

SMSF Deed Issues

There have been substantial reforms in recent times to the rules governing self managed superannuation funds ('SMSF'). Irrespective of when you last upgraded your trust deeds, we recommend you consider reviewing them with the issues outlined below in mind.

With the defined benefit pension ('DBP') window of opportunity closing for many on 30 June 2005 and the federal coalition government taking control of the Senate from 1 July 2005, leaving your review any longer may be leaving it too late! Funds with the most up to date deeds may be best placed to tackle the uncertainty that lies ahead.

A quality deed upgrade may be necessary to ensure your funds comply with the latest laws and provide maximum flexibility.

Recent reforms which you should consider when undertaking a review include the following:

Contributions from Mid 2004

From 1 July 2004 and subject to the deed for the fund, the 'work' or 'gainful employment' test for superannuation contributions has been removed for contributions made before age 65. This test has also been simplified for members over age 65 but under 75 who will now have to have worked at least 40 hours in a period of not more than 30 consecutive days in the relevant financial year before they can make a contribution. Only 'mandated employer contributions' can be made for members aged 75 or over.

Government Co-Contributions

Government 'co-contributions' can be made to funds with appropriate powers in their deed. This provides a potential maximum of \$1,500 in co-contributions by the government for those with employer support making personal superannuation contributions with taxable incomes below \$28,000 for the 2004-05 financial year. The \$1,500 co-contribution progressively phases out for those with taxable incomes of more than \$58,000 per financial year.

Choice of Fund

Employees can only choose a fund which will accept contributions from their employer. If a member's SMSF deed requires the employer be a 'participating' employer before the fund will accept contributions, the employer may not want to make contributions to the fund.

A participating employer is bound by the terms of the deed. The deed may also impose unreasonable obligations on the participating employer, eg, requiring it to make contributions more regularly than for members of other funds.

Compulsory Cashing from Mid 2004

From 1 July 2004, the 'compulsory cashing rules' have been simplified for members over age 65 but under 75 so that, subject to the deed for the fund, benefits can be retained in the fund if the member has worked at least 240 hours in the most recent financial year. Members aged 75 or over on 1 July 2004 will be required to 'cash' their benefit (ie, pay a lump sum or commence a pension) unless they have continued to work at least 30 hours a week since 1 July 2004. All members reaching 75 after 30 June 2004 will be required to 'cash' their benefit on or before they attain 75 years.

Defined Benefit Pensions

Recent changes allow pensions to be 'rolled-back' into a fund to restore the member's reasonable benefits limit ('RBL') position in relation to a prior counted benefit.

This may allow a member to stop a pension and start a new one for cash-flow, estate planning or other reasons. Until recently, 'internal roll-overs' were not permitted, so deeds drafted prior to mid-2002 may not provide this added flexibility.

Unless the deed has the power to do internal roll-overs, members may miss out on a window of opportunity to commence a DBP. Some DBPs can provide RBL compression for members with benefits in excess of their applicable RBL.

For example, a member with an excessive allocated pension can roll-back their pension into their SMSF and start a fully rebatable allocated pension and DBP.

Such members, provided they retire after attaining 55 years or attain 65 years, only have until 30 June 2005 to put in place an adequate DBP power in their deed and commence their DBP.

Market Linked Pensions

Members might also consider a market linked pension ('MLP') if they want to access the pension RBL or the 50% assets test exemption.

An MLP can only be paid to a member if the deed gives the trustee power to do so. Many deeds prior to mid-2004 may not have sufficient flexibility to pay an MLP, even if the trustee seeks to rely on a general pensions power in the deed.

Estate Planning

From 1 July 2004, the range of superannuation and tax 'dependants' have been expanded to include persons in an 'interdependency relationship' with the member. Broadly, this will exist if the person lives with the member as part of a close personal relationship involving personal care and financial and domestic support.

If a fund's deed does not include the full range of dependants, a member who wants their interest in their fund to be paid on their death to, eg, a same sex partner or a sibling who was in an interdependency relationship with the member, will not be able to do so.

Binding Nominations

Binding death benefit nominations ('BDBN') give members peace of mind as to how their benefits are paid after their death.

Pre-July 1999 deeds will not allow for BDBNs to be made.

SMSF Deed Upgrades

DBA's SMSF documents address the raft of recent changes. Each DBA SMSF deed is prepared by lawyers who are SMSF experts. Advisers can access our letter and procedures' checklist for obtaining client authority for having variations completed. Please contact our office if you would like a copy. We can also discuss the availability of discounts for bulk orders.

Reserving

You may also like to consider whether the deed allows sufficient flexibility for reserving post the May 2004 federal budget?

PDS

Trustees of SMSFs must issue a Product Disclosure Statement ('PDS') to each new member admitted after 11 March 2002. From 11 March 2004, SMSFs must also provide a PDS to a member prior to starting a pension.

Giving all SMSF members a PDS is considered 'best practice' for advisers and their clients.

SMSF Deed Upgrade

The DBA SMSF variation package contains all the necessary documents to upgrade a trust deed to comply with the latest law and provide maximum flexibility. The DBA deed and PDS have recently been updated to comply with the current superannuation law as at January 2005.

The following documentation is included with every DBA SMSF variation package:

- (i) Trust deed (in duplicate) updated as at January 2005;
- (ii) PDS & Memo for each member;
- (iii) BDBN form and guide for each member;
- (iv) Letter and variation checklist;
- (v) Trustee resolutions;
- (vi) Contributing employer form; and
- (vii) Member contribution notice.

For further information, please refer to our website or contact us.

For further Information please contact:

DBA BUTLER PTY LTD, Lawyers, 23 Union Street, South Melbourne Vic 3205
Ph 03 9682 0903 Fax 03 9682 0907 dba@dbabutler.com www.dbabutler.com

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