

Printed December 03, 2008 04:33am AEDT

It's often better to set up a company for super

Tony Negline | December 03, 2008

Article from: *The Australian*

A SUPER fund can have one of two different types of trustees, either individuals or companies.

Self-managed funds usually choose the former, but that may not be the best option.

In terms of a popularity contest, individual trustees win hands down.

According to the tax office, two-thirds of self-managed super funds have individual trustees.

No one knows precisely why small super fund investors choose one type of trustee over another.

Intuitively it seems logical to conclude that the main reason people choose individual trustees over corporate trustees is cost.

Setting up a special-purpose small super fund trustee company will cost between \$500 and \$900 and the annual ASIC regulatory fee for such a company is \$40.

These costs are greatly reduced from what they were a few years ago.

Using individual trustees means that these costs can be saved.

However, operating a super fund with individual trustees is not necessarily a prudent decision because it will probably end up costing a super fund big money.

The tax office has made it clear, on a number of occasions, that the names of all small super funds' trustees need to be recorded as the owners of every investment.

When auditors check over the fund each year they are expected to confirm that this has been done.

Ideally the investments will be held in a name similar to "Mary Jane and Robert James Smith as trustees for the Smith Superannuation Fund".

The reason for denoting official asset ownership in this way is to avoid confusion.

David Garde of Townsends Business and Corporate Lawyers notes: "Every time members retire, die, lose capacity, otherwise leave the fund, or a new member is added to the fund, the trustees are required to correct the ownership of the investments."

If a fund with individual trustees has many investments, then a change in the fund's membership will take considerable time and effort and incur considerable cost.

All share registries, banks and managed fund providers need to be advised.

Any real property -- residential, commercial or industrial -- causes considerable hassle.

This problem doesn't occur with a company nominated as trustee.

The directors of the company can change with relative ease and the company continues to own the investments.

Assume we have a super fund that owns two business premises, two life insurance policies, three managed funds and 18 ASX-listed shares.

"The fees and costs with one change to individual trustees, even with a professional administration service that charges moderate rates, could amount to over \$4200," Garde says.

"This is equivalent to the combined cost of establishing a special-purpose company to act as trustee and the annual ASIC fee for about 90 years."

When a super fund loses one of two individual trustees there is a risk that the fund may cease to be a trust.

A trust does not exist when the sole trustee is also the sole beneficiary.

The super laws cater for this problem by demanding that there must be at least two individual trustees.

The super laws give a small super fund six months to fix this problem.

However, Garde says that this six-month time frame doesn't solve the problem that under trust law a trust may have ceased to exist.

A corporate trustee never faces these difficulties because the Corporations Act gives a company a separate legal personality. This means that sole director companies can be trustee of single member funds as long as the fund member is the director of the trustee company.

An SMSF with individual trustees may only pay out "old age pensions", which means lump sum payments are not possible.

There has long been doubt as to whether or not an account-based pension would satisfy this pension requirement, because it can be turned into a lump sum at any time if the member satisfies the super law retirement rules.

Some superannuation professionals think this is a semantic point.

They may be right but surely it is better for a small fund trustee to be prudent, especially when a company trustee doesn't have these concerns (assuming the trust deed allows for lump sums and account-based type pensions).

The death of a member trustee can create almost insoluble problems.

The added burden of dealing with a stalled SMSF on emotionally strained survivors is sometimes heart-breaking to see.

This often arises when there is doubt as to who can be the trustee of the ongoing super fund.

Some people are tempted to use a company they already have as their SMSF trustee. That company might be trustee of their family trust or might be used to run a business.

The main driver is a desire to save costs or perceived simplicity.

Problems can arise when super fund assets become tangled with family trust or business assets and it becomes difficult to verify which entity owns which asset.

For these reasons the extra expense of running a sole purpose SMSF trustee company can save a lot of aggravation.

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