

DBA Butler welcomes back its members for 2008 and wishes to thank everyone for their ongoing support. Now that the dust has settled on the biggest super reforms in Australian history, 2008 is shaping up as a busy year for SMSF planning!

Critical SMSF Deed Issues

Many SMSF planning strategies and investment opportunities permitted by law must also be authorised by a fund's governing rules (usually the trust deed). As well as SIS compliance, an SMSF trustee is also subject to trust law and must act within the powers of the deed. This becomes critical in the event of an ATO audit or dispute following a divorce or death. We drill down on several key powers below.

Instalment warrant-type borrowings

Following the introduction of new laws which now permit SMSF trustees to borrow on a limited-recourse basis (refer to our [October](#) and [December](#) 2007 newsletters), many SMSF trustees and advisers wish to implement geared investments in property, shares and other assets. However, it is important that a fund's deed provides sufficient power to do this.

While the new laws are similar to typical 'instalment warrants' (and are commonly described in this way), the laws actually entail a borrowing by the trustee. The relevant power in the deed must therefore authorise this borrowing. A power to, eg, invest in 'instalment warrants' or 'derivatives' will be insufficient as this is not the correct legal character of the transactions which the new laws allow.

Before September 2007, trustees were broadly prohibited from borrowing (subject to certain limited exceptions). This prohibition is generally reflected in most deeds. Some deeds provide that a trustee must not borrow, 'subject to' or 'unless authorised by' the applicable law. While this may be sufficient from a SIS compliance viewpoint, this does not expressly empower the trustee to undertake a borrowing which complies with all the criteria in the new rules.

The preferred position is therefore to have an express power in the deed which provides clear power for the trustee to undertake the kind of borrowings now permitted by the new laws. DBA's new deed, launched in 2008, contains this.

LPR 'standing in' for a deceased trustee

The importance of control of an SMSF following the death of a member/trustee should not be

underestimated. The power to appoint and remove trustees and payment of death benefits will hinge on what prior planning has been put in place and, crucially, the fund's deed.

Trustee/member rules for SMSFs allow the Legal Personal Representative ('LPR') of a deceased member to be a trustee (or corporate trustee director) in their place until their benefits commence to be paid out. This affords the deceased person some control of this important decision, especially where there is no binding death benefit nomination.

However, many trustees and advisers may not realise that the LPR does not automatically become a trustee or corporate trustee director. The office of trustee is governed by the deed. While the law says it is *acceptable* for an LPR to stand in, the deed must expressly authorise this.

In the context of a legal challenge by children, ex-spouses or other aggrieved parties disputing the payment of a death benefit, the wording of the deed, and whether, eg, an LPR can stand in for a deceased member, are critical issues. For peace of mind, trustees should ensure their deed covers this issue as part of their succession planning. Further documentation to ensure an LPR can readily step in following a member's death must generally be executed while the member is still alive.

Pension powers

With the new pensions introduced by the *Simpler Super* reforms, DBA receives numerous questions regarding the power to commence these pensions.

Ideally, a deed should contain express powers to commence an Account-Based Pension ('ABP') and a Transition to Retirement Income Stream. Those with slightly older deeds can still commence these pensions if their deed contains a general benefits power to pay any benefit allowed by law.

However, if relying on a 'general' power, the pension should be commenced with adequate documentation which specifically details the features and requirements of the pension being commenced. Without this detail, it is doubtful whether the payment of the pension complies with SIS since neither the deed nor the pension documents outline the features which SIS regulations require the pension to have.

Note that the SMSF's deed must also authorise:

- the conversion of an allocated pension to the new ABP, and

- the segregation of assets funding a pension.

Superannuation & Centrelink

Broadly, for Centrelink purposes the following rules apply for the assessment of superannuation benefits in *accumulation phase*:

If you are	Income Test	Asset Test
Less than age pension age	Disregarded	Disregarded
Age pension age	Deeming rules apply	Counted as a financial asset

Accordingly, a member will generally not be assets or income tested on their super until they attain age pension age.

If you are in *pension phase*, then the funds are fully assessable for the income and asset tests regardless your age. However, assessable income for Centrelink purposes differs to actual income and is based on special formulas depending on the type of pension paid.

The amount assessable for asset test purposes also depends on the type of pension in place. Allocated pensions and ABPs are fully assessable while

complying lifetime pensions could be 50% or fully exempt depending on whether the commencement date is before or after 20 September 2004.

Keep SMSF Deeds Current

The Annual Update Service (www.smsf.com.au) provides annual updates to SMSF governing rules in an efficient, cost effective and legally sound manner.

Every SMSF subscriber has its own secure homepage containing current governing rules, viewable only by the trustee and their adviser.

Every July, new governing rules and accompanying PDS materials are placed on the homepage, along with tailored trustee resolutions adopting the new governing rules. This provides advisers with efficiency and the invaluable knowledge that all SMSF clients have the same governing rules that are up-to-date with the most current laws.

To register an SMSF to receive governing rules updates just tick the appropriate box on the new super fund/deed upgrade order form. For a small annual fee of \$150, you can ensure the fund always has up-to-date governing rules.

For more information, please visit www.smsf.com.au or contact Bryce Figot or Olivera Ivcovici of our office.



Improved pension kits!

DBA's pension kits provide template documentation to commence SMSF pensions. These kits have recently been improved — they are now even easier & quicker for advisers to complete. Naturally, the kits' high level of legal quality remains uncompromised.

*Account-Based Pension (\$440)**

*Transition to Retirement Income Stream (\$440)**

Name of person ordering _____ Firm _____

Postal address _____ State _____ Postcode _____

Tel _____ Fax _____ Email _____

*Single use licence. If you would like to purchase multiple use licences, please contact Ian Waters or Bryce Figot of our office. All prices include GST. Payment on receipt of invoice.

For further Information please contact:

DBA BUTLER PTY LTD, Lawyers, 23 Union Street, South Melbourne Vic 3205 (ABN 74 120 513 037)

Ph 03 9682 0903 Fax 03 9682 0907 dba@dbabutler.com.au www.dbabutler.com.au

DBA News contains general information only and is no substitute for expert advice. Further, DBA is not licensed under the *Corporations Act 2001* (Cth) to give financial product advice. We therefore disclaim all liability howsoever arising from reliance on any information herein.

✓ **Superannuation** ✓ **Tax** ✓ **Succession Planning** ✓ **Business**