

SMSF: 8 reasons a corporate trustee is better

ATO statistics suggest that most self-managed superannuation funds (SMSFs) have individual trustees. This is troubling as sole-purpose corporate SMSF trustees have been known to be superior for many years.

Why are they superior? For a start, the sole purpose" indicates that the company only acts in one capacity – as an SMSF trustee. Other key advantages include:

-) A corporate trustee cannot die and offers better continuous succession. On the other hand, if individual trustees change or one dies, administrative hassles can result (such as having to update ownership documents). If real estate is involved, it is up to the trustee to show the Tax Office that no duty should be payable as a result of the change of trustee. This can involve submitting substantial paperwork.
-) When adding a person to the trustee role, this is usually less work-intensive for a corporate trustee. For individual trustees, adding one or more persons to the trustee role constitutes a change of trustee. On the other hand, in the case of a corporate trustee, adding directors to a company does not technically change the trustee itself since the trustee is the company. Because of this technicality, it is usually less troublesome to add directors to a company than to add individual trustees.
-) Corporate trustees can help a fund stay within the requirements to be an SMSF, which broadly helps the fund stay complying in the ATO's books. In particular, in the case of a single-member fund with a two individual trustees, if one dies, the fund cannot remain an SMSF with only one trustee and one member. But because of a quirk in the legislation, a corporate trustee with one director, with a single member fund, can still meet the SMSF definition.
-) If an SMSF with individual trustees tries to engage in limited recourse borrowing with a bank lender, the bank will usually insist on a corporate trustee. If this occurs partway through the process, it can be obstacle to the loan's progression.
-) Sole-purpose corporate trustees offer greater asset protection for an SMSF at risk, or in debt. If an SMSF trustee is sued and a large debt results, for example, individual trustees have their personal assets at stake if the SMSF assets are insufficient. By contrast, a corporate trustee is a separate legal entity, offering better protection.
-) The ATO has noted that contraventions of the "separation of assets" rule is common. The relevant law states (in part) that a trustee must keep its money and assets separate from money and assets "held by the trustee personally". Having a sole purpose corporate trustee generally prevents this contravention from occurring because of the separation of entities, and because the trustee will not have any personal money (it will only have SMSF money). On the other hand, if an SMSF with individual trustees mingles SMSF money with the members' personal money, this is a contravention.
-) The SMSF administrative penalties rules allow the ATO to impose administrative penalties on SMSF trustees for the contravention of certain superannuation rules. Directors of corporate trustees are jointly and severally liable to the penalty. Individual trustees are liable to one penalty each. So having a corporate trustee instead of individuals can mean fewer "heads on the chopping block" for penalties.

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-) There are highly technical rules for SMSF residency that broadly require an SMSF to meet the "Australian superannuation fund" definition to retain tax concessions. Under these technical rules, it is usually easier to show that the central management and control of a corporate trustee remains in Australia.

While it can be possible for a company to wear "more than one hat" (operate as an SMSF trustee and a discretionary trust trustee), this can create confusion and lead to mistakes. There have been several instances where a company has stopped being used in one capacity, leading to its formal deregistration, with all parties having forgotten that it is also used as an SMSF trustee. Accidents like this can lead to serious problems. Accordingly, this is another reason that a sole-purpose corporate trustee is ideal.

For SMSFs implementing a sole-purpose corporate trustee, a concessional annual ASIC fee can apply (the discount is about 80 per cent compared to the normal proprietary company annual fee).

However, advisers and company directors must be wary of the special eligibility requirements. First, it must be that the sole purpose of the company is to act as the trustee of a regulated superannuation fund. Second, the constitution of the company must prohibit distribution of the company's income or property to its members. Accordingly, it is not the case that "any old constitution" is suitable.

Source: David Oon – Senior Associate at DBA Lawyers, Contributor to AFR – 16 January 2017

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