

Tech Time



SmartSuper's monthly technical guide

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Corporate versus individual trustees for SMSFs

A self managed superannuation fund (SMSF) can have a corporate trustee or individual trustees. An SMSF can have up to four members and, subject to certain exceptions, all members must either be individual trustees or directors of the corporate trustee.

While approximately 90% of newly established SMSFs use individual trustees, we recommend that SMSFs use a corporate trustee. A corporate trustee involves additional costs to establish and to lodge annual returns, but there are ongoing benefits that we believe outweigh these costs.

The advantages of a corporate trustee are set out below.

1. Change of individual trustees or directors of a corporate trustee

A change of individual trustees or directors of a corporate trustee will be required if:

- members join or leave the SMSF, for example adding children as members or in the event of divorce
- a member dies
- a member loses capacity and their legal personal representative takes over the role of trustee or director

- a member moves overseas for an extended period and a person holding an enduring power of attorney assumes the role of trustee or director.

The assets of a superannuation fund must be held in the name of the trustee(s).

Corporate trustee

There is no change in trustee so there is no change in the ownership of the fund's assets.

Individual trustees

A change in trustee means there is a change in the legal ownership and will require a change in the names on the titles of all of the fund's assets. It is particularly difficult to change the name on a bank account and in some cases it may be easier to set up a new bank account, which in turn requires the trustees to redirect deposits such as dividends.



Tech tip: For some trustees of SMSFs, having a corporate trustee will save them from mistakes. This can occur when the SMSF's bank account in the name of Mr and Mrs X is incorrectly used to pay for personal items. A bank account in the name of XYZ Pty Ltd is less likely to be used for personal items.

2. Estate planning

Corporate trustee

A company has an existence independent of its directors and shareholders, and therefore continues to be the trustee of the fund following the death of a member.

Individual trustees

Timely action needs to be taken on death of a member to ensure the member/trustee rules are met, eg if one member remains, it is necessary to appoint an additional trustee to meet compliance

requirements. This is not normally a time when the complying status of their super fund is uppermost in the member's mind but it is vitally important to comply with the legislation.

3. Single member fund

Corporate trustee

A single member fund can use a corporate trustee with a single director and so maintain control over the fund.

Individual trustees

Two trustees are required, which means that a person who is not a member of the fund is involved in making decisions for the fund.

4. Asset protection

Companies enjoy limited liability, so a corporate trustee receives an additional layer of protection compared with individual trustees if the trustees were sued.

Key reasons for excess superannuation contributions

At the recent SMSF Professionals Association of Australia (SPAA) conference, the Commissioner of Taxation, Mr Michael D'Ascenzo discussed the main reasons for taxpayers receiving excess contributions tax assessments.

1. Taxpayers are failing to take into account available information when planning their contributions for a financial year. This may be due to:

- funds not reporting contributions correctly
- taxpayers not completing their tax returns correctly
- taxpayers not giving superannuation funds correct contribution information.

It is the taxpayer's responsibility to ensure that their contributions remain within the relevant contributions cap. Accordingly, it is essential to have correct information about existing superannuation contributions and whether these are concessional or non-concessional.

2. Specific to the concessional contributions cap:

- salary sacrifice agreements and, in particular, the timing of contributions made by employers.

Contributions count against the cap when they are received by the fund, rather than in the financial year to which they relate. For example, June quarter superannuation guarantee (SG) contributions are not due to be made until the following 28 July. Taxpayers need to be aware of all amounts which will count as concessional contributions, including payment of life insurance premiums, payment of fund expenses and SG on bonuses.

The Commissioner may exercise his discretion to reallocate contributions to another financial year where the employer changes their usual contribution pattern, for example, June contributions which are usually made in the following July, are made in June. However, the Commissioner noted if contributions were brought forward in subsequent years, it would be more difficult to argue special circumstances.

3. Specific to the non-concessional contributions cap:

- taxpayers not understanding the tax treatment of contributions
- taxpayers receiving poor professional advice
- super funds not returning funds which cannot be accepted by law.

Many cases of taxpayers making excess contributions involve taxpayers who do not receive professional advice. However, there have also been cases where the taxpayer has received incorrect advice from their adviser. The third point refers to situations where funds are not permitted to accept contributions. These include:

- contributions made by or for persons aged 65 to 74, who do not meet the applicable work test
- contributions made by or for persons aged 75 or over (other than award contributions)
- non-concessional contributions that exceed \$450,000 for a person aged under 65 or \$150,000 for a person aged 65 or over. (This is interpreted as referring to a single contribution, not all contributions made during the financial year).

The Commissioner noted that most excess contributions are excess concessional contributions which are taxed at an additional 31.5%, although there were some taxpayers who paid excess contributions tax at an effective rate of 93%, where they had excess concessional contributions that also resulted in excess non-concessional contributions. He also noted that applications for Commissioner's discretion were only lodged for 8% of excess contributions tax assessments and that discretion was only granted in 20% of those cases.

As noted in previous issues of Tech Time, excess contributions tax is an increasing issue. The governing legislation is unduly restrictive and the Commissioner has only been exercising his discretion to disregard or reallocate contributions in very limited circumstances. As demonstrated by the following case study, it is possible for a seemingly minor error to have significant ramifications.

Case study

In 2007/08 Fred made total contributions of \$200,000 to his superannuation fund. He lodged a s290-170 notice and claimed a personal deduction for \$50,000. Thus his contributions for 2007/08 are as follows:

- concessional \$50,000
- non-concessional \$150,000

In 2008/09 Fred made use of the 'bring forward' provision to make a non-concessional contribution of \$450,000 covering the three years 1 July 2008 to 30 June 2011.

Fred subsequently amended his 2007/08 return and s290-170 notice to reduce the tax deduction claimed for personal contributions from \$50,000 to \$30,000. This changed his contributions in 2007/08 to:

- concessional \$30,000
- non-concessional \$170,000

As his 2007/08 non-concessional contributions now exceed \$150,000, this triggers the 'bring forward', making his non-concessional contributions cap \$450,000 for the three financial years 1 July 2007 to 30 June 2010. Total non-concessional contributions made during this period are \$620,000, giving excess non-concessional contributions of \$170,000. Fred received an excess concessional contributions tax assessment for \$79,050 ($\$170,000 \times 46.5\%$).

Fred can not amend his s290-170 notice as it is only possible to vary the deduction claimed by reducing the amount, not increasing it. Accordingly a seeming minor action has resulted in an excess contributions tax liability of \$79,050.

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smartsuper
superfund administrators

SmartSuper Pty Limited

abn 47 003 822 339 afs licence 247120

level 15, 123 Pitt Street, Sydney, NSW 2000

PO Box 529, North Sydney NSW 2059

phone: 1300 138 348 fax: 1300 138 349

www.smartsuper.com.au