

## Article Information

Authors: Donna Benge, Rod Jones

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## Trust deeds in the new SMSF world - Benefit payments and estate planning

**Your superannuation trust deed along with the superannuation laws form the governing rules that self managed super funds (SMSFs) needs to operate by.**

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Your superannuation trust deed along with the superannuation laws form the governing rules that self managed super funds (SMSFs) needs to operate by. The introduction of the \$1.6 million transfer balance cap (TBC) and new transition to retirement income stream (TRIS) rules are a 'game changer' for SMSFs when discussing benefit payments and estate planning. With the new super rules in effect as of 1 July 2017, now is the right time to review if your trust deed needs to be enhanced or amended to deal with the new approaches and strategies you may need to implement.

### Read the deed

The first step in reviewing your superannuation trust deed will be to read it. Trust deeds are legal documents which can be complex to read.

It is likely that most deeds will not result in a breach of any superannuation laws and would provide the trustee with powers to comply with relevant tax and superannuation laws as they change over time.

The next step would be to review the deed in consideration with your own circumstances.

For example, a common scenario may be a restrictive deed that only provides the trustee with a discretion to pay death benefits. Therefore, if a member of that SMSF wanted to create a binding death benefit nomination, it would be irrelevant due to the deed's governing rules.

In any event, deeds which are clearly out of date will need to be amended as soon as possible.

### Deeds post 1 July 2017

Post 1 July 2017, there are many approaches and strategies that will differ from the past and it is essential to ensure that your SMSF deed does not restrict you in anyway. We note the following areas should be considered:

#### *Paying death benefits*

The \$1.6 million TBC now restricts the amount of money that can be kept in super on the death of a member. This is crucially important as when a member dies, their TBC dies with them. SMSF members should review their estate planning and further review their trust deed for the following:

- Does it allow for binding death benefit nominations (BDBN)?
- Do BDBNs lapse every 3 years in accordance with the trust deed when the legislation does not prescribe it?
- Does it consider the appropriate solution when there is a conflict between a reversionary pension and a BDBN and which will take precedence?

#### *Reversionary pensions*

Reversionary pensions are pensions which continue being paid to a dependant after your death. Under the TBC,

reversionary pensions will not count towards a member's TBC until 12 months after the date of the original recipient's death. Importantly, the transfer of the pension from the deceased to the new recipient will count towards the TBC. The value of the credit to the TBC will be the value of the pension at the date of death, not the value after 12 months. This increases the complexity of reversionary pensions prompting a review of trust deeds to consider:

- Does it allow for a reversionary pension to be added to an existing pension or are there restrictions?
- Should it automatically ensure that a pension is reversionary so that it is paid to a surviving spouse?

### *Pensions*

The TBC also has implications for strategies in commencing pensions and making benefit payments. Trust deeds may need to be reviewed for:

- Ensuring that commutations are able to be moved into accumulation phase rather than being forced as lump sums out of superannuation.
- Are there any specific provisions relating to the TBC? There may be value in ensuring that the deed restricts pensions from being commenced with a value greater than the TBC.
- Are there provisions which detail where commutations must be sourced from first?
- Are there restrictive pension provisions that the trustees must comply with?

### *Transition to retirement income streams*

Tax concessions for TRISs where the recipient does not have unrestricted access to their superannuation savings (known as meeting a condition of release with a nil chasing restriction) have also been removed. Trust deeds may need to be reviewed for:

- Does the deed allow for the 10% maximum benefit payment to fall away once a nil condition of release is met?
- Does the deed deal with a TRISs character when a nil condition of release? (Does it convert into an account based pension?)

### **How can we help?**

Our Private Client Services team at Piper Alderman can help you understand how the new laws may impact you by reviewing and amending your trust deed as required. Please feel free to contact us to arrange a time to meet so that we can discuss your particular requirements, especially in regard to issues that may arise out of the latest super laws, in more detail.