

Self-Managed Super Fund: trustee duties and obligations

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A self-managed super fund (SMSF) requires appointed trustees to manage the fund. It is important you consider the duties and obligations of acting as a trustee and determine which trustee structure is appropriate before starting an SMSF.

Choosing a trustee structure

One of the first steps to setting up an SMSF is choosing whether to establish your SMSF with an individual or corporate trustee structure. With an individual structure, each member acts as a trustee; however, with a corporate structure, a company acts as the trustee and members of the SMSF are directors of the company.

While an individual trustee structure sounds simple and straightforward compared to a corporate trustee structure, it may not necessarily be the most efficient option for you in the long-term.

The following table sets out some important differences when considering trustee arrangements for an SMSF.

Issue	Individual Trustee	Corporate Trustee
How it works	• Trustees are individual people • Each trustee is a member* • At least two trustees, with a maximum of six • Has no more than six members, each of whom must be a trustee. Trustees cannot be paid for performing trustee duties and they cannot be employees of another member of the fund, unless they are related • Assets registered in the name of individual trustees owned in their capacity as trustee for the SMSF e.g. shares owned by Joe Bloggs as trustee for ABC Super fund *except for single member funds	• Trustee is a company that is set up to act as legal trustee • Each director is a member* • No more than six members, each of whom must be a director. Directors cannot be paid for performing director duties and they cannot be employees of another member of the fund, unless they are related • Assets registered in name of the company. • Each director must have a director ID before being appointed. *except for single member funds
Set-up fee	Arrangements are generally less costly as there is no need to establish a company.	Arrangements are generally costlier because a company must be established.
Annual fees	ATO supervisory levy	ASIC annual review fee ATO supervisory levy

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Issue	Individual Trustee	Corporate Trustee
Change of members	As all members are trustees, the names that each asset of the fund is held in must be changed every time a member is added, dies or leaves. This can involve substantial cost and inconvenience.	Unless the company acting as trustee of the fund changes, the name that each asset of the fund is held in never needs changing, that is, on addition, death or resignation of a member there is simply a change of directors of the corporate trustee rather the trustee itself.
Single member fund	An individual cannot be a single trustee of their own fund and requires an additional person to act as co-trustee of the fund.	A single director corporate trustee may be a simpler structure for a single member fund.
Separation of assets	Greater risk that fund assets could be potentially mixed with personal assets, making the fund non-compliant.	Separation of assets is clearer as the company is a separate entity from the members.
Asset protection	Members are jointly and severally liable for their actions and each individual's personal assets may be at risk where a party sues the trustee for damages.	As companies are subject to limited liability, a corporate trustee may provide greater protection where a party sues the trustee for damages.
Penalty unit regime	Each trustee will be individually liable for each contravention which increases the total cost if penalties apply e.g. if a SMSF has six trustees and 10 penalty units (costing $2,220) are levied against each trustee, a total of $13,320 is payable. Each trustee must pay $2,220.	Penalties are levied at the corporate trustee and each director (regardless of how many) is jointly and severally liable. e.g. If a SMSF has 6 directors and 10 penalty units (costing $2,220) are levied against the corporate trustee, each director must pay $370.
Limited recourse borrowing	Banks may be less inclined lend to an SMSF with an individual trustee structure.	Banks may require a corporate trustee structure when lending to an SMSF.

Considerations

While a SMSF gives you more choice and control regarding the management of your retirement savings, it is important to ensure the trustee structure is suitable to your overall financial goals. Consider:

- The costs and regulatory implications of each structure.
- The type of assets you wish to invest in and whether one trustee structure is better suited.
- What happens if a trustee passes away or chooses to leave the fund.
- Penalties are levied against each trustee of the fund. This means that each individual trustee is liable to pay the penalty, whereas directors of corporate trustees are jointly and severally liable to the penalty. For example, if an SMSF has six trustees and 10 penalty units are levied against each trustee, they would each pay $3,300 (a total penalty of $19,800), whereas if the same 10 penalty units were levied against a corporate trustee with six directors, each director would only pay $550 (a total penalty of $3,300).
- Asset protection. In the event a claim is made against your fund, assets you own outside of the fund may not be protected from liability claims if the fund operates under an individual trustee structure.
- Whether all trustees of the SMSF have the time and financial knowledge to participate in the management of the SMSF.

Eligibility

Anyone aged over 18 can be a trustee if they are not under a legal disability or a disqualified person.

A person is disqualified if:

- They have been convicted of a dishonest offence in any state, territory or foreign country.
- They have been issued with a civil penalty order.
- Are currently bankrupt or insolvent under administration, or
- They have previously disqualified by the Australian Taxation Office (ATO) or the Australian Prudential Regulatory Authority (APRA).

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A person can apply for waiver of disqualified status in some instances. For more information, visit www.ato.gov.au and search 'waiver of disqualified status'.

Consent

All trustees must formally consent to their appointment in writing and sign the Trustee Declaration stating they understand their responsibilities within 21 days of becoming a trustee or director.

This documentation must be on file for the life of the SMSF and for 10 years after an SMSF winds up.

Obligations

If you choose to establish your own SMSF, you need to understand the risks, time, resources, and compliance obligations associated with setting up and running a SMSF. Trustees must:

- Act honestly in all matters concerning the fund.
- Act in the best interests of all fund members when you make decisions.
- Manage the fund separately from your own superannuation affairs, know, understand and meet your responsibilities and obligations.
- Manage the fund objectively and without bias to your own personal super affairs.
- Know, understand and meet your responsibilities and obligations, and
- ensure that the SMSF complies with the laws that apply to it.

As a trustee, you are legally responsible for all the decisions relating to your SMSF even if you receive help from professionals. You are also responsible if another trustee breaches the law without your knowledge. If you breach your trustee duties, other members of the fund can take action against you.

Sole purpose test

Your SMSF needs to meet the sole purpose test to be eligible for the tax concessions normally available to super funds. This means your fund needs to be maintained for the sole purpose of providing retirement benefits to our members, or to their dependants if a member dies before retirement.

Failing the sole purpose test can lead to an SMSF losing its concessional tax treatment, i.e., the fund may need to pay additional tax on its superannuation contributions and investment earnings. Trustees can also face civil and criminal penalties.

The sole purpose test is likely to be breached if you or anyone else associated with you, directly or indirectly, obtained a financial benefit when making investment decisions and arrangements (other than increasing the return to your fund). Your fund will also fail the sole purpose test if it provides a pre-retirement benefit to someone, for example, personal use of a fund's asset or leasing a business real property owned by the SMSF to a related party below market rate.

Director ID

Directors need to apply for their own director ID. When they need to apply depends on when they become a director.

Directors of a SMSF must have a director ID before being appointed to the corporate trustee.

For more information, visit Australian Business Register Services at www.abrs.gov.au.

Acquiring assets from related parties

Your SMSF cannot acquire an asset from a related party unless it is acquired at market value and is an exempt asset such as:

- listed security (e.g. shares, exchange traded funds (ETFs), bonds listed on approved stock exchange)
- business real property
- an in-house asset, provided the market value of your fund's in-house assets does not exceed 5% of the total market value of your fund's assets
- an asset specifically excluded from being an in-house asset.

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If an asset is acquired below its market value, the difference between the market value and the amount actually paid will be treated as a contribution. For more information on related party transactions, visit www.ato.gov.au and search 'related party'

Commencing an account-based pension

Superannuation trustees must take a number of steps before commencing an account-based pension on a member's behalf.

You must receive a written request to establish an income stream from the member, indicating:

- the date of commencement,
- the type of income stream,
- the amount of capital to be used to commence the benefit,
- the payment amount and frequency.
- The member's tax file number and bank account details.
- The request should also include a statement confirming that the member has met a full condition of release or, for a Transition to Retirement Income Stream (TRIS) a statement that the member is over Age 60 and wishes to commence a TRIS.

Confirm that the trust deed allows an income stream to be paid from the fund.

Hold a formal trustee meeting and resolve to pay an income stream from the fund, in accordance with the written request. This decision should be recorded in the minutes of the meeting.

Value the fund's assets (at market value) to determine the member's share, particularly if the request is to use their full balance of their account.

Payments must meet the legislated minimum annual pension payment requirements, based on the age-based minimum pension factors, below:

Age of account-based pension owner	Minimum payment factor
Under 65	4.00%
65 to 74	5.00%
75 to 79	6.00%
80 to 84	7.00%
85 to 89	9.00%
90 to 94	11.00%
95 or more	14.00%

The minimum annual income payment is calculated using the above percentage factor multiplied by the account balance, either at commencement of the account-based pension or as of 1 July each year.

Failure to pay the required minimum annual pension payment could result in the pension account losing its tax-free status.

If the member has requested to commence a Transition to Retirement Pension, the maximum pension that the member can request is 10% of their balance at commencement and each 1 July.

It is essential that you ensure the total payments made remain under this limit. Any payment above this threshold would constitute a significant breach of superannuation legislation and may result in the fund losing its complying status, which carries significant penalties.

1. ATO, www.ato.gov.au, 'The ATO - helping trustees of self-managed superannuation funds to understand their role and meet their obligations'. Visited 18 October 2024.

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Should the member have met a condition of release, but are under 60 years of age, you will need register the fund for PAYG purposes, as tax must be deducted from each income stream payment and forwarded to the ATO.

If either the member receiving the pension or their partner is in receipt of a Centrelink or Veterans benefit, you may need to complete a 'Details of income stream' report for the Department of Human Services or the Department of Veterans Affairs.

Where a fund has members in both the accumulation and retirement phases, you are required to distinguish between income from pension assets and accumulation assets because they have different tax treatments. You are allowed to calculate exempt current pension income using either the segregated assets method, or the proportional (unsegregated assets) method. However, some restrictions apply as to which method you can use, so we recommend you discuss this with your accountant or tax adviser before commencing the member's pension.

You will need to complete a transfer balance cap report and submit it to the ATO within 28 days of a member starting or commuting a pension, so the ATO can track each members transfer balance cap and total superannuation balance. This is a separate report from the fund's annual reporting obligations or any rollover reporting. Your accountant or fund administrator should be able to assist you in completing this report. Penalties apply if you fail to lodge this report within 28 days.

Common trustee mistakes

The ATO have identified the following are areas where trustees commonly make mistakes:

- **New registration** – failure to properly set up the SMSF before applying for an ABN and not accurately collecting information about members, trustees or directors of the corporate trustee.
- **Sole-purpose test** - failure to ensure all investment decisions are solely to generate and provide retirement benefits.
- **Loans** – lending monies or assets to members or relatives of members of the SMSF, which is generally prohibited.
- **In-house assets** – failure to ensure in-house assets are equal to no more than 5% of the fund's total assets.
- **Separation of assets** – trustees incorrectly holding assets in their name when it should be held in the fund's name.
- **Borrowings** – breaching strict rules under which an SMSF is permitted to borrow.
- **Administration** – drafting and maintaining the trust deed, maintaining the investment strategy, lodgement obligations, valid bank account and electronic service address, and managing the annual audit process.

Ongoing trustee education and assistance from professionals can help avoid these common mistakes.

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Non-compliance

A range of measures can be undertaken by the ATO if you or other trustees have not complied with relevant laws and regulations:

Course of action	Description
Education direction	Trustees are given written direction to undertake a course of education.
Administrative penalty	Trustees are personally liable to pay a penalty and this cost cannot be paid using assets of the fund.
Enforceable undertaking	Trustees commit to an enforceable undertaking by submitting a written proposal for corrective action to the ATO who must accept the submission before proceeding.
Rectification direction	The ATO gives the trustees a written direction to rectify a contravention of super laws. Failure to comply with the direction commits an offence of strict liability. This can also lead to trustee disqualification or fund non-compliant status which can result in a significant tax penalty to the fund (refer to 'notice of non-compliance').
Trustee disqualification	Trustees who are disqualified must remove themselves from this role. Trustees who continue to act despite disqualification are committing an offence and further penalties may apply.
Civil and criminal penalties	The ATO may apply to the courts for civil or criminal penalties to be imposed.
Allow SMSF wind up	Following a contravention, the trustee may decide to close or 'wind up' the SMSF.
SMSF assets frozen	Anyone who has possession, custody or control of an asset of the fund may be instructed to freeze those assets. They can be directed not to acquire, dispose or deal with assets in a particular way. This can include trustees and investment managers.
Notice of non-compliance	The fund is non-compliant until a notice of compliance is received by the SMSF. Non-compliant funds are taxed at the highest marginal tax rate (currently 45%) and in the financial year it becomes non-compliant, assessable income includes an amount equal to the market value of total fund assets less any contributions that are not part of the taxable income of the fund. E.g. ABC Fund has $500,000 of total assets and receives a notice of non-compliance. During the financial year, the fund received $30,000 net contributions that are not part of the taxable income of the fund and $20,000 income from investments. The fund must declare $490,000 of assessable income ($500,000 total fund value plus $20,000 earnings less $30,000 net contributions) taxed at the highest marginal tax rate. If the highest marginal tax rate is 45%, $220,500 tax is payable and funded from SMSF assets.

Further education

All SMSF trustees and directors of a corporate trustee are encouraged to undertake an SMSF education course to improve their understanding of the obligations of being an SMSF trustee. The ATO has a range of free education courses. Visit www.ato.gov.au and search 'approved education courses for trustees'.

To keep up to date with the latest news for trustees, you are encouraged to subscribe to ATO SMSF News and alerts. This is a centralised online point with the latest news, useful resources, links and reminders. The ATO add information regularly and it generally remains published for three months. To subscribe for updates, simply go to the Subscriptions section of the ATO website and for the SMSF monthly newsletter just fill out the subscription form on the ATO website.

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