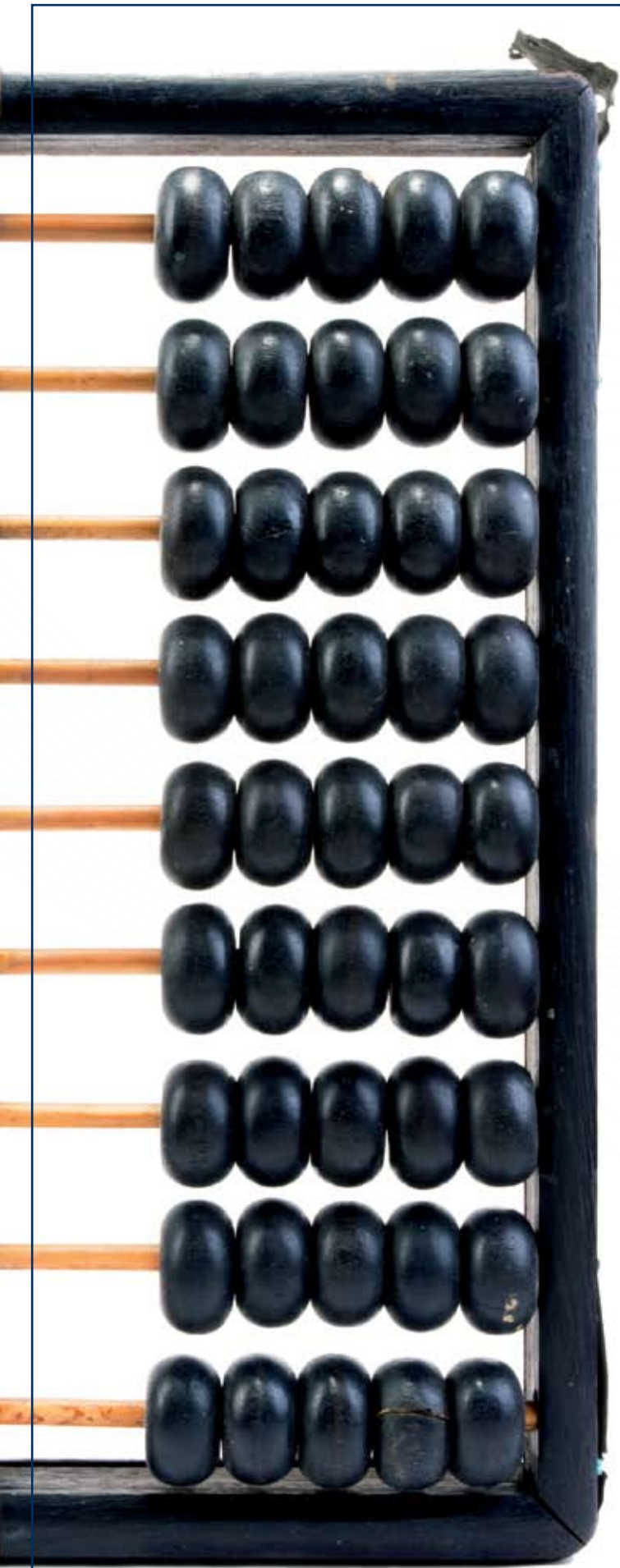


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Do you need to set up a company
to be the trustee of your self managed
superannuation fund?



A self managed superannuation fund is legally a trust – albeit one with a range of special rules and particular tax concessions. Like any other trust, it must have a trustee but there are some particular rules that affect who can and cannot be the trustee of your self managed superannuation fund. In particular, superannuation funds (not all other trusts) must either:

- Have a trustee that is a company (and the trust deed must actually require the trustee to be a company); or
- Have the primary purpose of providing old-age pensions - in which case the trustee can be either a company or a group of individuals. (Note, however, that even if your trust deed has individual trustees, you can still choose to take lump sums from your superannuation.)

What do most people do?

To date, most self managed funds have been established with individual trustees. The most recently available statistics (drawn from the final report on the “Superannuation System Review” – also known as the Cooper Review – in 2010) show that at 30 June 2009, around 71% of SMSFs had individual trustees and only 29% had a company as trustee. In fact, nearly 90% of new funds set up in 2007/08 and 2008/09 had individual trustees. In other words, there is actually a trend towards individual trustees.

What do we recommend?

Despite the trend towards individual trustees, we believe that a having a corporate trustee is a better approach. We also recommend that this company does nothing else but act as trustee of the self managed fund (for example, we generally advise against using a company that is also the trustee of your family trust or the company through which you run your business or other investments).

There are several reasons for this and we have outlined them in this article. However, there are also good reasons why some people choose individual trustees and we have explained these too.

Advantages of a corporate trustee

Corporate trustees have the advantage of:

- Administrative ease when a new trustee or member joins. If a new member joins a self managed fund, that person must generally become a trustee (either by joining the board of the trustee company or becoming one of the group of individuals that acts as trustee for the fund). With a corporate trustee this is straightforward – some forms are completed and sent to the Australian Securities and Investments Commission (ASIC), resolutions prepared and the change takes effect. Importantly, the trustee of the fund has not actually changed – it is still the same company. All that has changed is the group of people who are the directors of that company.

When the trustee is a group of individuals, adding a new person means that the trustee has actually changed. This results in an extra step – the names in which all the Fund's investments are held must be altered to reflect the change in trusteeship. This can be costly (for example, charges from brokers to reflect the transfer of ownership) and time consuming, particularly if the fund has a large number of investments. It can even create practical challenges. For example, many banks insist on the fund opening a new bank account (and closing the old one) rather than simply changing the name of the trustee. This can be a nuisance if the fund has established direct debit arrangements for pensions and other periodic payments.

You may feel this administrative benefit of a corporate trustee is not particularly relevant to you because the membership of your self managed fund might be unlikely to change. Bear in mind, however, that there are a range of circumstances where you might one day ask someone else to be a trustee of your fund on your behalf (which you can do if they hold an enduring power of attorney for you).

You might do this if you:

- Move overseas (often this requires a change in trustee because your fund must be controlled in Australia to be eligible for the usual tax concessions); or
- Decide to have one or more of your children, other relatives or trusted friends handle the formalities of managing your fund as you get older. An extreme example is a member with dementia – they are not able to be the trustee of their own superannuation fund given they are mentally incapacitated and must have someone act on their behalf.

In both cases, the change would be far easier to implement if the fund had a corporate trustee.

- Better control on death. One of the questions often asked about self managed superannuation funds is “who gets my super when I die?”. The rules on this are the same regardless of whether or not the fund has individual trustees or a trustee company but a corporate trustee certainly makes the transition easier. For a start, death means that one trustee (or director) is no longer a trustee (or director) – a corporate trustee therefore has all the administrative benefits described above. Secondly, a corporate trustee does not “die” even if all of its directors do. Rather, the company continues but (generally) has new shareholders (whoever has inherited the shares in the corporate trustee). What happens next depends on the precise rules embedded in the company's Memorandum and Articles (or Constitution) but generally the shareholders are able to elect new directors who continue to operate the fund. Importantly, “control” of the superannuation fund can be managed very closely without needing a change in trustee that might require (say) the agreement of the fund's remaining members;
- Single member funds. A corporate trustee can have a single director which is ideal if you are the only member of your fund. If you have individual trustees instead, you must have another person share the trustee responsibilities as it is generally not possible to have a single individual trustee of a superannuation fund. Whilst that second person does not have to be a member, they do have to be actively involved in the trustee decisions made in relation to your fund – for example, they have to agree with decisions made about the fund's investments and they are equally liable if the fund breaks the law. Remember too that even if your fund starts off with two members (and two individual trustees), one member will generally die before the other – at which point the fund may well become a single member fund; →

- Easier to ensure super fund assets are kept separate from individual affairs. An important requirement of superannuation law is to keep personal and superannuation assets quite separate and the Australian Taxation Office monitors this closely when it audits self managed funds. It is much easier to demonstrate that you have met this requirement when your superannuation fund's assets are owned by a company that only has one function; to act as the trustee of your superannuation fund. This issue is particularly true if your fund owns land or other real property because land titles offices generally only record the owner of the property, not the capacity in which it is held. It is therefore not possible to tell whether a property is owned by (say) you and your spouse in your own right or in your capacity as trustees of your self managed fund simply by looking at the title deeds. In contrast, if the property is owned by a company that is solely acting as the trustee of your superannuation fund, it is quite clear that it owns the property in that capacity.
- Lenders' requirements. If you intend to borrow through your self managed fund, you will almost certainly need a corporate trustee as most banks impose this condition before lending money to a superannuation fund;
- Protection of personal assets in the event of a claim against the trustee. One of the common arguments in favour of a corporate trustee is asset protection – ie, problems within the Fund which result in a claim on the trustee cannot extend to a claim on the directors' personal assets (whereas an individual trustee's assets would be at risk). This is an important benefit in some situations – for example, say the trustee (on behalf of a self managed superannuation fund) owned a building and was sued in relation to an injury sustained by someone in that building. If you were an individual trustee of the fund, you and each of the other trustees would be personally liable and your personal assets would potentially be exposed. In contrast, if the trustee of your fund is a proprietary limited company and you are one of its directors, your personal assets are generally not exposed.



If you intend to borrow through your self managed fund, you will almost certainly need a corporate trustee...



However, there are two points to note on this issue. Firstly, most trust deeds permit trustees to be indemnified from the assets of the Fund under certain circumstances. This means that the assets of the Fund would be used first in the event of any relevant claim.

Secondly, the corporate structure is unlikely to provide protection from the various penalties that can be levied by the courts under superannuation legislation (fines, gaol terms etc). The legislation is specifically worded so that the regulator is able to pursue any "person" (where person includes a company) involved in a breach of the legislation. Where a \$2 corporate trustee was involved, the regulator would no doubt pursue the directors of the trustee company rather than the company itself.

Advantages of individual trustees

Some of the popular features of individual trustees are:

- Fewer statutory forms, lower costs and less reporting. With a group of individuals, there is no need to complete ASIC forms (say, in the event of a change in the trustee group) or to lodge an annual return with ASIC (which all companies are required to do). Note, however, that these tasks are not particularly onerous and a reduced annual ASIC fee applies for companies which only act as the trustee of a superannuation fund. It is now possible to set up a company for the sole purpose of acting as trustee of a self managed superannuation fund for less than \$1,000 and the ongoing costs are also modest.
- Fewer procedural issues to consider. The trust deed of a superannuation fund will often set out any particular procedures which must be followed when you make decisions (for example, any notice periods for the calling of meetings, what constitutes a quorum, whether resolutions can be passed by circulating a minute rather than holding a meeting, etc). A company will usually also specify these in its Memorandum and Articles (or Constitution). Consequently, if your fund has a corporate trustee, you need to make sure you comply with both the Memorandum and Articles of the company and the requirements of the trust deed. This adds a layer of complexity that does not exist if you have individual trustees;
- Less risk of misunderstanding where the power lies. This point is related to the procedural issues above. The trust deed of your fund may well indicate where control of the fund lies in terms of how the trustee is appointed, who may belong to the fund, how decisions are made, etc. If you have individual trustees, you need look no further than the trust deed to answer these questions and consequently it is very easy to be clear about how much control each person has over outcomes within the fund.



The situation is more complicated if you have a corporate trustee...



The situation is more complicated if you have a corporate trustee, however, in that the actions of that company will also be governed by its Memorandum and Articles (or Constitution). It is entirely possible for the trust deed to state that decisions will be made by majority (with each trustee having one vote) but for the company's constitution to state that voting rights are proportional to the members' underlying balances in the self managed superannuation fund. In this situation, there is only one trustee (the company) and hence the deed's provisions on making decisions by majority are effectively meaningless – what will actually drive decision making for this fund is how the company decides to cast its vote.

Simply reading the trust deed in this situation would give a misleading impression of where control of the fund actually lies;

- Different penalty regime. Fines imposed on trustees, advisors etc are defined in terms of "penalty units". Each penalty unit is currently worth \$110 – ie, a fine of 1,000 penalty units equates to a fine of \$110,000. In the case of some breaches, the legislation gives the courts the ability to levy a higher fine on companies than individuals (the company fine is five times the individual fine). It is unlikely that the regulator would ask the courts to impose a higher fine on a trustee company (it is more likely to pursue the directors individually). However, in the event of a serious breach, the courts may well fine the corporate trustee directly (at the higher level) if the trustee is (say) a trading entity with significant assets.

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Conclusion

As mentioned earlier, we believe that a company which does nothing but act as the trustee of your superannuation fund is the best approach. It provides clarity on a range of fronts (ownership of assets, control and continuity on death), greater protection of personal assets and administrative convenience. In our view, these outweigh the disadvantages of some minor additional costs and procedural matters to consider.

However, regardless of which approach you take, the responsibilities for trustees (or directors of trustee companies) are the same. They must comply with the various rules and prudently manage the fund's assets for its members' retirement.

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