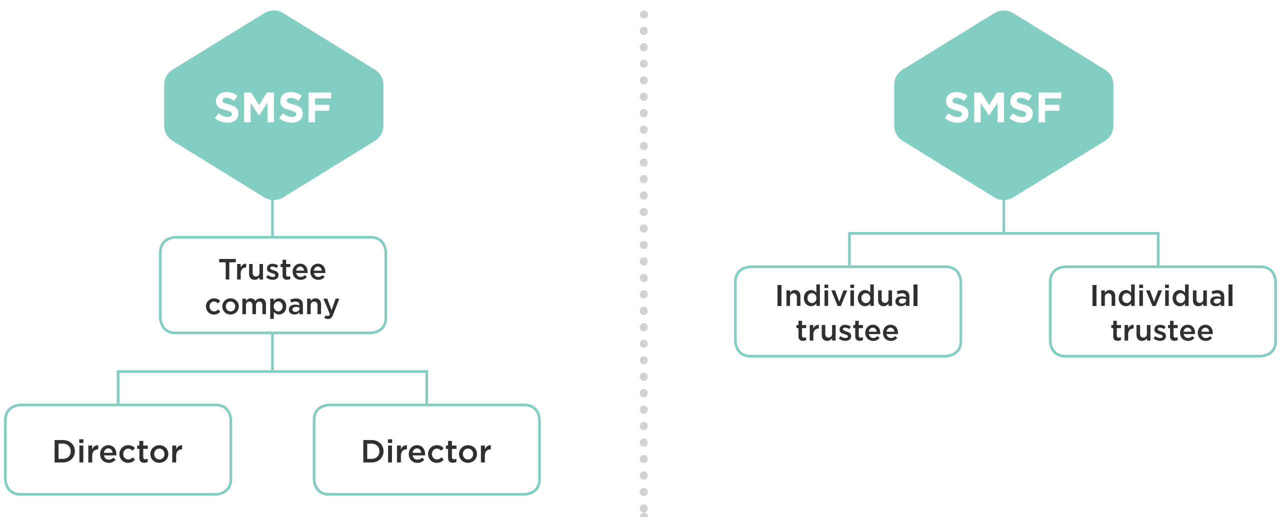
Deciding on a trustee structure

The superannuation law sets out the basic rules for structuring a self-managed super fund (SMSF). One of these rules requires the SMSF to have a trustee. There are two trustee structure options, either individual trustees or a corporate trustee. Whilst it is best to decide on the trustee structure option at the time the SMSF is established, it can always be changed at a later date.

There are many considerations when determining whether an SMSF should opt for individual trustees or have a corporate trustee, such as administrative efficiencies, legal liability, asset protection, succession planning and cost. As trustees are equally responsible and liable for managing the fund, they need to be comfortable sharing this responsibility with the other fund trustees. A corporate trustee can have a sole director with full control over the fund, while a fund with individual trustees will need to have at least two individual trustees. For this reason, a corporate trustee is generally chosen for a single member SMSF.

As an example, an SMSF with two members could have the following trustee structures:



How does a corporate trustee structure work?

- A company is established to act as trustee of the fund
- The company can have between one and four directors
- Directors cannot be remunerated for their services as trustee
- Directors must be members of the fund, except where the fund has a single member and in addition to the member being a director, a second person is appointed as a director – the second person is not required to be a member of the fund
- Members cannot be employees of other members unless they are relatives
- Fund assets are registered in the name of the trustee company in its capacity as trustee of the fund

How does an individual trustee structure work?

- The trustees are individual people
- The fund can have between two and four individual trustees
- Trustees cannot be remunerated for their services as trustee
- Trustees must be members of the fund, except where the fund has a single member and in addition to the member being a trustee, a second person is appointed as a trustee – the second person is not required to be a member of the fund
- Members cannot be employees of other members unless they are relatives
- Fund assets are registered in the name of all the individual trustees in their capacity as trustee of the fund

Below are some of the issues to consider when determining which trustee structure to select.

Administration efficiencies

All assets of the SMSF must be held in the name of the trustees in their capacity as trustee for the fund (i.e. "SMSF trustee name(s) ATF SMSF name"). When a fund has individual trustees, the assets are held in the name of all the individuals as trustees for the SMSF. For a corporate trustee, the assets are held in the name of the company as trustee for the SMSF.

All members are required to be a trustee or a trustee director. When there is a change in membership of the SMSF, i.e. either a new member joins or a member leaves the fund, the trustees or trustee directors are required to be changed. Changes in membership can occur upon marriage, divorce, death and including children into the fund. The ATO must be notified of this change within 28 days and any change must be made in accordance with the fund's trust deed and the SIS Act.

Where individual trustees are used, a change in trustee can be a costly and time-consuming exercise as the ownership details of all the fund's assets must be changed - this is required every time there is a change. This may be an issue where the SMSF holds numerous parcels of shares with different registries or stock brokers. Where the fund holds real estate, in some cases a change of legal title may incur additional stamp duty. When it comes to changing the legal title of a bank account, generally the account will need to be closed with a new account established in the name of the new trustees – this often requires setting up new direct credit instructions with investment institutions.

For an SMSF with a corporate trustee there is no change to the ownership of the fund's assets because the assets are owned by the corporate trustee itself. The only change that is required is a change to the directors of that company.

Another consideration is that there must be a clear distinction between assets owned by the fund and assets owned by the individual. Many jurisdictions do not allow recognition of trusts, which an SMSF basically is, albeit a special kind of trust. Also, sometimes, when assets are registered, the SMSF designation is left out. Where the SMSF's asset is recorded in the names of the individual trustees, there can be a risk of intermingling of fund assets with personal assets. A separate corporate trustee solves this problem.

Legal liability & asset protection

Trustees are liable individually as well as jointly with the other trustees for any legal action taken against the fund. This has the potential to place the individual trustees' personal assets at risk to legal challenge.

A corporate trustee provides limited liability for the directors and shareholders of the company. This ensures litigation against the trustee of the SMSF is generally limited to the assets held in the name of the corporate trustee and does not extend to the directors of the company (unless they are fraudulent in their duties).

Perpetual succession & estate planning

An SMSF with an individual trustee structure cannot legally operate with less than two trustees (as there is no longer a trust arrangement). Therefore in the event of an individual trustee's death (leaving one individual trustee remaining in the SMSF), another individual trustee must be appointed. This requires the legal title of all SMSF assets to be updated to reflect the new individual trustees of the SMSF. This can be time-consuming and costly.

In the case where a director of the SMSF's corporate trustee passes away, the corporate trustee continues being the trustee of the SMSF without the requirement for an additional director to be appointed. As a company has an indefinite lifespan – it doesn't die. A corporate trustee can therefore operate with only one director with the surviving member retaining complete control of the SMSF. A corporate trustee structure allows the fund to be passed down from one generation to another.

Trustee penalties

Under the ATO's administrative penalties regime, the ATO can impose fines on trustees for breaches of superannuation legislation. Administrative penalties cannot be paid for by the SMSF – trustees are personally responsible for their payment.

These administrative penalties apply per trustee. This means that a fund with four individual trustees will pay four times the amount compared to a fund with a corporate trustee company.

Cost considerations

There are additional costs in establishing a corporate trustee. There is an upfront establishment cost and an annual ASIC levy. A corporate trustee is generally established with ASIC as a special purpose SMSF trustee company, which means it is prohibited from trading. A special purpose SMSF trustee company obtains concessions from ASIC regarding its annual filing fees and is not required to prepare or lodge financial statements or an annual tax return.

As an individual trustee structure does not require the establishment of another legal entity, there are no company establishment costs or annual ASIC levy. Members will need to consider the additional upfront costs of establishing a corporate trustee versus the additional cost that will be incurred in the case of trustee changes where the fund has individual trustees, or converting to a corporate trustee in the future.

Get in touch

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