Client Focused Financial Planning
Targeting Your Today and Tomorrow

Who controls a self-managed super fund?

When you set up a self-managed super fund (SMSF) you need to understand what it is, and also what it isn't.

Firstly, an SMSF is a trust and, like all trusts, it's not a legal entity.

Therefore the fund needs a trustee who makes decisions, opens up bank accounts, completes the tax return and so on and so forth.

Under legislation all members of an SMSF must be trustees either as individuals or as directors, if the trustee is a company.

But when it comes time to decide whether to be an individual or a director and establish an SMSF company many people grapple with the decision.

Before I begin answering this question, however, it's important to note that an SMSF must have two or more trustees if individuals and if there is only one member then a second person must agree to take up the position.

This second person must have access to all information and must be part of all decisions, even though they are not a member of the SMSF.

In the event of the sole member's death, the second member can make decisions contrary to their wishes if these wishes are not both identified and legally binding on them as a trustee of the SMSF.

Of course, that is not necessarily a good position to leave your family or loved ones in.

If the trustee is a company then, in a one member fund, that member can be the only director and shareholder.

So as you can see, there are advantages to establishing a company as trustee of your SMSF.

What if you have individual trustees?

If you have an SMSF with individuals as trustees, there are a number of factors which make this set-up more difficult to administer and manage.

1. If members change – such as people coming in or out (including death) – then all documentations and bank accounts need to change to reflect the changes to individual trustees. This can be both costly and time-consuming, as would be the case when changing the legal owner of individual share balances within a portfolio.
2. If property is purchased with debt, the banks will want to see a company as trustee plain and simple.
3. Super is there to create retirement income and if individuals are trustees the legislation does not allow a lump sum payment, which requires a company to be trustee. While the ATO has advised it accepts this we must ask ourselves for how long it will do so.
4. Superannuation is normally protected from a receiver in bankruptcy however if a member is receiving a retirement pension this would be available to a receiver in bankruptcy as the funds are no longer in super. That said, a lump sum is not available to the receiver if there is a company as trustee. Even if the ATO allows this lump sum, the receiver would not ignore the legislation and try and grab it.
5. If a binding nomination is not absolutely legally correct it becomes non-binding nomination. What this means is that in the event of death, the second trustee in a one member fund can pay as they decide. This could perhaps result in your partner missing out and the member's death benefits being paid to people you would not have wanted.
6. In the event of non-compliance of the SMSF, the ATO applies penalties per trustee, so with multiple individuals the size of the penalty can be up to four times greater than if there was a company trustee as that entity counts as only one.
7. In case a member goes into liquidation, the receiver could try and argue SMSF assets are those of the individual and not the SMS, thereby creating the need for potentially expensive legal advice.

What about a corporate trustee?

With a company as trustee, the one member fund can operate via the decisions of that one member and on death the executor, under very strict legal requirements, must follow your wishes.

The costs of a company, while initially more as an upfront payment, would normally be very small compared to the administration and uncertainty of making changes if individuals are trustees.

It’s also important to understand that the set-up of a company for SMSF purposes is very different to the establishment of a company for a standard business.

A SMSF company is actually called a “special purpose company”, which can only act as a superannuation fund (SMSF) trustee and therefore annual ASIC costs are minimal compared to a normal company.

While the growth of SMSFs has been growing exponentially in Australia, it’s imperative that you understand all their requirements and regulations before you create your own fund – and this includes the differences between individual and director trustees.