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SELF-MANAGED SUPERANNUATION FUNDS

GUIDE FOR TRUSTEES

Trustees have an enormous responsibility in respect to the management of a self-managed superannuation fund. They can and will be penalised for contravention of the superannuation legislation and regulations. Penalties can include up to 5 years imprisonment or a fine of up to \$220,000. In addition, the fund may lose the advantage of concessional tax rates in which case the assets of the fund (less the value of any undeducted contributions) will be taxed at 47%.

It is vital that all trustees of self-managed superannuation funds understand their responsibilities under the Superannuation Industry (Supervision) Act 1993 (SISA) and the regulations. The following guide is a brief outline of the matters that they need to understand. Further details and advice should be obtained from your adviser.

What is a self-managed superannuation fund?

To be a self-managed superannuation fund it must meet the following definition:

- there are fewer than five members in the fund
- all members of the fund are trustees of the fund (or directors of the trustee company)
- each individual trustee of the fund, or director of the trustee company, is a member of the fund
- no member of the fund is an employee of another member of the fund, unless those members are related
- no trustee of the fund receives any remuneration for his or her services as a trustee

OR for single member funds:

- the member is the sole director of the trustee company; or
- the member is related to the other director of the trustee company (and there are only 2 directors of that company); or
- the member is not an employee of the other director of the trustee company (and there are only 2 directors of that company); or
- the member is one of only two trustees, of whom one is the member and the other is a relative of the member, or

- the member is one of only two trustees and the member is not an employee of the other trustee; and
- no trustee of the fund receives any remuneration for his or her services as a trustee

There are some exceptions to these general rules, for example, where a member is under a legal disability.

Trust deed

The trust deed of a self-managed superannuation fund is the fund's governing document. It details various aspects of the operation of the superannuation fund, its powers, and the powers of the trustees. Therefore, all superannuation funds must have a trust deed.

The trust deed must:

- be properly executed
- state the name of the fund
- state who are the trustees
- include a statement that the fund must either
 - a) appoint a corporate trustee or
 - b) that the sole or primary purpose of the fund is to provide old-age pensions.

The trust deed will also include provisions relating to -

- how trustees are appointed and how they can be removed from the fund
- the powers of the trustees
- that the members agree to act as trustees
- confirmation that the trustees are not 'disqualified persons'
- that trustees cannot accept payment for services as trustees
- paying benefits to members
- what contributions the fund can accept
- who can be members
- winding up of the fund

Note: Trustees are bound by the trust deed and responsible for any contravention of the rules set out in the deed. For these reasons it is very important that they know the contents of the deed.

Who can be a trustee?

Anyone over the age of 18 can be a trustee of a self-managed superannuation (or a director of a company who is a trustee of a self-managed superannuation fund) except if they are "disqualified" persons. An individual is a "disqualified person" if:

- the person has, at any time, been convicted of an offence involving dishonesty; or
- the person has, at any time, been subject to a civil penalty order under SISA; or
- the person is an insolvent under administration (an undischarged bankrupt).

A company is prevented from being a trustee if:

- a responsible officer of that company is a disqualified person (see above); or
- a receiver, official manager, or provisional liquidator has been appointed to the company; or
- action has commenced to wind up the company.

Consent to be trustee

SISA s118 states that a “person is not eligible for appointment as a trustee of a superannuation entity, or as a director of a corporate trustee of a superannuation entity, unless the person has consented in writing to the appointment”.

It is vital, therefore, that written consent be obtained from each trustee and that the written consent also provides confirmation that they are not a “disqualified person”.

Electing to be regulated

A fund must elect to be a regulated superannuation fund and comply with the requirements of the Superannuation Industry (Supervision) Act 1993 (SISA) to ensure it is a complying superannuation fund. If it does not, the fund may not receive concessional taxation treatment.

An election that the SISA is to apply to the fund must be lodged with the Tax Office within sixty days of establishing the fund.

Tax file number

The fund must have its own tax file number.

Australian Business Number

The fund should have its own Australian Business Number (ABN)

Separate bank account

Money belonging to the fund must be kept separate from accounts of the members, the trustees and related employers (employer-sponsors). For this purpose a separate bank account must be opened.

Failure to keep the fund’s money separate will contravene the SISA and the fund will be non-complying.

Purpose of fund

The fundamental basis under which the self-managed superannuation fund (or any other superannuation fund for that matter) obtains concessional tax treatment is the “sole purpose test”. This requires that the sole purpose of the fund must be to provide retirement benefits to members. The trustees are responsible to ensure the fund is managed and maintained in accordance with this sole purpose test.

The sole purpose test is the overriding principle. All other provisions of the legislation and the regulations are included to ensure that the sole purpose test is met.

All the trustees of the fund must be aware that they are responsible for the fund's compliance. This is so, even when external advice is sought, for example, from a tax agent, financial planner, investment adviser etc.

Not only must the sole purpose test be met but also it must be seen to be met. Therefore, the trustees must be able to prove to the fund's auditor and the regulator that all of the actions and transactions have been for the purpose of providing retirement benefits to members.

Accepting contributions

SISA rules relating to gainful employment and age restrictions for accepting contributions must be understood and complied with.

The superannuation fund can only accept contributions in accordance with their fund's deed. Therefore, the provisions of the trust deed relating to acceptance of contributions must be understood and complied with.

The fund cannot accept contributions from related parties in the form of assets other than money (known as 'in specie' contributions) except assets which are expressly allowed to be acquired from related parties under the SISA.

Make sure that trust deed provides that the fund:

- can accept contributions from a member's employer
- can accept contributions from members
- can accept roll-over payments
- can accept contributions in respect of a member's non-working spouse
- can accept contributions in respect of minors.

Investment strategy

The fund must have a medium to long-term investment strategy that considers:

- diversification of investments - including, for example, such things as:
 - cash based, low risk investments;
 - growth investments, for example shares;
- combinations of investment types
- the return on investments compared with risks involved
- the ease of converting assets to cash in order to meet payments due by the fund
- members' ages and individual retirement benefit needs
- overall, the aim of my fund's strategy is to increase members' benefits over time.

Contravention of the requirement to have an acceptable investment strategy can result in the trustees being fined or sued for loss or damages. The fund can lose its compliance status and, as a result, its concessional rate of tax.

Investing

- At all times the assets of the fund must be kept separate from those of:
 - a) the members;
 - b) the trustees; and
 - c) related employers.
- Each member must have a separate account in the fund.
- The fund's accounting and banking records must be kept entirely separate from those of members/trustees/employers
- All transactions by the fund must be conducted on a strict commercial (arm's length) basis
- The fund must be able demonstrate that market value has been paid and received on all transactions.

These requirements are to prevent the fund from:

1. *Contravening the sole purpose test and*
2. *exposing the members' retirement benefits to unnecessary risk.*

Investment restrictions

The trustees must ensure that the fund does not:

- lend money to or provided financial assistance using the resources of the fund to a member or member's relative
- borrow money
- acquire assets from 'related parties' of the fund. Related parties include all members of the fund and their associates and all employer sponsors of the fund and their associates
- lease, loan or invest more than 5% of the fund's total assets in related parties of the fund. These assets are known as 'in house assets'

Note: There are limited exceptions to the above restrictions

Keeping of records

The trustees must keep accounting records which:

- comply with accounting guidelines for true and accurate accounts
- provide an accurate record of the true financial position of the fund
- will assist an approved auditor in reviewing the financial statements and preparing the annual financial and SISA compliance audit certificate
- will help members understand their retirement benefits

These accounting records must be kept for 5 years.

The trustee must keep for 10 years:

- minutes of all meetings
- records of changes of trustees
- records of changes of directors, if corporate trustees
- written consents by members to be appointed as trustee
- a hard (paper) copy of any returns lodged electronically with the Tax Office.

Penalties apply if trustees fail to keep the records listed above for the required period.

Paying a benefit

The trustees must only pay benefits in accordance with the SISA, *Superannuation Industry (Supervision) Regulations 1994* (SISR) and the trust deed of the fund. SISA sets payment standards based on events such as reaching a certain age, termination of employment etc and can place restrictions on how a benefit can be paid.

All paperwork in relation to the following must be completed:

- Eligible Termination Payments (ETPs)
- Withholding tax from ETPs and superannuation pensions and annuities and remitting the tax to the Tax Office
- Reasonable Benefit Limits.

Benefits should be checked for accuracy, prior to payment. The payment standards of the SISA work with the sole purpose test and the preservation rules to ensure monies are only paid to members in appropriate circumstances.

Annual requirements

The trustees must:

- appoint an approved auditor to examine the records at the end of the financial year
- lodge the combined income tax and regulatory return (Form F) with the Tax Office by the due date
- pay the supervisory levy and the fund's tax liability, when due
- comply with superannuation contribution surcharge requirements.

Penalties apply for failing to meet the annual requirements listed above.

Tax matters

Normal substantiation provisions apply. Additionally, records must be kept by the trustees in relation to:

- deductions claimed for administrative and operating expenses of the fund
- sales/purchases of assets for Capital Gains Tax purposes
- tax file numbers of members

- deductions claimed for the provision of death and disability benefits for members.

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