

Amendments to Superannuation Law

Introduction

The Federal Parliament has passed an Act that changes the way small self managed superannuation funds are to be regulated.

This legislation is available from Government Bookshops and also on the Internet at www.aph.gov.au. In effect, the new Act amends the Superannuation Industry (Supervision) Act ("the Act") by establishing a new regime of Self Managed Superannuation Funds ("SMSF") as the new category of small superannuation funds which have fewer than five (5) members. Importantly, the regulation of SMSF's from 1 July 1999 will be the Australian Taxation Office ("ATO").

What is an SMSF?

The new section in the Act (Section 17A) defines a SMSF as a fund that would fulfil the following criteria:

- (a) it has fewer than five (5) members;
- (b) each individual trustee or director if a corporate trustee must be a fund member;
- (c) each member must be a trustee (or a director if a corporate trustee);
- (d) each member must be "linked" to the other members; and
- (e) trustees must not receive remuneration for their services as a trustee.

Are the Members of your SMSF Linked?

Members will be linked if they are relatives (including former spouses) or if they carry on a business together (or carried on a business together immediately before retiring).

This means that arms length members (for example, a non-related employee in a newsagency run by Mum and Dad), cannot be in Mum and Dad's SMSF. This is because such a person would not normally be in a position to adequately look after their own interest in the fund.

Further, the Act is amended to provide that a single member fund may have one additional trustee (or director) who is not a member, provided that the additional trustee (or director) is "linked" to the single member. This amendment overcomes the problem of trust law where it is not possible for an individual to be both the sole trustee and the sole beneficiary of a trust.

In addition, where a member is under a legal disability, or the legal representative has an enduring power of attorney, or in the event of a member's death prior to payment of death benefits, then the legal personal representative can act as a trustee for the member. A parent or guardian can also act as a trustee for a child.

Trustee Liability

As of 1 July 2000 a trustee will incur strict liability for acting as a trustee of a small APRA regulated fund if that trustee is not an approved trustee under the Act.

Binding Death Nominations

The amendments also permit members to give a binding death benefit nomination to the trustee. The trustee must act on the nomination if it complies with the Act.

Requirements for binding death benefit nominations include:

- ✦ the persons nominated must be the member's legal personal representative or dependants;
- ✦ the trustee must explain to members how the regime works; and
- ✦ nominations, amendments and revocations must be signed and dated in the presence of two (2) adult witnesses.

Your Fund will need to Comply!

Although there may be no legislative imperative to amend your deed, you *will* need to review your clients' SMSF Deeds. There are several reasons for this, most importantly the considerable penalty for failing to comply with the new changes to the trustee/member rules found in the Act.

The Changes to the Trustee/Member Rules impose strict liability - either meet the rules by the due date (presently 31 March, 2000), or suffer taxation at the top marginal personal income tax rate. Note that strict liability applies to the Trustee/Member Rules only.

What Does your Deed do for you?

The ACIS Deed has been continually updated since the inception of the Act in 1993. Features such as broader reserving policy, broader forfeiture of benefits clauses, death benefit payment insurance option, eligible spouse contributions and preservation rules for new requirements under the Act have been incorporated into our SMSF Deed since 1993.

Our updated Deed incorporates all of the essential amendments that have recently been passed by Parliament. This new Deed will serve your purposes because it:

- ✦ ensures that the Fund is managed and maintained by Trustees for the sole purpose of providing retirement benefits for members;
- ✦ provides members with the option of making binding death nominations;
- ✦ ensures compliance with the Act by clearly defining itself as SMSF;
- ✦ complies with all the rules of the Act enabling the trustees to take advantage of certain tax concessions;
- ✦ specifies in clear and precise terms that the Fund may accept contributions only as allowed by the Act;
- ✦ allows the Trustees the wide flexibility required to comply with the Australian Taxation Office Investment Rulings.

SMSF and Exemptions from the Act

The Act requires a substantial level of compliance. Nevertheless, if your fund is a complying SMSF, then it may take advantage of certain exemptions under the SIS Act including:

- ✦ the requirement to have an approved trustee. If after 31 March 2000 your fund, (which may have fewer than five members) is not an SMSF it will be required to have an approved trustee (as defined in Part II of the SIS Act). APRA will have the ability to remove the fund trustee if they are not in fact an "approved trustee";
- ✦ restrictions imposed on non-complying SMSF's in relation to amending the trust deed;
- ✦ audit requirements which are more onerous for non-complying SMSF's. Non-complying SMSF's are required to lodge their audits 5 months earlier from complying SMSF's. Further, auditors of non-complying SMSF's must be registered company auditors and members of one of the five professional accountancy bodies;
- ✦ the requirement for non-complying SMSF's to incorporate rules for the appointment and removal of member representatives. There is also a duty to publish these rules to bring them to the attention of members.

What ACIS can do for you

- ✦ If the members of your fund are already "linked" but not all members are trustees or directors of the corporate trustee, ACIS can arrange for those members to be appointed as trustees/directors of a corporate trustee or, if they are individuals, to be appointed as a trustee if they are eligible.
- ✦ If there is a trustee of your fund who is not a member, eg. perhaps an accountant or legal advisor, this person must resign unless they have been appointed as the legal personal representative of a member under a disability. ACIS can arrange the appropriate documentation to implement any trustee resignation required.
- ✦ If there is an independent corporate trustee in your fund, which is not an approved trustee, then this trustee must resign and either the members become trustees or the members will have to arrange for an appointment of an approved trustee. An approved trustee is a trustee that has met the capital, solvency and other requirements as detailed under Part Two of the Superannuation Industry (Supervision) Act. We can arrange the necessary documentation to implement the resignation and appointment of trustees in this situation.
- ✦ To ensure that your Fund complies and allows the greatest flexibility in investment strategy permitted under the Act, it would be prudent to replace your existing trust deed with our updated and fully complying Trust Deed.

We suggest in any event, that you contact us with regard to these important amendments to the Superannuation Industry (Supervision) Act.