



# SMSF Trustee Structure – What is the process to change it?

The choice to have either individual or a corporate trustee is an important decision to make for an SMSF however it doesn't need to be fixed for the life of the SMSF. The structure can be changed to suit the changing circumstances of the trustees/members.

Reasons to change the trustee over the life of the SMSF may be as follows:

- New members may want to join the fund
- Death of a member
- Incapacity of a member
- Divorce of a couple
- Bankruptcy
- The change in SMSF legislation allowing up to 6 members in a fund (yet to receive Royal Assent, but will apply from the start of the first quarter that commences after the act receives Royal Assent)

There may need to be a change made to the SMSF trustee structure as follows:

- From individual trustees to a corporate trustee
- From a corporate trustee to individual trustees
- Adding more individual trustees or removing/replacing individual trustees
- Adding more directors or removing/replacing directors

Meeting the definition of an SMSF at all times is essential to maintaining the complying status of a fund. Before we go into the process of what happens to change the trustee we will revisit the current rules around trustee requirements so you can consider if any changes you may be considering making to your SMSF are allowable.

To meet the definition in the legislation an SMSF needs to meet the following conditions:

- Fewer than 5 members (or in other words up to 4 members maximum – this will change to a maximum of 6 members once the new legislation receives Royal Assent)
- If the trustees are individuals, each individual trustee is a member of the fund
- If the trustee is a company, each director of the company is a member of the fund
- Each member of the fund is a trustee of the fund or if the trustee is a company, each member is a director of the company
- No member of the fund can be an employee of another member unless the members are relatives (so there can be no unfair influence over another member)
- No individual trustee or director of the corporate trustee of the fund can receive any remuneration for any duties or services performed as a trustee in relation to the fund

Furthermore, there are different rules for single member funds. A single member fund must have a second individual to act as trustee with them. The second trustee does not need to be a member of the fund. If a single member fund chooses to have a corporate trustee, then they can be the sole director as there is no requirement for there to be a second director. However, they can choose to have an additional director if they wish.

It is important to follow a clear and consistent process to ensure all necessary changes are made and to avoid any compliance issues arising. The following steps outline the basic process that is followed to change the trustee of an SMSF:

**Step 1** - Review trust deed, and constitution (if necessary) to determine how the change must take place



**Step 2** - Arrange legal documentation to enable change in trustee



**Step 3** - Notify government bodies of the change including the ATO, and ASIC (if necessary)



**Step 4** - Update the SMSF's investments to reflect the updated trustee name(s)

## **Step 1 – Review the trust deed, and constitution (if necessary) to determine how the change must take place**

The first step in any major decision for a super fund should be to check the trust deed. The deed outlines the rules of the SMSF and will generally give guidance on the process of appointing or removing trustees. It should have specific clauses outlining the requirements for the fund. The trustees are bound by requirements of the deed and should follow what it says to do to validly appoint or remove trustees. In some cases, it may prescribe that a deed of appointment and removal/resignation/retirement is required, or a meeting of trustees may be sufficient to fulfil their obligations.

Additionally, if there is a corporate trustee in place for the SMSF, then any changes to the directors will require the trustees to check the constitution of the company for instructions about appointing and removing directors. The constitution will contain the specific clauses outlining the requirements for the company. For example, it may prescribe that the directors need to pass a resolution to change the directors.

## **Step 2 – Arrange legal documentation to enable the change in trustee**

Once the deed (and constitution if necessary) have been reviewed we will have an understanding of what changes need to take place. Xpress Super will liaise with a legal documentation provider to prepare the necessary documentation to change the trustee, and directors if necessary.

If changing an individual trustee structure to add or remove an individual it may be a matter of preparing a deed of appointment and removal/resignation, or simply a resolution. A trust deed update may be required depending on the age of the deed and the clauses in the current deed.

If changing from an individual trustee to a corporate trustee, then there may be a need to prepare a deed of appointment and retirement and may also be the need to incorporate a company to act as trustee if one does not exist already (preferably a new company is setup). You will need to choose a proposed company name and make sure it is available to use (we can search the ASIC website for availability). We will need to know the director's details if not already available, who will be the shareholders and who will be the ASIC agent for the company. Various documents will be prepared and sent out for signing including the company constitution, resolutions, ASIC forms and special purpose declaration (where necessary).

The level of legal documentation required will vary greatly depending on the specific circumstances of the fund and the changes taking place. This will also impact on the fees charged as it will vary depending on the extent of documentation required.

In addition to the legal documentation, we will prepare Trustee Consent to Act forms for the new trustees and ATO Trustee Declaration forms. The ATO Trustee Declaration is a form that was introduced in July 2007 and is required to be signed by every new trustee or director of a corporate trustee within 21 days of becoming a trustee or director of a corporate trustee. There may also be other internal documents that Xpress Super will update at the same time to reflect the new trustee arrangement (such as our Limited Power of Attorney which is used for administrative purposes). All documentation needs to be executed correctly to be legally valid.

### Step 3 – Notify government bodies of the change including the ATO and ASIC

When the legal documentation has been put in place the relevant government bodies need to be notified of the change of trustee. SuperGuardian as tax agent will arrange to update the ATO's trustee/member records within 28 days of the change taking place.

Where a corporate trustee is in place, and SuperGuardian are the ASIC agent we will take care of the forms to notify ASIC of the change in directors. Alternatively, where we are not the ASIC agent, the directors/members will need to ensure ASIC is notified within 28 days of the change.

If either the ATO or ASIC are not informed within the relevant timeframes, then penalties can apply to the SMSF.

### Step 4 – Update the SMSFs investments to reflect the updated trustee name(s)

SIS Regulation 4.09A requires that money and assets be kept separate from personal assets. Keeping assets separate helps to safeguard the fund assets. An SMSF is a separate legal entity which must have its own assets clearly held in its own legal fund name. The assets are held by the trustees for the SMSF. Once the SMSF trustee is changed and all documentation is in place it is important that the trustees get the investments all updated so they are held in the correct legal name.

The following is a breakdown of the general process for different asset types:

- For **bank accounts and term deposits**, the banks will be able to guide you on whether they will accept the original or certified copies of the change of trustee documentation to update their records. In some cases they may require that the existing accounts are closed and new ones opened in the new trustee names.
- For **listed securities** held through a broker, they will be able to setup a new CHESS account and do an off-market transfer for each holding (there will likely be fees for each transfer). For issuer sponsored holdings you will need to arrange off market transfers for each holding through the relevant share registries.
- For **managed funds** and **wrap accounts** the process will depend on the specific institutions involved. There will likely be forms to be completed to transfer ownership into the new trustee and they will probably need to sight certified copies of the change of trustee documentation to update their records. There may be stamp duty payable on transfers depending on the specific states they are registered in.
- For **property** held, a lawyer or conveyancer would be engaged to prepare the legal transfer forms required to change ownership through the state revenue office. Where there is no change in beneficial ownership of the property, there is generally no stamp duty payable to reflect the change in ownership.

If you would like to change the structure of your SMSF, please contact your Client Manager to discuss the changes and obtain a quote on the fees that apply to your specific circumstances.