

What to consider when updating SMSF trust deed

- If your trust deed was prepared quite some time ago, it may be time to update the governing rules of your SMSF trust deed.
- Doing so means that you can have peace of mind in knowing that the rules are current.
- Transactions such as an LRBA are permitted by the SMSF's governing rules.

John and Mary established their SMSF back in 1999. They want to know whether they should update the current governing rules of their SMSF trust deed.

The trust deed of the fund is the rule book for its operation. The ATO have said many times that it is vital that the deed give the necessary power to the trustee when it comes to any act or omission by the trustee.

Super fund trustees cannot rely on the SIS Act and regulations which most often do not empower the trustee but simply make clear what the trustee's obligations are and confirm permissibility of trustee action. Trust deeds which simply import the provisions of the Act and regulations are normally defective.

With this in mind it is vital that the fund's deed be as up to date as possible.

For example the trustee(s) of an SMSF should update the governing rules of an SMSF regularly to ensure that the governing rules of the fund are up to date with current superannuation legislation and regulations.

The governing rules of some old trust deeds may need to be updated especially if the trustee(s) of an SMSF wants to borrow via a limited recourse borrowing arrangement ('LRBA') under section 67A of the *Superannuation Industry (Supervision) Act 1993* (Cth) ('SIS Act').

John and Mary's SMSF trust deed should be reviewed prior to their SMSF entering an LRBA to determine whether there are express provisions in their trust deed which permits the trustee of their SMSF to enter an LRBA to avoid any super compliance breach of section 67A of the SIS Act.

Trust deeds such as John and Mary's which were established back in the 90s are likely to be outdated when it comes to setting out the minimum pension standard for SMSFs.

From 1 July 2007, the Superannuation Industry (Supervision) Regulations ('SISR') provided that all pensions must meet the minimum pension standards.

As the governing rules in John and Mary's trust deed pre-date the minimum pension standards which came into effect from 1 July 2007, Mary and John should update the governing rules of their SMSF trust deed so that it contains provisions which satisfy those minimum standards.

All pensions that satisfy the minimum standards will generally be treated as super income stream benefits for income tax purposes. This means that Mary and John's SMSF may be able to claim an exemption for the income earned on pension assets ('ECPI').

It is important to note that if the minimum pension standards are not met, the payments in relation to the pension will not be treated as super income stream benefits and an SMSF could lose ECPI for the income year and transfer balance account consequences may arise.

Some trust deeds may be silent on how a member of an SMSF can appoint another person to act as a trustee (or director of the corporate trustee) of their fund on their behalf.

This appointment may be required in cases where:

- a member becomes incapacitated, and may not be able to act as a trustee/director; or
- a member may no longer want the responsibility of being a trustee/director; or
- a child member is to be admitted as a member of the fund.

As John and Mary's trust deed is silent on this it is recommended that they update the governing rules in their deed to ensure that a person who is acting as a representative trustee/director on behalf of a member is appointed in accordance with the governing rules of the fund to avoid future disputes from third parties who may challenge the validity of the member's appointment of the representative trustee/director.

If your trust deed was prepared quite some time ago, it may be time to update the governing rules of your SMSF trust deed. Doing so means that you can have peace of mind in knowing that the rules of your fund are up to date with superannuation laws and regulations and that the transactions that your SMSF enters such as an LRBA are permitted by the SMSF's governing rules.

When updating the governing rules of a trust deed the trustee(s) of an SMSF should also consider updating the investment strategy of the fund.

John and Mary should update the investment strategy of their SMSF so that the strategy is consistent with their current investment objectives and retirement goals.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.