One of the greatest aspects of a self managed super fund (SMSF) is the level of control you have in tailoring your fund to meet your needs now, and in the future.

After deciding that an SMSF is right for you, you’re faced with your first question—is an individual or corporate trustee structure right for your SMSF?

**WHAT ARE THE REQUIREMENTS OF EACH STRUCTURE?**

If you choose an **individual trustee structure** for your SMSF, and will have more than one member in your fund, there is a basic requirement that:

- the fund has four members or less
- all members must be trustees of the fund
- all trustees must be members of your fund
- no member of your fund can be an employee of another member of the fund, unless they are relatives
- trustees cannot be paid for their services (except in limited circumstances).

If you are the only member of your fund, you are required to appoint another individual to act as a trustee of your fund with you. This other individual cannot be your employer, unless you are relatives, and cannot be paid for their services (except in limited circumstances).

If you choose a **corporate trustee structure** for your SMSF, and will have more than one member in your fund, there is a basic requirement that:

- the fund has four members or less
- all members must be directors of the company that has been set up to act as the corporate trustee
- all directors must be members of the fund
- no member of your fund can be an employee of another member of the fund unless they are relatives
- the corporate trustee and the directors cannot be paid for their services (except in limited circumstances).

If you are the only member of your fund, you must be either the sole director or one of only two directors of the corporate trustee. You cannot be an employee of the other director and directors cannot be paid for their services (except in limited circumstances).

**FOR MORE INFORMATION**

Contact **John Lethbridge** on 03 8508 7800 or jlethbridge@partnerswealthgroup.com.au
ADVANTAGES OF A CORPORATE TRUSTEE

Administrative Efficiency

One of the key benefits of an SMSF is its fluidity; allowing multiple generations of a family to come and go from the Fund. Instances of changes in membership to an SMSF may include:

- Parents admitting their children into the Fund;
- The marriage of an existing member of the Fund to a non-member of the Fund, or the divorce of members within the Fund;
- Upon the death or incapacity of a member of an SMSF, where an external Legal Personal Representative is appointed to temporarily participate in the Fund in the existing member’s stead.

Whenever a change in membership occurs, a change in trusteeship is also required to occur. The fact that trustees and members can come and go easily to and from an SMSF, raises a time consuming and costly administration problem for SMSFs with individual trustees. This is because the law requires the SMSF’s assets to be held in the names of all trustees of the Fund.

As a result, in Funds will individual trustee structures, whenever a trustee is appointed to the Fund, or an existing trustee leaves the Fund, the Fund is required to notify all relevant registries of a change in the name of the assets held by the Fund. As well as the legal advice as to the procedures to remove/appoint the trustee and member, as determined by the Fund’s Trust Deed, must also be taken. Overall, the admission and removal of individual trustees can be a costly and time consuming exercise.

In contrast, when a new member joins an SMSF with a corporate trustee, the corporate trustee itself does not change, only the underlying directorship of the company changes. Therefore, there is no requirement to change the name in which the assets of the Fund are held. The assets are still held in the same name – that of the name of the company.

Sole Member Funds

If a Fund with individual trustees has a sole member, the SIS Act requires that the Fund must have a second individual trustee in order to be a compliant SMSF. The reality is, at some stage, due to divorce, incapacity or death, every fund will become a sole member fund, this will result in the remaining Trustee with the option of either; paying the fees involved with establishing a corporate trustee and have the trustee structure of the fund amended or relinquishing some control of the Fund to another person.

Alternatively, the SIS Act provides that a sole member SMSF can have a company as trustee with either one or two directors, one of which must be the member. In this case, a sole member can assume total control over the SMSF by appointing themselves as the sole director of the corporate trustee.

Continuity

In relation to continuity, a company has an identity of its own separate from its shareholders and directors and can exist indefinitely. If a director dies or becomes mentally disabled, a corporate trustee continues to act as trustee. The appointment of a new director does not change the legal ownership of the assets.

If two or more individuals are acting as trustees and one of them dies or becomes mentally disabled, the remaining trustee/s can continue to act as the trustee/s and make decisions. In most cases a new trustee will need to be appointed and ownership of the assets changed.

The other occasion on which there would typically be a change of directors or individual trustees is in the event of divorce.

A third option, although not very common, is to appoint a company as custodian, to hold the assets of the fund on behalf of the individual trustees so that no change in the recorded ownership of the assets occurs when there is a change in trustees.

While establishing your SMSF with individuals as trustees may save you a few dollars in the short term, the benefits of registering a corporate trustee for your SMSF far outweigh the short term savings. Here are the key reasons why we believe you should use a corporate trustee.
Liability

In relation to liability, if individual trustees become liable to the fund for a breach of trust, their personal assets are at risk. If a company is acting as trustee, the liability is limited to the assets of the company unless the directors of the company can be made personally liable.

Directors of a corporate trustee can be personally liable under both SIS and the Corporations Act.

Section 180(2) of the Corporations Act states directors who make a business judgment are taken to meet their equivalent duties at common law and in equity, in respect of the judgment if they make the judgment in good faith for a proper purpose, do not have a material personal interest in the subject matter of the judgment, inform themselves about the subject matter of the judgment to the extent that they reasonably believe to be appropriate and rationally believe that the judgment is in the best interests of the corporation.

Section 181(1) of the Corporations Act also imposes obligations on directors. It states that directors must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.

Administrative Penalties

The bill to introduce a new range of penalties that the ATO could apply lapsed when the last Federal election was called. The bill had the support of the major political parties and a replacement bill has now been issued and passed with an operative date of 1 July 2014 this year.

Under the legislation the ATO will be given the power to direct a SMSF to rectify a breach and the fund’s trustee will have to comply. Until now the ATO could only request a breach be fixed. Where the ATO believes appropriate it will also now be able to instruct a SMSF trustee to undertake an appropriate education course.

There is also a range of administrative penalties that the ATO will impose, therefore no discretion, when they become aware of these. The penalties will range from $850 to $10,200 per offence per trustee. Another good reason to have a corporate trustee (refer below). Penalties become payable when the ATO becomes aware of them. And if they exist at 30 June this year, a penalty will become payable at 1 July.

The penalty cannot be paid from the fund. It has to come from the individual trustees or the directors of the corporate trustee and cannot be reimbursed by the fund.

SOME EXAMPLES OF THE FINES ARE

- A loan to a member will attract a fine of $10,200;
- In house assets, typically loans to associated companies or trusts, in excess of the 5% threshold will also incur a penalty of $10,200; and
- Investments held incorrectly by the fund will be subject to a fine of $850 per investment.

It is not uncommon to see a SMSF with a corporate trustee and shares held in the names of the individual members instead of the name of the trustee company. Or individual trustees and shares held in the name of one person. Most SMSFs tend not to own shares in one company but in several, so the penalty will be a multiple of $850.

As mentioned above, the ATO has no option but to issue the fine once they become aware of the breach. At this point of time it is unclear as to what level of discretion the ATO will offer as to waiving the penalties in certain circumstances i.e. first time offence.

CONCLUSION

In light of the above we continue with our preference for corporate trustees of SMSFs. As most SMSFs have two members, a corporate trustee will halve the penalty applicable if a mistake is made. The ATO will have no discretion when it comes to the application of penalties under the Administrative Penalties legislation.

If you have clients with individual trustees and they would like to take the opportunity to convert to a corporate trustee, Partners can assist as follows:

- If they have an existing company available to use, preferably not a trading company, we can prepare the deed to replace the current trustees and, where appropriate, update the existing trust deed to incorporate the changes made since the fund was established or the deed last updated;
- If they don’t have a suitable company available, we can arrange incorporation of a new company to act as trustee. And proceed to do the deed to replace the individual trustees and update the deed as required; and
- We can assist with arranging the change of ownership from the individual trustees to the new corporate trustee. This assistance is also available to those funds where existing assets are incorrectly held.

DISCLAIMER This document is for information purposes only and should not be treated as advice. We advise all prospective clients to obtain financial advice before commencing an SMSF or altering their Trustee Structure.