Why you need to update your SMSF Deed

The Government just can't help itself but tinker with super. Our courts then need to interpret what it all really means, so we know exactly what we can and can't do. Put simply, super never stands still.

But it remains worthwhile hanging in there, because you can still save a material amount of tax. Super also has asset protection benefits you can't get elsewhere.

An SMSF gives you the maximum amount of direct control. You can take full advantage of sophisticated strategies for acquiring and holding unique assets, for managing retirement income streams, and to dovetail into your estate planning.

But all this doesn't come for free. You need an SMSF Deed that keeps pace with these changes. A lot of the sophisticated strategies are only possible if your SMSF Deed is up-to-date and written carefully.

Our modern SMSF Deed ensures you:

- Comply with ever-changing Government regulations;
- Avoid the pitfalls highlighted by recent court cases; and
- Take maximum advantage of all the available strategies.

Ever-changing laws

There have been a lot of major reforms to super in recent times.

In 2007 there were 'simplification' changes, including how a super fund pays a pension (or 'income stream'). Your SMSF Deed must recognise these rules, including minimum payment amounts, dealing with residual amounts, and what happens to your account balance or pension when you die. If you want to take advantage of the relaxation of the borrowing restrictions from 2007, your SMSF Deed needs to recognise the rules for a complying limited recourse borrowing arrangement (LRBA).

In 2013 the Government tightened up the auditing requirements for SMSFs. Your SMSF Deed needs to reflect these changes to ensure compliance. Other compliance measures in 2016 dealt with the common circumstance when a member makes excessive concessional and non-concessional contributions. But these administrative concessions are only available if your SMSF Deed allows for them.

In 2017 the Liberal Government brought in major changes to how pensions are funded within your fund, including the introduction of the $1.6 million transfer balance cap (*indexed to $2 million as of 1 July 2025*), to limit the extent of pension assets benefiting from no tax.

Avoiding the pitfalls

In addition to the swathes of law changes, the courts have also been busy clarifying potential opportunities and pitfalls.

Your SMSF Deed should give the trustee the power to 'segregate' assets into different member accounts, and between accounts for the same member (e.g., pension and accumulation balances). This will allow you to properly manage the pension cap, accommodate LBRA-type arrangements, save stamp duty and implement more sophisticated estate planning strategies.

The law now provides some leniency for excessive contributions, but your SMSF Deed also needs to allow for the refund or 'roll back' of contributions that were incorrectly or accidentally made.

Your SMSF Deed should include a clear statement about adherence to the limitations on investments in certain in-house assets, and investments not made on arm's-length terms. But it should also allow you to take advantage of strategies around commercial real property and un-geared unit trusts. When dealing with banks and broking firms, they will want to see that the trustee clearly has power to invest in a broad range of financial instruments, securities and more 'structured' products.

From an estate planning perspective, you need to ensure your SMSF Deed allows for you to clearly direct who gets your super when you die. This includes the ability to keep assets in super and pay a concessional pension to your spouse. Most SMSF deeds only provide very limited provisions about death benefits and super nominations – giving rise to destructive arguments between family members (and sometimes expensive litigation). Part of these strategies includes 'non-lapsing' nominations and having an appropriate enduring power of attorney that ties in with the ongoing management of your fund and personal member balance.

Finally, your SMSF Deed should be drafted flexibly enough to adapt to changes in the law, such as potential changes to member limits, without requiring you to update its terms every time the law changes slightly.

What next?

If your super fund deed is over three years old or is an 'off-the-shelf' deed prepared by a 'document shop', chances are it isn't up to the job of appropriately managing your retirement savings.

The cost of updating to a modern and flexible SMSF Deed, tailored for your needs by a qualified lawyer, is very small when compared to the potential cost of something going wrong.

If you would like to speak to someone about getting this process started, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.