

# **THE GUIDE TO** SMSF TRUST DEEDS PLUS STRATEGY REVIEW



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**Grant Abbott**

# THE GUIDE TO SMSF TRUST DEEDS PLUS STRATEGY REVIEW

## Foreword - Grant Abbott

In my career I have authored five SMSF books. Now if you have never written a book, it is a tough task and takes a good year of research, writing and editing. My maxim has been that to write a book you need to know your stuff pretty well or you will get caught out. Coupled with all the training and courses I do, let's say I definitely know my SMSF stuff.

However, what I am most proud of is the three SMSF trust deeds I have written – each better than the last. I have never bought into the idea of simply 'band-aiding' a current deed to cover any major super law changes as all the other lawyers do – my preference is to build a new foundation for the current times.

Let me ask you a simple question.

Given the trust deed is the foundation of a fund, would you prefer a deed originally created in 1995 or in 2017? I know which I would prefer – and you?

Yet I still see so many deeds come across my desk at Abbott & Mourly Lawyers that were written prior to 2000 but marketed as a current deed. My guiding light for SMSF trust deeds is they **must** be current, written by someone who is an industry expert/leader and offer a full suite of options. Don't buy or hold onto rubbish. A family's SMSF deed is not for hoarding – it is to protect a family's super wealth while at the same time maximising tax concessions.

**If you had to pick a SMSF Trust Deed most like a phone - which phone would it be?**



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## 1. Hitting The Start Button

The SMSF trust deed is crucial to the success and longevity of any fund, yet so few trustees and, for that matter, their accountants, advisers and auditors take the matter seriously. For such a small outlay to upgrade a SMSF trust deed to the best in the market, you would think it would be a good idea to switch deeds and governing rules every two or so years. We do with our phones and should also do so with our SMSF trust deeds.

From a legal point of view, the Commissioner of Taxation requires that Trustees ensure that the fund's trust deed is current and for the benefit of all members. In addition, SMSF audit standards require the auditor of a SMSF to check transactions such as contributions, pension payments, death benefits and investments against the Fund's trust deed.

The danger of a SMSF trustee or any other person breaching the rules in a trust deed was seen in *Dunstone v Irving* [2000] VSC 488, where one of the Trustees and the Fund's bank failed to pay out a member's retirement benefits. The breach was a costly one for the fund, with the Victorian Supreme Court awarding more than \$250,000 in damages to the retiring member against the remaining trustee of the Fund. In my opinion, the bank in question was lucky not to get targeted as the recovery section in the SISA applies to all persons, professionals, institutions and entities that are involved in the breach. From a lawyer's perspective the motto is "sue one- sue all" and they would have been first in my firing line.

To discover why the rules that govern a fund deed are so important and how to make sure you have the best foundation as possible, consider the following:

- Is a SMSF a trust or some other entity and does it need to be documented?
- What are some of the key features that should be covered by the trust deed?
- How does the trust deed fit in with the Superannuation Industry Supervision Act 1993(SISA)?
- How to review a SMSF trust deed
- How does a trustee know that the trust deed meets their needs?
- Can the trust deed be upgraded without tax or other consequences?
- The ten "must have" 2022 strategies to be found in the Abbott & Mourly SMSF deed used by LightYear Docs
- *Why a Corporate Trustee is a must rather than individual trustees*
- SMSF Deed review checklist

## 2. Introducing The SMSF Trust

SISA requires superannuation funds including SMSFs to be trusts. As a result, they are governed not only by SISA but also by the law of trusts. Trusts are not new to the law and the first ever trust was documented in the Roman times. They became very popular in the 12th century in England when crusading soldiers would entrust their properties to family or friends to look after while abroad crusading for King and country. They have history which SMSFs and all superannuation funds leverage, particularly cases for breach and taking action against trustees and other relevant parties.

Surprisingly, we deal with trusts every day and most do not have a deed.

### Case Study One - Everyday Trusts

John lent his RV to his best mate Gary to take away on holidays. This is an informal trust where the RV has passed to Gary under certain unspoken conditions including that it is returned in the same way that it left John. If Gary returns it with \$5,000 of damage, John may seek to take action under trust law and also the law of equity (negligence) to recover any costs of repair.

In its simplest form, trust law requires the trustee – Gary – to look after the trust’s assets – John’s RV – for the benefit of the beneficiary – John.

But as you can imagine without a document formalising the agreement things can get very messy.

### Case Study Two - Trust Implied with Direction

John transfers his 50% interest in the family home to his wife to protect against litigation. There is no deed of gift or other formal documentation put in place. John is then declared bankrupt. Can his creditors and the trustee in bankruptcy make a claim on the family home?

Without any legal document that details the nature of the transaction the Courts will need to fill the legal void and look at intent. In the 2021 case of the Commissioner of Taxation v Bosanac [2021] FCAFC 158 the Full Federal Court held that a 50% interest that the Mr Bosanac’s wife held in the family home was by way of a trust for the benefit of Mr Bosanac. Mr Bosanac argued it was a gift but without a deed of gift the Court held that a trust was in play and the Commissioner of Taxation could access the equity in the home to pay ATO debts owing by Mr Bosanac.

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*Abbott & Mourly Lawyers warning:* If you have put a property, shares or any asset in the name of a spouse, child or friend for the purposes of protecting it against litigation then you MUST address the matter immediately. Failure to do so will open up the opportunity of litigation against the accountant. Contact us at [info@abbottmourly.com.au](mailto:info@abbottmourly.com.au) to find out how to get things back on track.

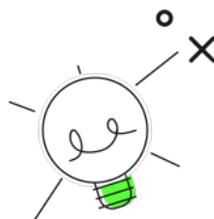
## Case Study - SMSF Deed with Breach

John Smith is a member of the Smith Family Super Fund – a SMSF, with his wife Sally. They are both directors of the Fund's corporate trustee, Smith Nominees Pty Ltd. The fund was established in 2005 and the deed has not been upgraded since that time. In 2017 John and Sally, both aged 60 retired and commenced a tax free accounts based pension from the Fund.

The Fund's auditor reviewed the Fund's deed and noted that the Fund was not able to pay an accounts based pension. Why was that? First off account based pensions were not law until 1 July 2007. Reviewing the deed, the auditor found that only old school allocated pensions could be paid under the governing rules of the Fund - NOT an accounts based pension. In that regard, as in the Dunstone v Irving case, section 54C of SISA does not allow anyone to breach the governing rules of the Fund including ALL the terms of the Fund's trust deed.

The auditor, aware of section 54C raises a contravention notice for the past four years recognising the Fund is in breach and will lose its tax free status. The best estimate of taxes due, penalties plus administrative penalties for the Trustee are \$79,550. The worst case is the \$2M SMSF is non-complying, and the Commissioner of Taxation levies a penalty tax of 47% on the value of the assets of the Fund - \$940,000. Guess who is going to have to pay for that mix up?

If the Trustee was advised by the Fund's accountant and auditor to upgrade the Fund's deed previously then it would not fall on them but the Trustee as they had been warned. However, if the accountant or the auditor had never checked the deed or advised an upgrade then they are in the firing line!!!!



## 3. Key Features of a SMSF Trust Deed

As discussed above section 54C requires the Trustee of the Fund and any other person to abide by the Funds Governing Rules. The term governing rules is defined in section 10 to include the Fund's deed and any pension, lump sum, contribution, investment strategy or other documents dealing with the operation of the Fund (provided they are authorised by the Deed). Legally and professionally documentation is all important and the more the merrier as it provides evidence of intent.

Given the significant downside for breaching the Fund's deed and governing rules it makes sense to have an up to date and comprehensive deed. Which leads us to identifying what the deed needs to cover in its most basic form?

Some of the key features that a SMSF trust deed should cover include, amongst others:

- the appointment of the trustee to the fund and removal of the trustee – who holds the appointment power – generally the members or if you are using one of the Abbott & Mourly Leading Member bloodline SMSF trust deeds it is the leading SMSF member;
- the admission of members to the fund which can be by application or preferred under the Abbott & Mourly deed, the initial members become parties to the SMSF trust itself;
- the appointment of various professional advisers to the fund, including the SMSF adviser, the administrator and the auditor;
- trustee meetings – voting guidelines, minutes and how meetings are to be run; the establishment of the fund's cash account;
- the setting of an investment objective and strategy for the fund and its members including separate investment strategies for younger members of the Fund;
- the types of investments that the trustee is able to invest in;
- the acquisition and disposal of investments in accordance with the investment strategy;
- the approval of the making of a benefit payment to a member – including a payment of a pension and what type;
- the payment of a death benefit to a dependant or legal personal representative of a deceased member;
- the acceptance of a death benefit nomination form such as a binding death benefit nomination or a SMSF Will and the establishment of a death benefits policy;

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- the payment of a disablement benefit to a dependant or legal personal representative of a disabled member;
- the acceptance of a disablement benefit nomination form and the establishment of a disablement benefits policy;
- the retirement of members as members of the fund;
- the establishment of members' accounts, accounts of the fund, audit reports and any notifications to members required under the trust deed or SISA; and
- the creation of any reserves.

## 4. Does SISA Override the Trust Deed?

There is no escaping abiding by the trust deed at all times. However, unlike standard company constitution rules there is no standard superannuation fund deed. It was argued for many years ago, but the government decided to let each Trustee acquire their own style of SMSF. This means that each SMSF and fund Trustee must stand on its own SMSF deed laurels. As they say in law – caveat emptor or buyer beware, there is no excuse for ignorance.

Most people are not aware that the trust deed and governing rules are paramount. It is only in very limited circumstances that the deed is overridden by the provisions of SISA. In that regard SISA provides that if the trust deed of the fund is silent in relation to a specific limited list of items contained in sec 52B for SMSFs, they are taken to be included in the trust deed. Some of the specific inclusions are:

- The trustee is to act honestly in all matters concerning the SMSF;
- The trustee should exercise their powers for the best interests of members and other beneficiaries;
- The trustee should keep the money and assets of the fund separate from the trustee's personal assets and money or those of another person; and
- The trustee is to formulate and implement an investment strategy for the fund.

For all other transactions, management, operations, investments, member plus trustee powers and rights, the "go to" is the Fund's deed. The reason for this is SISA is about what cannot be done rather than what can be done.

## 5. How to Review a SMSF Trust Deed

We will look at why the Abbott & Mourly SMSF strategic trust deed, part of the LightYear Docs portfolio of document excellence, is a “must use” document for both compliance and strategy. However, before upgrading a SMSF trust deed one needs to determine whether the Fund’s current trust deed fits the criteria.

✓ Abbott & Mourly advise that if a deed is more than three years old it is better upgrading the deed rather than spending hours to find deficiencies, limitations and traps.

The following review points are designed to enable a person to initially become familiar with, and understand, a SMSF trust deed. They are not exhaustive, however; for a more detailed checklist of review points for a SMSF, see the Appendix.

### ***(1) If it is an existing SMSF, when was the trust deed last upgraded?***

SISA came into effect in 1994 and there have been countless changes since that time with the laws growing from 400 pages to 3,200 pages to 2022. The big four areas of change, the times when I started from scratch and wrote a new deed, were:

1. **Year 1994:** The start of SMSFs in the SISA which commenced on 1 July 1994 and required all superannuation deeds to be upgraded. This is when most SMSF deeds were first created and for the large majority of lawyers, they have kept this deed and band aided it up as changes came along – no matter how profound those changes were.
2. **Year 2000:** With the takeover of SMSF regulation by the ATO and a new definition of SMSF. If the fund’s deed predates 1 July 2000, it is redundant.
3. **Year 2007:** The biggest change to superannuation occurred on 1 July 2007 with the Government’s Simpler Super package ensuring that lump sums and pensions taken post age 60 were tax free. But there were limitations on contributions, changes to deductions and also different pensions on offer. If the fund’s deed predates 1 July 2007, it is redundant as we saw above with John Smith receiving an account based pension under a 2005 fund – an impossibility.
4. **Year 2017:** Fundamental tax and contributions changes were made throughout the period from 2013 onward culminating in the changes to tax free pension balances, contribution caps and much more on 1 July 2017. A deed from this era is generally passable but as advised earlier if it is two years old it is very likely redundant.

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The best advice I can provide is this; know your trust deed well, what it can and cannot do and upgrade as often as the provider upgrades their deed. Here are some other key areas and pointers.

## ***(2) Membership***

Most trust deeds have a contents page. On that page the following will be found – a page number for the trust deed dealing with membership of the fund and a page number for “definitions” or “interpretations”. Under the membership rule, what does it say about who can be a member and under what circumstances?

Quite often the term “member” in the fund is defined to particularly mean some person. For example, a number of funds have a definition, and thus a rule, that says a member is an “eligible employee” or “eligible person”. When looking at what this definition means, it more often than not says that a person is an eligible person if they are engaged in gainful employment. Under SISA anyone can be a member of a superannuation fund and do not need a member balance.

If the expression of membership is limited to someone engaged in gainful employment, it excludes the following.

### ***(a) Retirees***

The deed would not allow persons to remain members of the fund once they are retired. This means that the trustee must pay out any benefits in the fund for a member who is no longer working.

### ***(b) Non-workers, spouses and children***

There is no age or other limits on memberships under SISA so a trust deed should reflect this. Read your current deed and you are looking for a rule that lets the trustee allow any person to become a member provided they complete an appropriate application form and they also choose to become a trustee, unless they come under one of the exceptions under the member’s trust deed.

## ***(3) Contributions***

Under SISR reg 7.04, persons can make contributions on behalf of others and themselves. However, 50% of SMSF trust deeds state that the trustee is only able to accept contributions on behalf of a person who is gainfully employed.

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To review the contributions in a trust deed, return to the contents page of the fund's trust deed, locate the contributions section, and find out what it says. In a number of funds, the trust deed will limit contributions to amounts of money, meaning a contribution of assets or in kind is not allowed. This is a big problem!

The Commissioner of Taxation has produced extensive contributions guidelines SMSFR2010/1 dealing with what is and what is not a contribution, the current tax laws, excess contributions rules and much more. ALL of the issues, traps and tips from the Commissioner's ruling must be included in the trust deed. For example, a business may pay for the accounts of a closely related super fund.

The Commissioner calls this an "in kind" contribution as it is not in cash nor an asset. You can tell the quality of a deed by simply seeing if "in kind" contributions are allowed.

**Note:** *The Abbott & Mourly SMSF trust deed is secure, flexible and compliant up to 31 January 2022 and has taken into account a number of recent SMSF death benefits cases.*

## 6. Upgrading a SMSF Trust Deed

Given the amount of constant change in the superannuation, taxation, estate planning and other laws that apply to a SMSF, there is a strong argument for an annual upgrade of the trust deed of the fund to ensure it remains current and relevant, as well as ensuring the trustee minimises the potential for compliance error by breaking a rule of the fund. In any event, most SMSF lawyers would recommend an upgrade of a SMSF trust deed at least every three years.

It is common for a SMSF trust deed to be upgraded, more so than a discretionary trust. It can be simple, painless and effective if done correctly. However, replacing the trust deed is not a matter of removing the current trust deed and ordering a new one. This would result in creating a new SMSF. As a result, all assets of the SMSF would be taken to be disposed of by the trustee, thereby realising a capital gain, rendering the fund liable for stamp duty and leading to double reporting for that year. A SMSF adviser can guide members through the upgrade process and ensure it is done correctly and in accordance with the taxation, SISA and stamp duty laws to ensure no unwanted difficulties.



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Provided the SMSF trust deed upgrade is completed in accordance with the deed of variation or amendment provisions in the deed it will not amount to a new SMSF or resettlement for stamp duty purposes – see the Commissioner’s determination TD 2012/21.

## **DO YOUR SMSF DEED UPGRADES NOW!**

LightYear Docs provides a simple, easy and compliant SMSF deed upgrade process for \$129 per variation and an annual upgrade for \$129. If you are on one of the LightYear Docs subscription packages these documents – SMSF deed upgrade, new SMSF deed and annual upgrade are all included within the subscription. If you would like Abbott & Mourly to do the deed upgrade for you via the legal firm the cost is \$395.



## **7. Why the Abbott & Mourly SMSF Deed sets the Standard?**

The Abbott & Mourly SMSF Deed used by LightYear Docs is a new deed created in 2017 by Grant Abbott. With Grant’s pedigree it is current, compliant and as you will see carries more strategies than any other deed in Australia.

Abbott & Mourly has taken a different approach and from the very start built it as a Family Super Fund able to hold up to six members. Additionally, with our strategic enduring powers of attorney and a special purpose ATO SMSF ruling - users of our SMSF, where a person may give their attorney their SMSF trusteeship or directorship, it now means that not all members have to be trustees or directors of the corporate trustee, only those who want to take on the big responsibility of being a trustee of a SMSF. We have built six member SMSFs with only two directors of the Fund’s corporate trustee – all within the bounds of the ATO ruling.

Apart from optional trusteeship, we have built the following ten strategies into the deed, which you will not find anywhere else:

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- 1. Family Super:** Ensuring six members of a family can become members of the SMSF making it a true family super fund. Other funds have slipped a six member band aid on their deeds but not thought through the strategic ramifications that six members in a fund can offer, such as ....
- 2. Different SMSF investments for different generational members:** Not limiting younger members to a general investment strategy enables the younger member or members to hold their own assets in the fund. Likewise older members in pension phase can have the trustee set aside investible assets that more meet the cash flow requirements of a pension rather than the growth objective of younger members of the fund.
- 3. Bloodline Limitations on benefit payments:** The Trustee under an Abbott & Mourly SMSF trust deed, like our discretionary trusts, has the ability, if the member has chosen to limit the payment of superannuation benefits on the death of a member to the deceased member's lineage or bloodline. This includes via a payment through the deceased member's estate.
- 4. Saving tax on Death Benefits:** Where a death benefit is paid to an adult child on the passing of the senior members of the fund, it may be subject to a 17% tax and in some cases, if paid with insurance monies, a 32% tax unless the adult child is a financial dependant of the deceased member. The Abbott & Mourly SMSF deed enables a member to make a declaration to the Trustee as to who they believe is a financial dependant and why. To maximise this opportunity of removing a death benefits tax, LightYear Docs also provides for a family allowance agreement to support the financial dependency claim.
- 5. Wide range of Contributions:** The deed enables the Trustee of the Fund to accept a broader category of contributions for fund members, particularly retired fund members.
- 6. Special Strategy Options for Incapacity:** The ability to implement a SMSF Living Will. This specialist document which provides directions to the Trustee of what is to happen in the event the member is incapacitated with a sickness, quarantined, or has dementia.
- 7. No dangerous BDBN but a SMSF Will:** Binding death benefit nominations from a SMSF are increasingly being challenged with a soon to be heard case making it all the way to the High Court. It does not make sense to use a BDBN but a special purpose SMSF Will. This document provides directions to the Trustee on what is to happen in the event of the member's death. It is far stronger, more secure and better optioned than a BDBN as it provides bloodline limitation, asset transfers and the possibility of a SMSF Death Benefits Trust – a testamentary trust to protect dependants.

8. **Superannuation Testamentary Trust:** Any super paid into a deceased's estate may be subject to a family provisions challenge or claim against the estate by children, spouses and even grandchildren. Paying directly from the super fund to a dependant generally prevents that action as it sits outside the estate and is governed by federal laws. However, paying directly to a dependant means they may lose protection against litigation and a trustee in bankruptcy so a SMSF Death Benefits Trust, which is a special purpose testamentary trust can be created by the Trustee of the Fund for adult children and grandchildren who are bloodline. As an added benefit minors are taxed as adults with no penalty taxes.
9. **Replacement Director's and Trustees:** When a member dies or becomes incapacitated it is vital to have a succession plan in place in terms, not of their membership, but their role as trustee or director of the Fund's corporate trustee. In the Abbott & Mourly SMSF deed, the Executor steps in as Trustee automatically as Trustee and is the only person able to vote on the distribution of death benefits. For a company, our special purpose SMSF trustee company has similar provisions. This is crucial to put in place so that your enduring power of attorney becomes your replacement trustee, able to implement and execute your wishes in a binding manner.
10. **Sickness Benefits:** If a member gets sick from Covid or any other reason and cannot go to work or carry on business, then if the deed allows, the Trustee may pay a monthly income to the member equal to what they were receiving before the sickness or temporary incapacity. The Abbott & Mourly SMSF deed provides for a temporary incapacity income stream.

## 8. Why a Corporate Trustee is a Must!

For a superannuation Fund to be a SMSF all members of the Fund must be Trustees or directors of the corporate Trustee of the Fund. There are some exceptions to the rule for enduring powers of attorney and deceased member's Executors and we have already looked at these in terms of the Abbott & Mourly deed with replacement Trustees.

However not all trustees are the same. From a high level perspective there are two options:

- i) the members themselves individually as Trustees; or
- ii) a company as a corporate Trustee – where all the directors of the company are the members of the SMSF, may be established.

Although there is a small initial expense to create a company to act as Trustee there are significant taxation, practical and financial benefits in choosing to do so. These include:

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## ✔ Longevity for Future Generations

It is a requirement under equity law that a trust is to last no more than 80 years. This rule, known as the “rule against perpetuities” was designed to prevent family assets being locked into a trust forever and not being subject to death duties or being brought into the capital gains tax net on the death of the appointor or beneficiaries of the trust.

Although a SMSF is a trust, s 343 of SISA provides that the rule against perpetuities does not apply to trusts established as superannuation funds including a SMSF. Strategically this means that “a SMSF lasts forever”. If the Fund lasts forever, by virtue of the SISA, it is also important for the Trustee to have the capacity to last forever. The only entity that makes the grade is a company which lasts until wound up or deregistered. Current and future members may come and go as directors, but the company remains constant as the Trustee.

## ✔ Concessional Taxation Guaranteed for a Trustee Company

Section 19 of SISA provides that ONLY SMSFs with corporate Trustees can pay lump sums as well as pensions. If a SMSF has individual Trustees, the sole or primary purpose of the Fund must be to pay old age pensions – otherwise the Fund and its members will lose their concessional taxation status. Unfortunately, lump sums and estate planning benefits do not fit within these tight individual Trustee guidelines. A SMSF with individual Trustees seeking to run a modern day SMSF with accumulation (and also pension) accounts for a retiree members as well as having extensive SMSF estate planning needs to change Trusteeship to a corporate Trustee or limit superannuation benefits to primarily pensions only.

## ✔ Administration Simplicity – Trustees come and go

Members move in and out of the Fund, as a consequence of marriage, divorce, death, disability or bankruptcy. A requirement under the superannuation laws and by the Commissioner of Taxation is that the SMSF Trustee must hold all of its assets in the names of the Trustee. Where a member leaves the Fund or a new member joins the Fund and the Trusteeship is by way of individual Trustees, it is incumbent upon the Trustee to notify all share and unit holder registries, land title offices and other asset registries that there has been a change in Trustee. After a divorce or death or adding a new member, this can be a sizeable and very time consuming administrative task and can also be costly. Strategically a corporate Trustee remains constant even though the underlying director/members may change on occasion.

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## ✔ Litigation Protection

Trustees are potentially confronted with being sued should an event occur to an asset of the Fund. For example, the Trustee of a Fund may own a residential property and, as a result of an accident or for some other reason, a tenant or visitor may sue the Trustee under owner's liability. If a corporate Trustee is in place, the directors – who are members - are personally protected, but not so for individual Trustees.

## ✔ ATO Administrative Penalties Savings

Where the Trustee of a SMSF breaches one of the many SISA laws, including the trust deed, the Commissioner of Taxation may fine the Trustee up to \$13,200. For individual trustees, that is each Trustee but for a company, it is only the company not the directors.

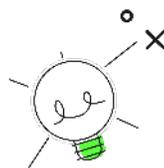
## 👍 *Why the Abbott & Mourly – LightYear Docs special purpose SMSF Trustee company*

As with SMSF Trust Deeds, not all companies are suitable to act as a SMSF corporate Trustee. From a legal point of view a corporate Trustee of a SMSF must be built specifically for a SMSF in order to ensure that the Trustee can be focused on SMSF strategy rather than the ordinary business and shareholder principles found in most proprietary limited and shelf companies. There is also a legal and financial reason to put in place a special purpose corporate Trustee for a SMSF. The benefit of being a special purpose SMSF Trustee company is that the annual ASIC fees are \$56 compared with the normal \$276 for a proprietary company.

In order to be classified as a special purpose SMSF corporate Trustee, rule 3 of the Regulations provides that the following two conditions must be met:

- (i) the constitution of the company prohibits distribution of the company's income or property to its members, and
- (ii) the sole purpose of the company is to act as the Trustee of a regulated superannuation Fund.

Generally, a special purpose Corporate Trustee Constitution will have been built to cover all SMSF strategies. This means that the company should act exclusively as a Trustee of a SMSF, not to be the Trustee of a family trust or to run a business. For members with an existing dormant or unwanted company, an upgrade to the company constitution to convert the company to a special purpose corporate Trustee is a simple and inexpensive exercise.



## 9. Don't forget the Governing Rules beyond the Deed

Section 103 of SISA requires the trustee of the fund to keep, and retain for at least 10 years, minutes of all meetings of the trustees at which matters affecting the entity were considered. A breach of sec 103 renders the fund a non-complying SMSF unless the Commissioner of Taxation uses his discretion under SISA sec 42A (5) to treat the fund as complying. Recently, the Commissioner has stated that one of the significant problems that his audit teams have found in their ongoing investigation of SMSFs and trustees is the lack of minutes and other SMSF documentation.

Documentation is not only a requirement under SISA but also provides a paper trail on what was supposed to happen. If there is no paper trail, then the ATO must investigate what went on by interviewing the trustees of the fund. Its conclusion on what went on may not be the one that the client and their accountant expect.

**Example:** Consider a SMSF of a retired ex-accountant who believed that he knew all there was to know about SMSFs. He was in his sixties and married. He had more than \$1M in his account in the family SMSF plus plenty of cash to live on outside of his SMSF. In fact, he did not need any money at all from the fund but had decided to commence a pension so that he could contribute any surplus cash back into the fund as a non-concessional contribution. The purpose was to increase his tax free component in the Fund so when it is paid to his adult children on his death it will be tax free.

On the face of it, there was nothing wrong with his strategy. It was a matter of withdrawing cash from the fund as a pension payment and then contributing the cash back into the fund as a contribution on behalf of his spouse. In practice, the strategy should have been undertaken as follows.

- A pension payment should have been paid into his personal cash account from the fund's cash account. The definition of "pension" for the purposes of the SMSF laws is found in SISR reg 1.06 where it states that a payment must be made. If there is no payment, then there is no pension.
- A cash contribution should have been made from his cash account into the SMSF on his behalf as a contribution. This should have been evidenced by formal notification to the trustee of the fund, acceptance of the contribution by the trustee plus formal notification to the member and the contributor of the contribution and the subsequent investment of that contribution.

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However, the strategy did not end up this way. The ex-accountant did not wish to realise any of the underlying investments in the SMSF so that cash could be paid out of the fund; rather he decided to do everything by book entry. No physical cash was paid out or paid back in. All that happened was that the trustee transferred assets from his pension account into his wife's accumulation account in the fund.

The Commissioner has previously ruled that a book entry would not suffice in this instant and the Trustee of the Fund would be in breach of SISA.

**Tips:** Producing a paper trail and accurate compliance documentation is critical for the trustee, the SMSF adviser and the auditor. All documentation must also provide its source in the trust deed. Without a source, the documentation is irrelevant. In terms of the auditor's responsibilities, they must review all documentation and report the fund as complying.

## Supporting Documentation

To produce a flow of compliance documentation does take time. It must be signed off and filed away with the remaining paper trail. Some of the transactions and trustee actions that need supporting documentation are:

- contributions – in specie, in kind, spouse, employer, child and self-employed;
- membership application or admission;
- trustee appointment, dismissal or resignation;
- establishing an accounts based pension, with or without a reversion;
- setting up an investment reserve;
- paying a disability or incapacity benefit;
- notice to new members;
- investment strategy;
- notice of binding death benefit nomination or SMSF Will; and
- appointment of a SMSF adviser, auditor, financial planner, accountant, or actuary.

The documents should also be referenced back to the relevant rules in the fund's trust deed. This reveals where the trustee has obtained the power to undertake such a transaction.

# THE GUIDE TO SMSF TRUST DEEDS PLUS STRATEGY REVIEW

Abbott & Mourly has developed compliance documents, which record a number of the transactions that could be undertaken by the trustee of the fund – many of those mentioned above. These are referenced back to specific rules under the trust deed. The compliance documents make it easier for the accountant, auditor, SMSF adviser or trustee to develop compliance documentation for any particular transaction. These compliance documents are available as a package with the SMSF trust deed and PDS.

## Appendix - SMSF Trust Deed Checklist

ISSUE	CHECK IF OK ✓
Product Disclosure - Has the Trustee provided a Product Disclosure Statement to existing or prospective members?	
<b>ESTABLISHMENT</b>	
Are the rules of the fund properly executed and stamped?	
Do the rules incorporate the SIS Act and SIS Regs and other major applicable superannuation and taxation rules?	
Is the trust deed a true SMSF trust deed or is it in fact an employer sponsored fund trust deed with numerous, irrelevant yet onerous, trustee and member requirements?	
<b>TRUSTEES</b>	
Can both individuals and corporate entities be trustees?	
Does the trustee have extensive powers of investment?	
Does control of the fund rest with the trustee with the larger member balance or does each trustee have equal voting rights?	



# THE GUIDE TO SMSF TRUST DEEDS PLUS STRATEGY REVIEW

Is there a mechanism for a casting vote?

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Are all trustees or directors required to be members?

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## MEMBERSHIP

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Are members required to be trustees or directors of the trustee company?

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Is the deed flexible enough to cover members who are self-employed, retired, etc. (ie the deed is NOT conditional on or tied to there being an employer of a member?) Therefore:

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Can a non-working spouse be a member?

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Can a retired person be a member?

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Can children be members?

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## CONTRIBUTIONS

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Does the deed allow eligible spouse contributions?

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Does the deed allow for in specie contributions of shares, property and promissory notes?

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Are the co-contribution rules, where an employer can contribute on behalf of a spouse, incorporated in the rules?

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Does the deed allow contributions for members under age 75 without employment nexus under the new contribution laws?

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Does the deed allow "in kind" contributions?

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Does the deed allow for contributions reserving to shift contributions into a following income year if made in June for contributions caps maximisation?

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# THE GUIDE TO SMSF TRUST DEEDS PLUS STRATEGY REVIEW

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## INVESTMENTS

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Is the Trustee required to complete an investment strategy each year?

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Can the Trustee invest in a unit trust?

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Can the Trustee invest in a wholly owned SISR 13.22C unit trust?

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Can the Trustee undertake property development?

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Is cryptocurrency investing and trading allowed?

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Can separate investments be held for different members or different generations?

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Can the Trustee invest or run a business within the SISA?

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Does the deed allow investments, loans or leases to an employer-sponsor or member or associate of either within the in house assets test?

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## PENSIONS

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Does the deed expressly allow for the following pensions?

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Non-commutable pensions for second spouses on death.

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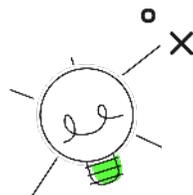
Account based pensions.

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Converting legacy pensions such as market linked pensions to account based pensions.

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Transition to retirement income streams.



# THE GUIDE TO SMSF TRUST DEEDS PLUS STRATEGY REVIEW

Temporary incapacity income streams.

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Payment of a promissory note as a pension.

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Ability to choose whether pension payment is a minimum payment with anything above a commutation for transfer balance maximisation?

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## ESTATE PLANNING

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Does the deed allow for sufficient estate planning flexibility?

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Is a BDBN the only estate planning tool?

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Is a SMSF Will allowed?

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Will a reversionary pension take precedence over any BDBN or SMSF Will?

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What happens to any life insurance proceeds?

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Can child pensions be paid and can they be reversionary?

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## INCAPACITY PLANNING

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Does the deed allow for sufficient incapacity planning flexibility?

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Who becomes Trustee where a member loses capacity?

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Is a SMSF Living Will allowed?

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Can a temporary incapacity pension be paid from the time of sickness?

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What happens to any disability insurance proceeds?

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