GFM
Wealth Advisory

SMSF SMART

Being an SMSF Trustee

Edition #2

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Being an SMSF Trustee

Edition #2

In our first edition of SMSF Smart, we provided an introduction to SMSFs.

In this edition of SMSF Smart, we work through the obligations of being an SMSF Trustee. We cover:

- Who can be a Trustee?
- Trustee duties and responsibilities
- The Sole Purpose Test
- Getting it wrong – Penalty Regime

SMSF Trustees are ultimately responsible for ensuring that the SMSF complies with the superannuation laws. Generally, all Trustees of the SMSF must be members of the SMSF. SMSF Trustees carry equal responsibility for the management of the SMSF, regardless of the level of involvement in the running of the SMSF. Trustees are ultimately responsible even though they may use accountants, financial advisers, lawyers and other professionals to look after the SMSF.

As always, we encourage you to ask us any questions if you need further information or clarification concerning the obligations of being an SMSF Trustee.

Who can be a Trustee?

It is not possible for an individual to act as a Trustee (or Director of the Trustee company) under the Superannuation Industry (Supervision) Act 1993 (SIS Act) if they;

- Are under 18 years of age;
- Lack the ability to manage their affairs (e.g. don't have full mental capacity);
- Are bankrupt or have been found guilty of an offence involving dishonesty;
- Have been penalised under the SIS Act or related regulations;

There are three exceptions to the rule that all members of the SMSF must be Trustees. They are;

- Should a member pass away, a Legal Personal Representative can act as the Trustee until the deceased member's benefits commence to be paid from the SMSF.
- If an Enduring Power of Attorney has been made for a person, they can act as Trustee.
- If the member has no legal capacity to act as a Trustee, their Guardian or Parent can act as the Trustee.

Trustee duties and responsibilities:

Obligations as an SMSF Trustee include:

- Legal obligations
    - The SMSF must be operated as required by the Trust Deed, the provisions of the SIS Act and applicable tax, corporations, family and trust legislation.
- Adhere to the Covenants (obligations) in the SIS Act and Regulations
    - The covenants imposed on Trustees by the legislation are deemed to be part of the Trust Deed of every fund.

The covenants require Trustees to:

- In all matters concerning the SMSF, act honestly
- Act in the best interests of all members
- Ensure SMSF assets are separated from personal and business assets
- Develop, implement and regularly review an investment strategy
- Allow access to information and keep members informed

Obligations with which SMSF Trustees must comply under superannuation and taxation laws include:

- Maintain the SMSF for the sole purpose of providing retirement benefits to members, or to their dependants if a member dies before retirement
- Accepting contributions and paying benefits (pension or lump sums) to members and their beneficiaries in line with superannuation and taxation laws and the SMSF Trust Deed
- Valuing assets at market value for the preparation of financial accounts and statements
- Having the financial accounts and statements for the SMSF audited:
    - All SMSFs must have their financial accounts and their compliance with the SIS Act audited annually by an approved SMSF auditor.
- Meeting the reporting and administration obligations imposed by the ATO:
    - Trustees must keep minutes of meetings, keep the financial records, prepare and lodge annual returns with the ATO and have the fund's accounts audited every year. Some of these records are required to be kept for up to 10 years.

Trustees are responsible for compliance with a range of investment-related requirements including:

- The investment strategy covenant
- Various restrictions on investments and benefits including those related to:
    - Lending to members or their relatives
    - Acquiring assets from members or their relatives
    - In-house assets
    - Arms–length transactions
    - Borrowing by the SMSF
    - Member reporting obligations
    - Contribution standards, and
    - Benefit payments standards.

The Sole Purpose Test:

It is the Trustee's responsibility to ensure the SMSF is only maintained to provide benefits to members upon their retirement or their beneficiary if a member dies. An SMSF is required to be exclusively operated for superannuation purposes to be eligible for the tax concessions ordinarily available. This is called the Sole Purpose Test

Contravening the sole purpose test is very serious. In addition to the fund losing its concessional tax treatment, Trustees could face civil and criminal penalties.

It's likely that an SMSF would not meet the sole purpose test if you or anyone else, directly or indirectly, obtain a financial benefit when making investment decisions and arrangements (other than increasing the return to the SMSF).

Your SMSF will fail the sole purpose test if it provides a pre-retirement benefit to someone – for example, personal use of an SMSF asset.

Getting it wrong – Penalty Regime:

At all times, with no exceptions, an SMSF needs to be an appropriate retirement savings vehicle.

An SMSF needs to meet the definition of an 'Australian superannuation fund' to be a complying super fund and benefit from tax concessions. This means:

- The SMSF has been established in Australia or holds investments in Australia
- The decisions about the SMSF must be made in Australia except where the Trustees are temporarily absent from Australia for short periods of up to two years
- Where the SMSF has contributions added to it by members (the active members), 50% of the SMSF's assets are attributable to active members who are Australian residents

If an SMSF is non–complying, its assets and income less any non–deductible contributions are taxed at 47% currently.

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Some duties and obligations are outlined in the SIS Act; other responsibilities are the subject of general trust law. Trustees are liable under the law for breaches of duties.

If an SMSF breaches the SIS Act:

- The SMSF may no longer be eligible for the superannuation concessional taxation treatment.
- The ATO may fine the SMSF.
- The SMSF may be issued with rectification and an education direction by the ATO.
- Trustees can be disqualified as a Trustee of any superannuation fund.
- Trustees may each have an administrative penalty imposed personally. The penalty cannot be paid from the SMSF.

In Summary:

Getting the right advice and expert guidance is so important when you are a Trustee of an SMSF.

While SMSFs come with greater control, there is also more responsibility. Being a Trustee requires you to actively participate in the investment, administration and management of the SMSF.

The ATO encourages individuals to engage professionals to help set up and run an SMSF. This is where GFM Wealth Advisory can help, by providing advice around managing your ongoing obligations as Trustee, undertaking the day–to–day administration and compliance tasks, provision of strategic advice as well as investment management.