Succession to the role of trustee: a guide for SMSF members

Q: What are the advantages generally of a corporate trustee?

A self managed superannuation fund (or SMSF) can either have a corporate trustee or individual trustees. An SMSF can have up to 4 members, and generally speaking, the members must be the same as the individual trustees (or the same as the directors of a corporate trustee).

We generally recommend that an SMSF have a corporate trustee rather than individuals. The one downside of a corporate trustee is the cost of establishing the company. However, there are longer-term benefits of having a company which outweigh the up-front cost. These benefits include:

<table>
<thead>
<tr>
<th>Corporate Trustee</th>
<th>Individual Trustees</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Continuous succession</strong>&lt;br&gt;A company has an indefinite life span and cannot ‘die’. Therefore, a corporate trustee can make control of an SMSF more certain in the circumstances of the death or incapacity of a member.</td>
<td><strong>Cease upon death</strong>&lt;br&gt;If an SMSF has individual trustees (e.g., mum and dad) timely action must be taken on the death of a member to ensure the trustee/member rules are satisfied. SMSF rules do not allow a sole individual trustee/member SMSF, so if Mum or Dad passes, the surviving spouse must appoint a co-trustee.</td>
</tr>
<tr>
<td><strong>Administrative efficiency</strong>&lt;br&gt;When members are admitted to or cease membership of the SMSF, all that is required is that the person becomes, or ceases to be, a director of the corporate trustee. The corporate trustee does not change as a result. Therefore, title to the SMSF’s assets remains in the name of the corporate trustee.</td>
<td><strong>Extra and costly paperwork</strong>&lt;br&gt;To introduce a new member to an SMSF with individual trustees requires that person to become a trustee. As trust assets must be held in the names of the trustees, this will require the title to all assets to be transferred to the new trustees when a member is admitted to or exits the fund.</td>
</tr>
<tr>
<td><strong>Lump sums and pensions</strong>&lt;br&gt;An SMSF with a corporate trustee can pay benefits either as pensions or as lump sums.</td>
<td><strong>Paperwork for lump sums</strong>&lt;br&gt;The SMSF rules require that a lump sum can only be paid by surrendering a pension entitlement or commuting a pension, which gives rise to extra paperwork. You cannot simply pay a lump sum benefit.</td>
</tr>
<tr>
<td><strong>Sole member SMSF</strong>&lt;br&gt;You can have an SMSF where one individual is both the sole member and the sole director.</td>
<td><strong>Sole member SMSF</strong>&lt;br&gt;A sole member SMSF must have two individual trustees.</td>
</tr>
<tr>
<td><strong>Greater asset protection</strong>&lt;br&gt;As companies are subject to limited liability, a corporate trustee will provide greater protection where a party sues the trustee for damages.</td>
<td><strong>Less asset protection</strong>&lt;br&gt;If an individual trustee suffers any liability, the trustee’s personal assets may be exposed.</td>
</tr>
<tr>
<td><strong>Estate planning flexibility</strong>&lt;br&gt;A corporate trustee ensures greater flexibility for estate planning, as the trustee does not change as a result of the death of a member. A director can also have greater control over their succession plans by passing on their shares in the corporate trustee.</td>
<td><strong>Extra administration and costs</strong>&lt;br&gt;The death of a member requires there to be a change of trustee, and this gives rise to considerable administrative work and costs at an inopportune time.</td>
</tr>
</tbody>
</table>
**Q:** Why is succession to the role of trustee important?

On the death of the member, the trustee is responsible for the administration of the fund, including (where there is no Binding Death Benefit Nomination, or BDBN) the decision as to how the deceased member’s benefits will be paid out. If the deceased member did not have a BDBN in place, this decision is at the trustee’s discretion.

Uncertainty about who will become the trustee after death can lead to consequences which the deceased member would not have intended. For example, where an SMSF has two individual trustee/members (eg, Mum and Dad), a co-trustee will need to be appointed in order to ensure the fund continues to fulfil the trustee/member rules for SMSFs. The surviving trustee/member can appoint anyone who is eligible to be a trustee: this could be a new partner, one of the couple’s children, a friend, etc. Even with the best intentions, this could result in the deceased member’s benefits being paid out in a way that member would not have intended.

In Australia there has been litigation on these issues where the courts have upheld the trustee’s decision to pay benefits in a way which the deceased member may not have intended (one example is the case of *Katz v Grossman*, where the decision to pay a deceased father’s benefits entirely to one child to the exclusion of the other was upheld).

**Q:** If I have a BDBN in place, why should I worry about succession to the role of trustee?

- A BDBN is binding on the trustee, whoever they may be. However, if a trustee refuses to follow a BDBN, delays its payment, disputes the existence or terms of a BDBN, etc, it may prove difficult, time consuming and expensive to enforce this.

  The Superannuation Complaints Tribunal has no jurisdiction to hear complaints relating to SMSFs. Therefore, rightful beneficiaries under a BDBN would need to take legal action against the trustee through the general court system, which is time-consuming and costly.

  In the context of family disputes and large sums of money potentially available following the death of a member, risk can be minimised by ensuring that there is planned succession to the role of trustee.

- Paying out benefits in accordance with a BDBN is not the only important task for a trustee after the death of a member. The continued operation of the SMSF (eg, where there are other surviving members or where an SMSF will continue to operate to pay out the deceased member’s reversionary pension to a dependant) relies on there being a reliable trustee in place.

- Sometimes, leaving payment of benefits to the trustee’s discretion can be a good thing. For example, if a member’s child is going through divorce or bankruptcy on the member’s death, it would be preferable to pay benefits to the estate. Conversely, paying benefits to the estate may not be desirable if the estate is subject to legal challenge; in this case the super benefits would be more suitably paid directly to the beneficiaries. If there is a valid BDBN in place, this must be followed by the trustee, whatever the circumstances. Leaving payment to the trustee’s discretion can therefore be advantageous in certain circumstances, provided the trustee is trustworthy and capable of making sound decisions.

- BDBNs often expire (either on the expiration of, eg, 3 years or following a triggering event) depending on how the BDBN is drafted and the SMSF’s deed. Many SMSF members are therefore unaware that their BDBN may no longer be valid, or may forget to renew their BDBN once it expires or after a triggering event. Unfortunately, some BDBNs are also completed incorrectly or unclearly, making them invalid.

  While a BDBN can be an effective lasting planning strategy (if prepared properly), in reality some members are unknowingly exposed with their death benefits left to the discretion of the trustee after their death.

It is good practice to review a member’s BDBN regularly. It is also good practice to ensure there is planned succession to the role of trustee.
Q: How can I plan control of my super after my death?

It’s not possible to entirely plan what happens after death, but there are some key steps that can be taken during a member’s lifetime to ensure greater certainty:

- **Make a valid BDBN.** Note, the member’s Will should generally be reviewed at the same time to ensure the rest of their estate plans are consistent with their wishes as to how their super benefits are paid. Where a member directs that their super benefits be paid to the estate, it is important the Will is appropriately structured to deal with superannuation proceeds (eg, older Wills may not adequately deal with this).

- **Appoint a corporate trustee to the SMSF.** This will ensure that on the member’s death, the company can continue in place as trustee (eg, with the member’s spouse continuing on as sole director). As well as saving paperwork on death, this also avoids the need for the surviving trustee/member (eg, spouse) to have to make a decision as to who to appoint as an individual co-trustee.

Even if you have already set up your SMSF with individual trustees, a corporate trustee can be appointed at any time.

- **Ensure the corporate trustee has a constitution appropriate for SMSF trustees.** If there is already a corporate trustee in place, it is possible to amend its constitution.

- **Appoint a successor director**, if this is possible under the company’s constitution.

- **Ensure the SMSF’s governing rules have appropriate succession provisions.**

- **Appoint a successor trustee** (if individual trustees), if this is possible under the SMSF’s governing rules.

Q: I agree that a corporate trustee is better, but isn’t it expensive and time-consuming to change trustee now?

Appointing a company to act as trustee does give rise to some costs. However, these costs can be justified by the significant long-term benefits of having a corporate trustee. Many Australians hold significant assets in super – for many, super is their largest asset – so it pays to ensure there is appropriate planning in place for control of an SMSF after death.

Title to all of the SMSF’s assets must be transferred to the new trustee after the change and this gives rise to some paperwork. However, if an SMSF continues on with, eg, Mum and Dad as individual trustees, on the death of a trustee a new co-trustee will need to be appointed anyway (and title to the assets will need to be changed), so by not appointing a corporate trustee now, the trustees are simply deferring this cost and paperwork until after death, to be left to the surviving spouse to attend to during a difficult grieving period.

No capital gains tax liability arises when assets are transferred purely because of a change of trustee of a super fund. Further, depending on the particular State or Territory, there may be no or concessional stamp duty on transfers of assets to the new trustee.

Naturally, establishing an SMSF with a corporate trustee from the start overcomes this paperwork cost. Those wishing to set up a new SMSF should therefore seriously consider the benefits of starting with a corporate trustee.

Q: Is it sufficient to use a shelf company supplier for my corporate trustee and SMSF deed?

Many shelf company constitutions are ‘all-purpose’ and pay little or no regard to the company’s role as an SMSF trustee. A well-drafted constitution prepared with SMSFs in mind will have provisions that maximise succession planning possibilities. For example, under some constitutions it is possible for a director to nominate a successor director who can take their place on death.
Similarly, good SMSF deeds or governing rules will have appropriate provisions dealing with the death of a trustee/member. This includes the ability to nominate a successor trustee who can take a trustee’s place on death (where trustees are individuals) or the ability for a member’s Legal Personal Representative (or LPR) to represent them after death. Many SMSF members do not realise that the LPR does not step in automatically, unless the SMSF has a deed which appropriately addresses this.

There are numerous other issues impacting SMSF planning which must be covered off in the governing rules, such as the provisions relating to BDBNs. Many SMSF deeds, unfortunately, do not address these issues adequately.

**Q: How can I set up control with DBA’s deed and constitution?**

DBA’s SMSF deed and company constitution have been designed specifically with SMSF succession planning in mind. DBA is recognised as one of Australia’s leading superannuation law firms and has utilised this expertise to prepare an SMSF document range that provides greater planning possibilities than many shelf company documents available.

Some of the features of DBA’s constitution which may not be available from other suppliers: -

- The ability to nominate a successor director to step in after the death of a director.
- Greater control placed in the hands of the shareholders, which provides greater opportunities to plan control of the SMSF, both before and after death.
- The ability to issue shares from an ‘SMSF share’ class, which helps to ensure the SMSF remains a ‘sole purpose company’ where applicable (which therefore means the company is entitled to a reduced annual ASIC fee).
- The ability to include ‘guardian’ shareholders where there is a need for a guardian to step in and exercise greater control, eg, if there is particular risk of family dispute.
- High level of attention to the company’s role as SMSF trustee, with many provisions to help protect the SMSF’s complying status which are simply overlooked in many shelf company constitutions.
- Flexibility to use DBA companies for other purposes, eg, as trustees of family or unit trusts or in a trading capacity. Many of the succession planning advantages outlined above can also be utilised for these trusts and family businesses.
- Every company ordered by DBA’s clients is reviewed and signed off by a DBA lawyer.

For further information or to order DBA documents, speak to your accountant or financial adviser or contact our office on (03) 9682 0903 or visit our website at www.dbalawyers.com.au.

DBA provides this memo as a general guide only. It is no substitute for expert advice. This memo is based on the law as of 19 May 2008. Superannuation, estate planning, corporations and taxation laws continually change. Anyone seeking to rely on this memo should obtain expert advice to confirm particular issues. Finally, note that DBA is not licensed to provide financial product advice under the Corporations Act 2001 (Cth).