

SELF MANAGED SUPERANNUATION FUNDS POST JUNE 2008

This is a guide for those planning to start a self managed super fund or for existing SMSF trustees looking to adjust their funds to allow for changes in the new super environment.

Introduction

The following notes have been written to assist trustees of existing SMSFs and those looking to establish new funds better understand the rules under which funds will operate after June 2007.

The notes are of a general nature and we recommend that readers seek advice to tailor these recommendations to their specific circumstances.

There have been changes to super terminology and where appropriate, we have used both pre July 2007 and post June 2007 terminology to assist the reader.

These notes are not exhaustive and should you have any queries please contact our office

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These notes have been updated at July 2008 to reflect changes to Superannuation Legislation and Regulations in the previous twelve months.

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Starting a SMSF

In the new superannuation environment, to establish a new fund you will need to:

- Execute a trust deed, preferably solicitor drafted, to bring the fund into existence.
- Ensure each of the trustees or directors of the corporate trustee consent to being a trustee and confirm they are eligible to carry out this role.
- Establish an investment strategy and devise a plan about how to implement the strategy. More information on this later.
- Elect whether or not to be a regulated fund. Being regulated means the fund is eligible for taxation concessions granted under legislation and superannuation regulations.
- Trustees or directors of corporate trustees must sign a declaration acknowledging they understand their role.

To qualify as a regulated superannuation fund, the fund must comply with the sole purpose test. This requires the fund to be maintained for the purpose of providing benefits to members when they retire or to their dependents in the event of a member's death before retirement.

The trustees are also able to provide other benefits such as death & disability cover - either of a permanent or temporary nature - via the fund.

Existing Funds

Where existing funds are concerned, these are the rules going forward:

- If an additional person joins the fund and becomes a trustee or director of the corporate trustee, he/she is required to sign a declaration confirming he/she understands the role of a trustee. He/she will also have to complete a consent form to be a trustee.
- A SMSF with a trust deed that incorporates legislative changes effective from July 1994, will continue to comply, unless the actions of the trustee/s result in the fund's compliance status being removed. However the deed may not meet the members' current requirements in that certain actions may not be possible. As an example, if the trust deed does not allow receipt of the Federal Government's Co-contribution, this money will have to be paid into another fund.
- It is recommended that trustees have their fund's Trust Deed updated on a regular basis to ensure it continues to meet their needs. The recommended period between having a deed updated ranges from twelve months to five years depending on who is advising changes and the extent of legislative changes since the deed was last updated.

If you are concerned about your fund's deed, we suggest you ask your deed provider if it should be updated.

Members

While there have been no rule changes about SMSF membership, members need to be aware of the rules as they stand

- No more than four people can be members of the fund.
- No member is allowed to be employed by another member unless they are related.
- All members must be individual trustees or directors of the corporate trustee.

Trustees

The rules governing trustees have not changed.

Single member fund

There are three options available to trustees. They can be:

- A single director company with the member being the only director,
- A two director company with the member being one trustee and a person selected by the member as the second director - for example, a relative,
- Two individuals comprising the member and a person selected by the member as the second trustee.

Two - four member funds

The rules governing the trustee/s of a fund with 2-4 members are very specific

- The fund can have either individual trustees or a corporate trustee.
- If they are individual trustees, all members are required to be trustees and all trustees are required to be members of the fund.

- If a corporate trustee, all members are required to be directors of the trustee company and all directors are required to be members of the fund.

The exception is when the member is a minor - under age 18 years - or the member is unable to perform his/her role as trustee due to health reasons. In these situations

- The minor's parent or legal guardian must hold the position of trustee until the minor reaches the age of 18,
- The incapacitated member must be replaced by the person holding an appropriate Power of Attorney or someone appointed by the Courts.

A superannuation fund can have either individual trustees or a corporate trustee. The fund cannot have a combination of the two.

Disqualified Persons

People are prohibited from being either an individual trustee or a director of a corporate trustee if they

- Have any prior convictions involving dishonest conduct,
- Are insolvent, bankrupt or have entered into an arrangement with creditors under Part X of the Bankruptcy Act 1996, or
- Have had a civil penalty order under the Superannuation Industry (Supervision) Act 1993.

A corporation may be disqualified from being a trustee if

- A responsible officer (e.g. a director) is a disqualified person,
- There is an application to wind up the company, or
- A receiver or provisional liquidator has been appointed.

Contributions

There have been some changes to contributions post June 2007.

Concessional (formerly tax-deductible) contributions

Employer Contributions

- There will be no restriction on the amount that an employer can contribute and obtain a tax deduction for.
- However, a maximum contribution will apply per person irrespective of whether he/she works for one or more employers. A penalty will apply to contributions in excess of the maximum.
- Trustees of funds will be required to advise the Australian Tax Office annually about contributions.
- The maximum contribution per person for the 2008/9 year will be \$50,000. This will be indexed annually in multiples of \$5,000. A person aged 50 - 74 years during the four years to 30 June 2012 can have contributions of up to \$100,000 paid in each of those years. While an employer can make contributions in excess of these amounts, the tax payable on these contributions will be increased from 15% to 46.5%. The additional tax can be paid by either the member or the fund.
- From July 2007 an employer can make an “in specie” contribution without incurring an FBT liability. This means certain assets can be transferred into the fund as a contribution.

Personal Contributions

- A person who is self employed or deemed to be substantially self employed will be entitled to a concessional (deductible) contribution as shown above. Employer and personal deductible contributions will be combined when considering whether or not the cap has been exceeded.

- A person is deemed to be substantially self employed if he/she passes the 90/10 test. This requires that no more than 10% of the person's assessable income, exempt income and reportable fringe benefits are attributable from employment activities.
- Members making personal contributions must notify the fund's trustee of their intention to claim a tax deduction and the trustee must acknowledge receipt of the notice. The notice must be given, either when the person lodges his/her tax return or the end of the following financial year - depending which happens first.
- If the member intends to use the amount contributed to assist in the funding of a pension on income stream, the notice of intention to claim a tax deduction must be given to the fund's trustee (s) prior to the pension commencing.
- From 1 July 2007, 100% of the amount contributed will be deemed concessional (tax deductible) if the above requirements are met. The level of contribution is the same as that of an employer.

Non Concessional (formerly undeducted) contributions

- A non concessional contribution is the amount a member deposits into a superannuation fund which does not receive a tax deduction.
- Non concessional contributions cannot be made by an employer.
- For the 2008/9 year a member can make a non concessional contribution up to \$150,000 in any one year. If the person is less than 65 years, he/she can make up to three year's contributions in one year. If this occurs the person cannot make a non concessional contribution in each of the following two years.
- For members aged 65-74 years, the maximum non concessional contribution in any year is \$150,000. People in this age group must satisfy the requirements of the work test (see later).
- If the amount contributed in any one year is less than \$150,000 then the difference will not be carried forward to the following year. However, there is one exception. This arises when a person has contributed more

than \$150,000 in year 1 - say \$200,000 - then \$50,000 in year 2 and \$200,000 in year 3.

- In the event that contributions exceed \$150,000 or \$450,000 (see above) the tax payable by the fund will be at the rate of 46.5% on the excess.

Co-contributions

A co-contribution is a payment made by the Commonwealth Government at a rate of up to \$1.50 for each \$1 non concessional contribution made by a fund member.

From 1 July 2007 the ability to obtain a co-contribution was extended to include employees, self employed and people deemed to be substantially self employed.

The maximum co-contribution is \$1,500 and is payable if the contributor's assessable income does not exceed \$30,342. The payment is scaled down until it is reduced to \$0 for people with an assessable income of \$60,341 or greater. The reduction is five cents for every dollar of assessable income above \$30,342.

Spouse Contributions

A person may make a contribution up to \$3,000 in any one year and receive a tax rebate of 18% on the full amount. The spouse's personal assessable income cannot be more than \$10,800 for the maximum rebate to be obtained.

The level of rebate is reduced on a pro rata basis as the spouse's income exceeds \$10,800 until it reaches \$0 at an income of \$13,800. If the spouse is aged 65-74 in the year in which the contribution is made, he/she must meet the requirements of the work test as outlined later.

Contribution Splitting

A member can continue to split concessional (tax deductible) contributions with his/her spouse. However non concessional (undeducted) contributions made to a fund cannot be split by members.

Contribution splitting can occur at the end of the year for the year just completed. It allows members to eliminate all or some of the differences between the balances for the members. In addition it allows contributions to be put into the member's account which has the largest tax benefit. As an example, benefits paid to members over the age of 60 are tax exempt whereas there could be a taxable component if the member is under 60.

Work Test for people aged 65-74 years

To be eligible to make a contribution to a superannuation fund, those aged 65-74 must have been gainfully employed for a minimum of 40 hours in a period not exceeding 30 consecutive days prior to the person being able to contribute.

Exceptions to restrictions on non concessional contributions

Small Business CGT

A contribution arising from the disposal of qualifying small business assets will be exempted from the non concessional contribution limit, with a maximum of \$1,045,000 per person being allowed under this exemption. This figure is a lifetime limit.

Amounts that can be contributed under this exemption are

- Capital proceeds from the disposal of assets that qualify for the 15 year exemption, including amounts that would have qualified for this time period exemption except that no gain or loss occurred as a result of the disposal.
- Proceeds from the disposal of a pre-CGT asset.
- An amount received as a result of the disposal occurring before the 15 year period was reached due to the permanent incapacity of the person.
- Capital gains that qualify for the CGT retirement exemption subject to the lifetime limit of \$500,000 not having been exceeded.

Those contributing under the above rules must notify the fund at the time the contribution is made. The contribution must be made within 30 days of its receipt or the date on which the person is required to lodge his/her tax return whichever comes first.

Prior to making a contribution and claiming this exemption, we suggest business owners consult their accountant to determine if they are eligible for the exemption.

Personal Injury Payments

Under the new superannuation rules, personal injury payments can be contributed to a fund without impacting on the non concessional contribution limit in certain circumstances. The requirements are

- The contribution must arise as a result of a lump sum worker's compensation payment, a court order for a personal injury payment or a structured settlement
- The person must provide reports from two doctors certifying he/she is unlikely to be gainfully employed in future, as a result of the injury

- The payment to the superannuation fund has to be made within 90 days of receiving the money or receiving the court order / structured settlement.
- The person making the contribution has to advise the fund that he/she is using this exemption when making the contribution.

Superannuation account components

A member's superannuation balance has two components:

- Tax Exempt - this will consist of the sum of:
 - Non concessional (undeducted) contributions
 - CGT exempt contributions, and
 - Post June 1994 invalidity and concessional contributions plus the value of the Pre July 1983 component with this last portion being calculated at 30 June 2007 in most cases
- Taxable - this will consist of concessional (tax deductible) contributions plus fund earnings prior to the member commencing a pension or receiving a lump sum benefit.

Benefits to be paid will be on the basis of the ratio one component has to the other. For pensions the ratio will be fixed at the date the pension commences.

As an example, consider a person with an account balance of \$500,000 which includes \$100,000 in the tax exempt component. If that person were to be paid a lump sum of \$50,000, \$10,000 would come from the tax exempt component and \$40,000 from the taxable component.

Pensions or Income Streams

When a superannuant elects to commence a pension from the fund, the tax rate for the earnings on the assets used to provide the pension will be reduced from 15% to 0%. It is not necessary to segregate the assets of pension members from those of accumulation members. The tax rate for earnings will remain at 15% for the latter.

If the trustees elect not to separate assets they will be required to obtain an annual actuarial certificate to confirm the proportion of the fund's earnings that are tax exempt.

Pensions in place at 30 June 2007

Existing superannuation pensions will continue to operate unchanged from the rules applying prior to 1 July 2007. Allocated pensions can, however, be commuted and replaced by an account based pension. Complying and term allocated pensions cannot be altered.

An allocated pension will automatically be altered to become an account based pension - either on the death of the initial pensioner or when the member reaches age 60, depending which occurs first.

Account Based Pensions

An account based pension operates in a very similar manner to allocated pensions. The minimum pension is recalculated annually based on the member's age and his/her account balance at 30 June. In addition, lump sum withdrawals can be made for pensioners aged 65 years or older. For people aged 55 - 64, a lump sum benefit can be made if a condition of release has been met.

In order to obtain a lump sum benefit a member must

- If aged 55 - 59 years have retired from the workforce.
- If aged 60 - 64 years have ceased a period of employment.

The two major differences between an allocated pension and an account based pension lie in the calculation of the tax exempt portion of a pension (refer above) and the level of minimum pension to be paid.

Instead of having a different percentage for each year of a person's life, an account based pension has a set rate for a pre-determined number of years

Age	Percentage
55 - 64	4%
65 - 74	5%
75 - 79	6%
80 - 84	7%
85 - 89	9%
90 - 94	11%
95 or more	14%

The payment of an account based pension does not impose any greater restrictions on the investments of the fund than apply in the accumulation stage. Trustees should be prepared to change their strategy in order to ensure there are sufficient cash amounts available to pay pensions when required.

Transition to Retirement Income Streams

A member of a superannuation fund can commence an account based pension on reaching preservation age. This is age 55 years for people born before July 1960 but will gradually increase until it becomes 60 years for those people born after June 1964.

A Transition to Retirement Income Stream (TRIS) will have two restrictions

- There will be a maximum pension payable of 10% of the member's account balance calculated at the start of the pension and again at July each year, and
- No lump sum benefits can be paid.

In all other respects a TRIS will operate in the same manner as an account based pension.

Reversionary pensioners

When commencing a pension, a member can nominate a second person who can continue the pension on their death. This is the reversionary pensioner.

For all superannuation fund pensions commencing after 30 June 2007, the only people who can be reversionary pensioners are the pensioner's spouse/partner and a tax dependant*. If the nominated reversionary pensioner is a child under the age of 25 years, the pension can continue to be paid until age 25. At that time a lump sum benefit will have to be paid.

** A tax dependant includes a spouse (current or former), a bona fide de facto, a child under age 18, and people in an interdependency relationship. The latter is defined as a close personal relationship between two people who live together, where one or both provides for the financial and domestic support and personal care of the other. Individuals maintaining a close personal relationship but not living together due to physical, intellectual or psychiatric disability are also considered to have an 'interdependency relationship'*

When an allocated or account based pension is being paid, the reversionary pensioner has the option of continuing the pension, fully commuting the pension and receiving a lump sum or partially commuting the pension.

If a complying lifetime/life expectancy pension or a term allocated pension has been commenced in the fund prior to 1 July 2007, the reversionary pensioner must receive the benefit as a pension.

The exception to the above two paragraphs occurs when the nominated reversionary pensioner is not eligible to continue the pension. A lump sum benefit will have to be paid instead, with potential tax implications.

Death Benefits

Superannuation legislation allows for a death benefit to be paid either in the form of a lump sum benefit or, in certain instances, as a pension or income stream. A pension can only be paid to a spouse/de facto or a tax dependant.

The fund's trust deed may not allow for the benefit to be paid as an income stream if the deceased was not in receipt of a pension at the time of his/her death.

The tax treatment of the benefit will vary according to the age of the recipient and the form in which the benefit is paid:

- When a benefit is payable to spouse/tax dependant aged 60 or more, whether it is paid as a pension/income stream or as a lump sum, the benefit will be tax exempt
- When the benefit is payable to spouse/tax dependant under age 60,

If the benefit is paid as a pension/income stream,

- The account balance is divided into its taxable and non taxable components. The amount paid each year will be taken on a pro rata basis between the two components.
- The non taxable component will be tax exempt each year.
- As an example, a person dies and his/her account balance, by way of example, comprises a \$100,000 non taxable component and a \$400,000 taxable component. If we assume the pension selected is \$25,000 in the first year, then \$5,000 or 20% will come from the non taxable component and will be tax exempt.

- When paid to spouse/tax dependant other than a child the taxable component will be subject to income tax at marginal tax rates with

a 15% rebate applying if the recipient is aged 55-59 years. Using the above example, \$20,000 of the pension paid in the first year will be taxable. The tax rebate will be \$3,000 being 15% of \$20,000.

- When paid to a child under 25, income tax will be payable at marginal tax rates on the taxable component. The account balance when the child reaches age 25 has to be taken as a tax free lump sum.
- If the benefit is being paid from an untaxed fund (typically this only applies to some government employee funds) the taxable component of the pension is taxed at marginal tax rates. A rebate will apply that effectively reduces the tax to 10% of the amount received.

If the benefit is paid as a lump sum, it will be tax exempt for the recipient.

- When the benefit is payable to a non tax dependant it can only be paid as a lump sum.
 - The account balance is divided into its taxable and non taxable components. The taxable component is then further split into taxed and untaxed elements.
 - There is no tax payable on the non taxable component.
 - For example a person dies with an account balance of \$500,000. This comprises \$100,000 non taxable component and \$200,000 in each of the taxed and untaxed elements of the taxable component.
 - The taxable component (taxed element) will be taxable at the rate of 16.5%. In the above example this will be \$33,000 (16.5% of \$200,000).
 - The taxable component (untaxed element) will be taxable at the rate of 31.5%. This component will arise either when the fund is

an untaxed fund, this applies to some government funds only, or the death benefit includes some insurance proceeds. Using the above example the tax payable will be \$63,000 (31.5% of \$200,000)

- A member suffering from a terminal illness can elect to receive part or all of his/her account balance as a lump sum whilst still living. The amount paid will be exempt from tax.

Disability Benefits

A superannuation fund is able to provide disability benefits - in the event of both permanent incapacity and temporary disability.

Trustees can purchase insurance cover to increase the amount of benefit provided.

Temporary Disability

Trustees can obtain a tax deduction on the insurance premium required to pay this benefit up to the member's 65th birthday.

This benefit is provided as an income stream, typically paid monthly, and will be taxed at the member's marginal tax rate. The benefit provided can be up to 75% of the member's taxable income.

In order to qualify for this benefit the member has to provide suitable medical evidence of his/her temporary disability.

The size of the benefit and the duration of payments will be determined by the fund's trust deed and, where relevant, any insurance policy.

Before adding this benefit to a fund or extending an existing benefit provision, the trustee(s) should confirm the deed governing the fund allows for benefit payments to age 65.

Total and Permanent Disability

A member will be considered totally and permanently disabled if he/she suffers from physical or mental ill health and two doctors certify the member is unlikely to ever be gainfully employed in a role they are qualified or trained for or have experience in.

Depending on the wording of the trust deed governing the fund, the member may have the option of receiving his/her benefit as a lump sum, an account based pension or a combination of the two. Alternatively the deed may specify the format in which the benefit can be paid.

The tax free component of the member's account balance will be increased and calculated as - Total account Balance * A/B where

A = the number of days from date of being declared disabled to age 65

B = the number of days from the member's eligible service date to age 65

If the benefit is paid as a pension and the member is aged less than 60 then he/she will receive a 15% tax rebate on the taxable portion of the pension paid.

When the benefit is paid as a lump sum to a member aged less than 60, the tax treatment of the taxable component will be

- For members under age 55, a tax rate of 21.5% applies.
- For members aged 55 - 59, the first \$145,000 will be tax free. A tax rate of 16.5% will apply to any excess. The tax free amount will be indexed annually in multiples of \$5,000.

For members aged 60 or more the total benefit paid will be tax exempt.

Investments

Investment Strategy

The fund's trustees are required by legislation to have a written investment strategy. In developing the fund's strategy the trustees must consider

- The risk involved with, and the potential return from differing classes of investments, keeping in mind the fund's investment objectives and probable contributions to the fund.
- The make-up of the fund's investments, the amount of diversity - initially and in the future - recognising the potential risk associated with inadequate diversification of investments.
- The fund's expected cash needs and the liquidity of the investments to be acquired.
- The fund's ability to meet any existing and future liabilities including the provision of benefits - on retirement or at an earlier date.

Investment Strategy v Investment Plan

While the fund's investment strategy sets out its long term intentions, it will not necessarily cover the specific investments to be used to meet its obligations. These will be spelt out in the fund's investment plan.

While there is no requirement for the fund's trustees to formally document which investments they intend to hold, it is recommended this be done to ensure risks associated with the fund's investments are addressed and relative returns of differing assets are considered.

If the trustees intend to invest in artwork, antiques or other exotic investments, they are required to obtain written advice from a specialist in the field.

Trustees wanting to use derivatives as part of the fund's investment strategy must ensure their strategy adequately addresses this type of investment. It is recommended a risk management strategy is prepared to detail how they will address the volatility of this form of investment.

Changes to legislation during the 2007/8 year allow trustees to borrow for investment via an instalment warrant. Trustees can use a warrant to acquire any investment which could be purchased for cash. It is important that any investment made via a warrant is properly documented and the loan obtained be restricted to a limited recourse loan. Failure to comply could affect a fund's compliance status.

Investment Restrictions

In order to obtain the taxation concessions available to superannuation funds, trustees must comply with investment restrictions. These can be summarised as

- The investments must be appropriate for meeting the sole purpose test.
- The trustees cannot make a loan to a member of the fund or a relative of a fund member.
- There are restrictions imposed on assets that can be acquired from a member. Listed securities such as shares and business real property can be purchased. Trustees should obtain advice prior to acquiring any other type of investment.
- There are restrictions on the fund borrowing money. An amount of up to 10% of the fund's assets can be borrowed in order to cover settlement of investment purchases and benefit payments. The limitation on the term for this type of borrowings is seven and ninety days respectively.
- The trustees may only make a loan to, invest in or lease fund assets to a related party (a business, company or trust associated with the member or a relative of the member) provided the total of this type of transaction does not exceed 5% of the fund's assets

- The trustee's may also borrow to invest in an instalment warrant, refer above for more information.

We would suggest trustees obtain advice regarding their investment strategy and its implementation.

Insurance

Insurance premiums paid by a superannuation fund are tax deductible to the fund provided they are for a term insurance policy and provide Death, Total & Permanent Disablement or Temporary Disability cover.

If the super fund receives insurance policy proceeds from a death claim and these proceeds form part of the benefit paid to a non dependent, income tax is payable at 31.5% when the benefit is paid by the fund.

For members without a spouse or tax dependents, it may be preferable to have the Death insurance cover arranged outside the superannuation fund, thereby removing the tax impost in the event of death.

The benefit of this should be weighed up against the effective tax deductibility of the premiums.

Transfers from overseas

The rules relating to superannuation / retirement pensions differ markedly from country to country - something to be mindful of when transferring benefits from one country to another.

It is essential that specific personal advice be obtained before benefits are transferred to an Australian superannuation fund.

When entitlements are transferred from a foreign fund to an Australian fund within six months of arrival in the country, the full amount will be considered non concessional.

For transfers made after six months, the growth in the fund's value in that period will be considered a taxable contribution. We will use the example of

someone who migrated to Australia from the UK in 2005 and had a balance of \$50,000 in their UK superannuation fund. When this account was closed and the money transferred in 2007, the amount transferred was \$57,000. The \$7,000 increase was deemed to be a concessional contribution - taxable at 15% - while the remaining \$50,000 was deemed non concessional.

Additional tax could apply if either or both the concessional and non concessional amounts, when added to other contributions made to the Australian fund, in that tax year, result in the member exceeding the maximum thresholds.

Other matters of importance

Change of Details

The trustees are required to advise the ATO in writing within 21 days of changes to

- Fund trustees and directors of a corporate trustee, if applicable,
- Fund address,
- Fund membership,
- Name of fund, or
- Contact details.

Failure to do so can result in penalties.

Temporary Absence from Australia

The pre July '07 provision which enabled trustees to be absent from Australia for up to two years continuously but still maintain management and control of their funds in Australia, has been removed.

A draft ruling has been issued on the subject of management, membership status and control by the ATO. At the time these notes were prepared the final ruling had yet to be passed.

Late Tax Returns

An administration penalty will now apply where annual fund returns are either lodged late or contain false or misleading statements. Penalties will be imposed on trustees.

With effect from 1 July 2008, tax returns for SMSF's are required to show the date on which the fund's audit was completed.

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Martin is a CPA and a Fellow of the Australian & New Zealand Institute of Insurance and Finance.

Martin was one of the first people in Victoria to be accredited as a Specialist Superannuation Adviser by the Self Managed Superannuation Funds Professionals Association of Australia.

Martin is acknowledged within the accounting profession for his expertise on superannuation, taxation and self managed super funds. He has written for accountant newsletters and presented at seminars in Melbourne, Sydney, Adelaide and regional areas. He is also a speaker for accountants' discussion groups.