

SMSF TRUSTEE RESPONSIBILITIES



Before you get started

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Letter from Wealth Today

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With a national network of likeminded experts, we have the potential to provide the financial building blocks for future generations.

KNOWLEDGE GIVES YOU A HUGE ADVANTAGE

We believe that knowledge gives you a huge advantage in creating and effectively managing wealth; in planning to reach your goals; and in being prepared for whatever unexpected twists and turns life may present.

That's why our team of experts has created this series of eBooks that seek to inform you of not only the benefits but also the potential risks and pitfalls of various strategies and investments.

We trust you enjoy this eBook and find it informative and professionally presented. Of course, your feedback is always welcome as we strive to continually offer content in a format that is relevant to you.

TAKE THE NEXT STEP

We invite you to meet with one of our authorised representative to discuss what it was you were hoping to achieve when you downloaded this eBook and to establish if they can help you achieve your goals and objectives.

At the rear of this book you will find the details on how to book an appointment with one of our experts.

We look forward to meeting you soon.

Wealth Today

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Steps in establishing a self-managed super fund

There are a number of steps you will need to follow to establish a self-managed superannuation fund (SMSF).

Step 1: Pre-establishment issues

An SMSF will give you more control over your super and retirement planning, but there are a number of factors to consider before going ahead with setting up an SMSF:

- consider the advantages and possible disadvantages or risks of running an SMSF
- determine that an SMSF is suitable to your circumstances
- the level of your current super justifies the establishment of an SMSF
- current insurances in place in existing super funds and the implications of transferring these funds into the SMSF have been considered, in addition to future insurance requirements
- deliberation has been given to other individuals that may be included in the fund
- the most appropriate trustee structure has been selected (individual or corporate trustee)
- a thorough understanding of responsibilities and obligations of trustees and working knowledge of the relevant super rules
- other members of the fund, if any, have also carefully considered all of the above factors.

For more information on the suitability of SMSFs, please see the module: Introduction to SMSFs.

Step 2: Issue a Product Disclosure Statement (PDS)

Under the Corporations Act 2001, an SMSF is required to issue a Product Disclosure Statement, which means that all new members to an SMSF should receive a Product Disclosure Statement on or before they become a member of the fund. That is because they are receiving a 'superannuation interest' at that time.

SMSFs are considered a "financial product", under the Corporations Act, which means that all new members to an SMSF should receive a Product Disclosure Statement on or before they become a member of the fund.

A Product Disclosure Statement is a concise explanation of a member's benefits, entitlements and risks in respect to a financial product (e.g. an SMSF). Broadly, a Product Disclosure Statement must contain everything a reasonable person would expect to be aware of before investing in an SMSF.

The Corporations Act does not require a Product Disclosure Statement to be given to a new member of an SMSF where the trustee believes, on reasonable grounds, that the member has received, or knows they have access to, all of the information that a Product Disclosure Statement would be required to contain.

Step 3: Obtain a trust deed

A 'Trust Deed is a legal document that will govern every aspect of the establishment and management of your SMSF. Since it is a legal document, it should be drawn up by a qualified legal professional. He/she should be able to advise you about the items that should be included in the deed.

As a general rule of thumb, the deed should spell out the membership of the fund (i.e. the trustees and their responsibilities), the aims of the fund, the management and payment of benefits and procedures for the appointment of professional advisers. Your trust deed can be tailored to meet the specific needs and objectives of your fund members, but not to the extent that it overrides other legal requirements and the super and tax rules and regulations. The super rules stipulate that these rules will always override a fund's trust deed, if they are contradictory.

Whilst not favourable, there is nothing to prevent a fund's trust deed from containing provisions that are more restrictive than the super rules.

The trust deed should be reviewed regularly to ensure that it continues to comply with current legislation. If the trust deed is amended or replaced, trustees are required to keep a copy of all versions of the deed and any instrument that has amended it.

Step 4: Distribute member application forms

SMSF administrators and purchased fund deeds typically provide an SMSF application form as part of the establishment process. The information captured on these forms, including member details and their Tax File Number (TFN), is the basis to create member's records and accounts.

Step 5: Prepare an investment strategy

You must prepare an investment strategy for your fund that takes into account the members' needs and circumstances before any investments can be made. The investment strategy needs to:

- set out your fund's objectives, which should be meaningful and measurable, and
- outline the investments that will be made to achieve the objectives.

The trustees are also required to consider whether your fund should take out insurances on behalf of the members.

Step 6: Execute trust deed, appoint trustees, admit members and adopt investment strategy

The members will need to meet to execute the trust deed and appoint themselves as trustees, or directors of the corporate trustee. Trustees will need to sign the various consents and declarations as well as adopt an investment strategy for the fund. These are summarised as follows:

- Execute the trust deed - the trust deed must be signed and dated in accordance with the relevant state or territory law.
- Sign written trustee consents in relation to their appointment as a trustee - trustees may also be required to sign a declaration confirming that they are not disqualified from acting as a trustee of a super fund.
- Sign trustee declaration – all new trustees (or directors of a corporate trustee) must sign this declaration within 21 days of becoming a trustee or director, confirming they understand the duties and obligations of being a trustee or director. The declaration does not need to be lodged with the Australian Taxation Office (ATO) but it must be kept on record and provided to the ATO on request.
- Adopt the investment strategy and ensure this is documented in the minutes.
- The members of the fund should complete and submit application forms to become members of their fund.

Step 7: Register the fund with the ATO

As soon as your fund is legally set up you should register it with the ATO and elect for the fund to be regulated by them. This election must be done within 60 days of establishing the SMSF otherwise the ATO may not accept your registration.

WARNING

Funds that are not regulated cannot claim the super tax concessions associated. Members' employers (and self-employed members) will also not be able to claim deductions for contributions that they have made to the fund. Once you have made the election it is irreversible and the fund will remain regulated until it is wound up.

Once you are officially registered with the ATO your fund will be allocated a Tax File Number (TFN) and an Australian Business Number (ABN). This will allow you to open a bank account and to carry out normal business functions.

The ATO will also place details of your fund on the Australian Business Register and on the 'Super Fund Lookup' website.

These entries will allow other super funds to ascertain whether you are operating a compliant fund for the purpose of transferring super benefits.

Step 8: Open a bank account

Your SMSF will need a bank account so it can accept cash contributions and rollovers of super benefits, receive income from investments, pay fund expenses and pay benefits to members. The account needs to be opened in the name(s) of your fund's trustees and the money must be kept completely separate from other personal or business assets.

GST and super funds

A super fund must register for Goods and Services Tax (GST) where its annual turnover is greater than \$75,000. For super funds, turnover includes income from the leasing of commercial property owned by the fund.

Amounts that are not included in the turnover of an SMSF include:

- member contributions
- investment income (other than income from the leasing of commercial property)
- administration fees
- fees charged for life and total and permanent disability insurance
- rents from the leasing of residential property
- receipts from the transfer of capital assets.

Most SMSFs will not have to register for GST.

Step 9: Accept contributions and rollovers

Cash contributions can be made into your fund. Money can also be rolled over (transferred) directly from another complying super fund. The fund that you transfer from will need to establish that your SMSF is a complying super fund by looking up your fund's details on the Super Fund Lookup website. It would therefore usually only be possible to rollover money to your fund when it is up and running.

<http://superfundlookup.gov.au/>

SuperStream and employer contributions

All super funds, including SMSFs, are required to receive employer contributions electronically (including both the amount of the contribution and the contribution information).

For more information on SuperStream and employer contributions, please see the module: Contributing to Superannuation.

Step 10: Appoint external service providers

An independent auditor must be appointed to review the fund's activities each year and ensure it complies with the relevant laws. You may also want to use the services of other professionals, such as a(n):

- Lawyer, who can provide you with an appropriate trust deed and governing rules for your fund, and advise you on other legal matters
- licensed financial adviser to help you prepare, implement and review your fund's investment strategy
- accountant or registered tax agent, who can look after your fund's record keeping and reporting requirements, and provide taxation advice and prepare and lodge tax returns
- fund administrator to assist with the day-to-day running of your fund
- qualified independent valuer to assess the market value of a collectable from or disposed of to a related party.

WARNING

Whilst the trustees can engage other providers to do certain acts or things on their behalf, the trustees are ultimately responsible and accountable for ensuring the fund is run in a prudent manner and administered correctly.

Formulate and implement an investment strategy

The super rules applicable to SMSFs required you to develop, implement and review an investment strategy for the SMSF that has regard to the whole of the circumstances of a fund, including in particular:

- the personal circumstances of the fund's members—for example, their age and number of years to retirement, their risk tolerance and how much money each member will need at retirement, and when
- risk management of the underlying investments and strategies that focus on maximising member returns with consideration to the kinds of risks the fund is taking on, such as volatility, liquidity and cost
- investment across a diverse range of asset classes and how this will manage investment risk. Some of the asset classes may include cash, term deposits, bonds, Australian shares, currency, direct property etc.
- ensuring the fund is able to pay its obligations and liabilities as they fall due such as paying taxes, member retirement benefits and any other costs associated with running the SMSF
- the insurance needs of each fund member and whether it is appropriate to hold insurance cover inside the SMSF.

For more information on investment strategies and investing an SMSF's assets, please see the module: SMSF Investment Rules.

Trustee administrative duties and responsibilities

The trustees must administer the fund in accordance with the super laws as well as the fund's trust deed. The trustee's administration duties and responsibilities are outlined below.

Trustees to declare they understand their duties as trustee

All trustees and directors of corporate trustees must sign an SMSF Trustee Declaration. This must be done no later than 21 days after becoming a trustee or director. The declaration aims to ensure new individual trustees, or directors of corporate trustees, understand the duties of trustees of an SMSF.

Although the form is not required to be lodged with the ATO, the declaration must be readily available to the ATO if required. Failure to produce the signed trustee declaration at the time of an ATO audit or review may result in penalties being imposed. The declaration must be retained with the fund's records for a period of at least ten years.

Meet to carry on the business of the fund

Trustee meetings may occur throughout the year and should occur at least annually to address the fund's accounts, investment strategy and members' insurances.

Other meetings may be required to address specific circumstances such as the commencement of an income stream for a member, acquisition or disposal of an asset or the admittance of a new member.

The trust deed should stipulate the rules in relation to the conduct of the meetings such as attendance, quorum required to be present and votes required for the passing of resolutions. You need to keep minutes of trustee meetings and decisions, if matters affecting your fund including investment decisions, were discussed.

Comply with operating standards

Trustees are required to operate the fund in accordance with the operating standards for regulated super funds as outlined in the super laws. The operating standards that impact SMSF trustees include rules in relation to:

- persons who may contribute to the fund
- the amount of contributions that a fund may accept and the circumstances in which they may be accepted
- the preservation and payment of benefits
- the form in which benefits may be provided
- the investment of fund assets
- fund record keeping requirements
- fund reporting and disclosure requirements
- the winding up of funds.

Trustees that intentionally or recklessly contravene an operating standard can be subject to fines and other penalties.

Accept contributions and rollovers

Trustees should accept contributions and rollovers in accordance with the super laws. Contributions may include employer contributions for employees, personal contributions, spouse contributions and payments made by any other person.

Contributions and rollovers received by an SMSF must be allocated to a member within 28 days after the end of the month in which they were received.

On receiving a rollover from another super fund, the trustee should receive and must retain a Rollover Benefits Statement which details the tax components and preservation status of the rollover.

The super rollover benefit statement will also be required to prepare the fund's annual accounts and financial statements and may be required to be sighted by the fund's auditor.

For more information on accepting and reporting contributions, please see the module: Contributing to Superannuation.

Accept and acknowledge deduction notices for personal super contributions

Trustees must acknowledge receipt of valid tax deduction notices for personal super contributions after ensuring:

- the notice is both valid and in the approved form
- if it is a variation notice, that it does not increase the amount to be claimed.

Payment or transfers to or on behalf of members

Trustees must only pay benefits to members in accordance with the cashing restrictions outlined in the super laws and the terms of their trust deed.

Within 7 days of rolling over a member's benefit to another fund, the SMSF trustee must provide a Rollover Benefits Statement to the new fund. This contains details such as identification of the member and the taxation and preservation components. In addition, a copy of the Rollover Benefits Statement must also be provided to the member within 30 days.

Invest and manage fund assets

Trustees should invest the fund's assets in accordance with the fund's trust deed and investment strategy and the super laws.

For more information on the super investment rules, please see the module: SMSF Investment Rules.

Keep assets separate

Trustees must not inter-mingle the money and assets of the SMSF with their personal assets, or those of a related entity. The trustee must keep the SMSF money and assets separate at all times. These rules are designed to protect the members' retirement benefits and failure to do so could see the SMSF become non-complying.

The simplest way to ensure you comply with this requirement is to have all the SMSF's bank accounts and investment ownership registrations (where possible) under the name of the individual trustees or corporate trustee with reference to the SMSF's full name.

EXAMPLE

Individual trustees: Bill Edwards and Rita Edwards as trustee for the B & R Edwards Super Fund

Corporate trustee: B & R Edwards Super Pty Ltd as trustee for the B & R Edwards Super Fund

Value fund assets

The SMSF's assets are required to be valued at the end of the financial year for the purpose of preparing the fund's accounts, statements and the SMSF annual return.

The ATO has published Valuation guidelines for self-managed superannuation funds. This includes the following guide as to when trustees must value certain assets:

- the acquisition of assets from related parties
- the requirement for investments to be made and maintained on an arm's length basis
- determining the market value of a fund's in-house assets as a proportion of the fund's total asset holding
- determining the value of the assets that support a member's pension
- disposing of certain collectable and personal use assets to a related party.
- In addition, monitoring the investment allocation and performance is another benefit.

Keep proper records

The ATO requires that trustees keep accurate records for prescribed periods and must make them available to the fund's auditor or the ATO on request. The following records must be kept for a minimum of five years:

- accounting records that detail the transactions and financial position of the SMSF
- annual accounts and statements required by legislation
- annual returns lodged with the ATO
- copies of any other returns or statements provided to the ATO or other super funds (e.g. Rollover Benefits Statement).

These records must be kept for a minimum of ten years:

- minutes of trustee meetings e.g. details of investment decisions, decisions to pay benefits and decisions on where to store collectables or personal use assets
- trustee declarations
- the written consent of members to act as trustees
- copies of all statement or reports given to members that are required by legislation or the governing rules
- records of changes of trustees.

Prepare end of year accounts

For each year trustees must ensure that end of year accounts and statements are prepared, at market value in relation for the fund. This should include an annual operating statement, and an annual statement of financial position.

Appoint approved SMSF auditor

Trustees must appoint an approved SMSF auditor to audit the fund from a financial perspective and also that the fund has complied with the super laws. This entails:

- checking that the auditor you intend to appoint is registered with the Australian Securities and Investments Commission (ASIC). ASIC will issue approved SMSF auditors with an SMSF auditor number to assist with this purpose.
- contacting the auditor early to allow sufficient time to conduct the audit and to have enough time to lodge the SMSF annual return on time on your behalf
- appointing your auditor, at least 45 days before the SMSF annual return lodgment due date.

Some of the criteria that must be satisfied by an auditor are that they:

- must be independent and show freedom from bias, personal interest and association
- must not be a trustee or member of the fund
- must not have prepared accounts and statements for the SMSF
- must not be a relative or close associate.

Annual reporting obligations

When you become an SMSF trustee, you take on the administrative responsibilities designed to make sure your fund complies with the law.

Lodge the SMSF annual return

All SMSF's must lodge an annual return with the ATO each year in order to:

- report income tax
- report super regulatory information
- report member contributions
- pay the supervisory levy.

The lodgment date varies for different funds depending on when they were established and if the trustees prepare their own return. Failure to lodge by the due date will incur penalties.

If you lodge your SMSF annual return yourself, the due date is generally 28 February following the financial year. If you did not lodge your return for the previous financial year on time, the due date will be 31 October. For your first year the due date is 31 October.

If your return is lodged through a tax agent, they'll tell you the due date. For your first year the due date will be 28 February.

Financial and compliance audit

Trustees cannot lodge the SMSF annual return until the SMSF has been audited. This is because you need information from the audit report to complete the regulatory information in the return.

IMPORTANT POINT

Note that an audit is required even if no contributions or payments are made in the income year. It is worth noting however that when it comes to an annual return, the ATO's system will not accept one if at the end of the financial year the SMSF has no assets or no members; unless that is the year the fund is wound up.

Once they have all the relevant documentation, such as trust deed, minutes, accounting records, working papers and the fund's investment strategy; some of the compliance issues that the auditor will be considering include:

- Was the fund maintained for the "sole purpose" of providing benefits to either members on retirement or dependants (in the case of a member's death)?
- Does the fund meet the definition of an "SMSF" and has it chosen to be a regulated fund?
- Are any disqualified persons acting as trustee?
- Do the investments reflect the trust deed?
- Does the fund have an investment strategy that complies with investment restrictions?
- Did the fund give financial assistance to a fund member or relative?
- Are the fund's assets separate from those held by trustees personally?
- Do trustees adhere to contribution and benefit payment standards that comply with the preservation and other standards?
- Were any assets sold or transferred in-specie, and if so, was this at market value?

Outcome of the audit

When the audit is completed, the auditor must provide the trustees of the SMSF with the Independent Auditor's Report (IAR) outlining the findings and implications of the audit. This should be provided within 28 days of receiving all the relevant documentation and include:

- details of any contraventions of the super laws
- recommendations for any actions required by the trustees
- any weaknesses in internal controls that could be improved.

The trustees must then take steps to rectify the issue to the auditor's satisfaction as soon as possible.

As well as providing a report to the trustees, the auditor is also obliged to report in writing to the ATO if the financial position of the SMSF is unsatisfactory or if a contravention of the super laws has occurred or may be about to occur. This is referred to as an Auditor/actuary contravention report (ACR).

What happens when a fund is reported?

Where the ATO receives an ACR in relation to a fund, they will review the contravention and the other information they hold to determine what further action to take.

Other trustee reporting requirements

Trustees must also report to the ATO on the occurrence of a range of events, summarised below:

Reportable event	Reporting time frame
Trustee becomes disqualified	Immediately
Change of fund details e.g. contact details, name, residency status, associates (trustee, members, directors of corporate trustee, legal personal representative)	28 days
Fund ceases to be an SMSF	21 days
Fund becomes an SMSF after being a Small APRA Fund	21 days
The fund suffers a significant adverse event that is likely to have a significant adverse effect on the financial position of the fund and impact on the fund's ability to make benefit payments when they are due	Immediately

Penalty regime

As an SMSF trustee, if you fail to act in accordance with the super and tax laws then you risk:

- Your SMSF becoming non-complying and losing its tax concessions
- Disqualification, removal or suspension as a trustee of the SMSF
- Civil or criminal prosecution
- Financial penalties.

Furthermore, if you fail to act in accordance with your SMSF trust deed, other impacted members of the SMSF may take legal action against you.

Administrative penalties

Since 1 July 2014, the ATO has the power to impose a new list of administrative penalties.

In the case of individual trustees each trustee will receive a separate administrative penalty. However, for contraventions by a corporate trustee, the directors are jointly and severally liable for the one administrative penalty.

WARNING

Any penalty imposed will need to be paid by the individual trustees or by the directors of the corporate trustee in their personal capacity and cannot be paid from the assets of the fund.

Penalties range from 5 penalty units up to 60 penalty units. From 1 July 2017 onwards, each penalty unit equates to \$210. The value of a penalty unit will be increased every three years in line with increases in the Consumer Price Index, which means SMSF penalties will increase again from 1 July 2021.

EXAMPLE

For example, where an SMSF has breached the lending rules, and the SMSF has four individual trustees, then each of the four SMSF trustees is liable to pay a \$12,600 fine, totalling \$50,400. However, if this was a corporate trustee, a fine of \$12,600 would be payable by the directors of the corporate trustee.

The maximum administrative penalty for a single breach is \$12,600, and such a fine would apply where, for example, an SMSF trustee breached the borrowing rules, or the in-house asset rules.

Examples of some of the administrative penalties are listed below for particular breaches:

- duty for trustees and directors to keep minutes and records – 10 penalty units
- duty to keep record of any changes of trustees or directors – 10 penalty units
- operating standards (contribution and preservation standards etc.) – 20 penalty units
- requirement to comply with an education direction by due date – 5 penalty units
- duty to notify the regulator of significant adverse events – 60 penalty units
- prohibition on trustees borrowing money – 60 penalty units
- requirement that investment managers must be appointed in writing – 5 penalty units.

Request the trustee submit an enforceable undertaking

An enforceable undertaking is where the SMSF trustees submit a rectification solution to the ATO, undertaking that they will rectify the contraventions identified. This usually needs to be completed within a prescribed time frame.

If the trustee then breaches the conditions of the enforceable undertaking, the ATO can apply to a court for further penalties.

Rectification directions

From 1 July 2014, the ATO is also able to force trustees to rectify specific contraventions of the super laws.

A rectification direction requires the trustee to undertake specified action(s) to rectify a breach within a specified period of time.

Mandatory trustee education

From 1 July 2014, the ATO may give an 'education direction' that will require a person to undertake a specified course of education within a specified time frame and provide the Regulator with evidence of completion of the course.

This will apply where the person's lack of knowledge and/or understanding of their obligations contributed to committing the breach.

You will also be required to sign, or re-sign the SMSF trustee declaration to confirm that you understand your obligations and duties as a trustee, which should be done no later than 21 days after completing the education course.

Trustee disqualification

Disqualified persons are not allowed to be the trustee of an SMSF, or to be the director of the corporate trustee of an SMSF. Continuing to be the trustee of an SMSF while being a disqualified person can result in fines or even jail time.

How does someone become a Disqualified Person?

There are four reasons a person may become a disqualified person:

- I. They have been convicted of an offence involving dishonesty
- II. They were subject to a civil penalty order
- III. They are 'insolvent under administration', including being:
 - IV. an undischarged bankrupt
 - V. have executed a personal insolvency agreement
- VI. They have been disqualified by the Commissioner of Taxation.

Implications for SMSFs where a trustee becomes disqualified

A person cannot act as trustee if they are disqualified and so would need to resign immediately. The SMSF has six months to restructure to ensure it continues to meet the definition of an SMSF.

Loss of complying fund status

In the case of extreme or repeated contraventions, the ATO is able to revoke the complying status of an SMSF. This effectively removes the low rate of income tax applicable to the SMSF (currently 15%). The ATO will issue amended assessments where the income and the majority of assets of the SMSF are taxed at 45% from the date the SMSF is deemed to be a 'non-complying fund'.

For further detail about the taxation of SMSFs that become non-complying, please refer to the module: Taxation of SMSFs.

Reader Notes

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Take the next step

We trust you enjoyed this eBook and found it informative and professionally presented. Of course, your feedback is always welcome as we strive to continually offer content in a format that is relevant to you.

We now invite you to take the next step and meet with a Wealth Today authorised representative to discuss what it was you were hoping to achieve when you downloaded this eBook and to establish if we can help you achieve your goals and objectives.

Next you will find details on how to book an appointment with one of our experts.

We look forward to meeting you soon.

Wealth Today

Appointment Booking Request form

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Please complete the Appointment Booking Request below and scan and email to:

Appointments are available Monday-to-Friday from 8am and until the normal final starting time of 6pm. After-hours appointments are available by request most weekday evenings and on most Saturdays if preferred. Please nominate your preferred day, date and time to meet with us. One of our client services representatives will call you to confirm your appointment.

Preferred appointment day and time

Day

Date

Time

am/pm

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If you would like us to contact you via email to confirm your appointment or to answer any questions you have please provide a valid email address for our records.

Email

Contact details

Email:

Phone:

Your Details

Title

First name

Last name

Mobile

Wealth Today

Sydney

Level 11
95 Pitt Street
Sydney NSW 2000
Tel: 02 9248 0422

Perth

Suite 2
33 Cedric Street
Sterling WA 6021
Tel: 1300 364 699

Melbourne

Ground Floor
99 King Street
Melbourne VIC 3000
Tel: 03 8248 6001

Brisbane

Level 19
10 Eagle St
Brisbane QLD 4000
Tel: 07 3121 3189

Canberra

Level 9, NewActon Nishi
2 Phillip Law St
Canberra ACT 2601
Tel: 02 6243 3628