

Major Reasons for a Self Managed Superannuation Fund (“SMSF”)

- # Members control an SMSF and (subject to sole purpose test and other restrictions of Australian law) can choose investments (including own business premises).
- # Lower administrative costs – providing there are sufficient level of funds in member accounts to meet relatively fixed operating costs.
- # Member choice as to recipient of death benefit and terms of death benefit nomination.

Trustee(s)

The trustees are responsible for the administration of the SMSF. Each member must be a trustee or a director of the trustee company. Non-member trustees or directors are only permitted if they are the legal personal representative of a member or as a 2nd individual trustee or director for a sole member SMSF.

Australian Taxation Office (“ATO”)

Has prudential responsibility for all SMSFs and can demand to receive audited annual returns prepared on a current market value basis.

Income, Capital profits, Benefits, Pensions and Annuities

The trustee is taxed on all fund income at 15% (contributions and investment phase – 10% for most taxable capital gains) and 0% (benefits phase). Contributions are also generally taxed at 15% to the extent that the employer or self employed member has been able to claim an income tax deduction. Both those concessional contributions and non-concessional contributions are subject to annual limits. Benefits are paid by way of a lump sum, pension or annuity.

Restrictions

The trustee must formulate and review an investment policy for the fund in the light of the circumstances of the members. Significant constraints apply to the operation of the fund, eg sole purpose test, borrowing and lending restrictions and in-house asset restrictions (not applicable to business premises).

Super – Key Phases & Decisions

Contributions & investment phase, eg choice of members, trustees & investments, level of contributions, dealing with borrowing & lending restrictions, insurance cover for members

Decisions near, at or post retirement, eg pension/annuity (reversionary or non-reversionary) v lump sum

Benefits phase (tax free income if over 60 years of age)

Decisions re death benefits – planning opportunities & lump sum tax – reversionary & new pensions/annuities for some dependants or lump sums to dependants or member's estate

Role of Superannuation

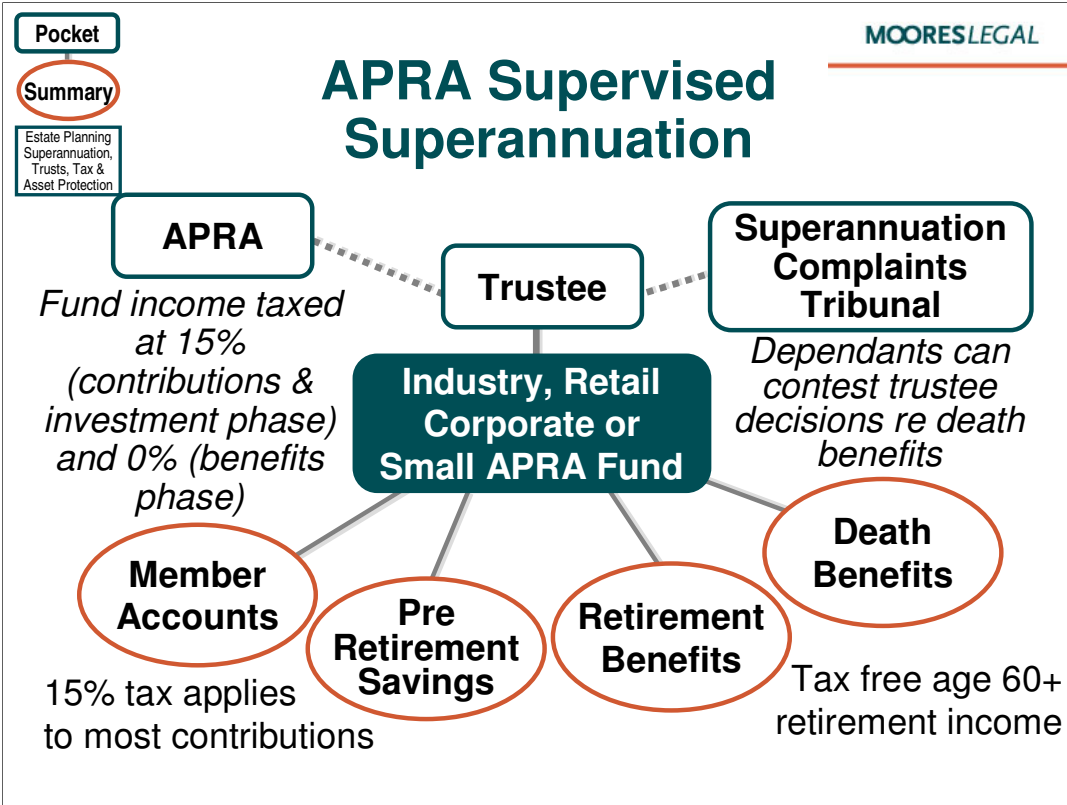
The role of Australian superannuation funds is to enable and encourage fund members to provide for their retirement and for the financial care of a member's dependants in the event of death. To this end, the ability of people to access their money once in the fund is restricted and complex laws govern the funds and their administration and audit. On the other hand, there are considerable taxation incentives to encourage the use of superannuation. Mandatory contribution levels also apply in respect of contributions made on behalf of employees.

Thus the operation of a superannuation fund is in 2 parts, a contributions and investment phase where the funding for retirement or death benefits is accumulated and a benefits phase where the member receives a concessional tax income stream (eg a pension) and/or a lump sum.

Control of Superannuation

Historically, in contrast to most other investment and business structures, superannuation funds have operated in a very paternalistic environment with members having little direct or indirect control over the administration, investment policy, payment of benefits or even choice of a superannuation fund. Progressive reforms to superannuation have meant the supervision industry is progressively moving towards an environment of greater accountability to members and choice between:

- Different types of non-member controlled (or APRA supervised superannuation funds), eg corporate, industry, public sector and retail funds – all reporting to the Australian Prudential Regulation Authority; and
- SMSFs – reporting to the Australian Taxation Office.



Major Reasons for an APRA Supervised Superannuation Fund

- # Administration – costs spread across all members.
- # Discounted premiums for life insurance policies can be available.
- # Independent decision making in relation to investments.
- # Compulsion – some industry awards or employment agreements do not permit employees to choose between superannuation funds.
- # Unlike SMSFs, more than 4 members permitted.
- # Majority of members may live outside Australia.
- # Member lacks decision making capacity and is represented by a professional trustee.
- # Most funds offer portability, ie the ability to transfer from fund to fund.

Trustee

The trustee is responsible for the administration of the fund. Any member control is usually limited to relatively restricted nominations regarding death benefits.

Australian Prudential Regulation Authority (“APRA”)

Has prudential responsibility for all superannuation funds other than SMSFs and most public sector funds and must receive audited annual returns prepared on a current market value basis.

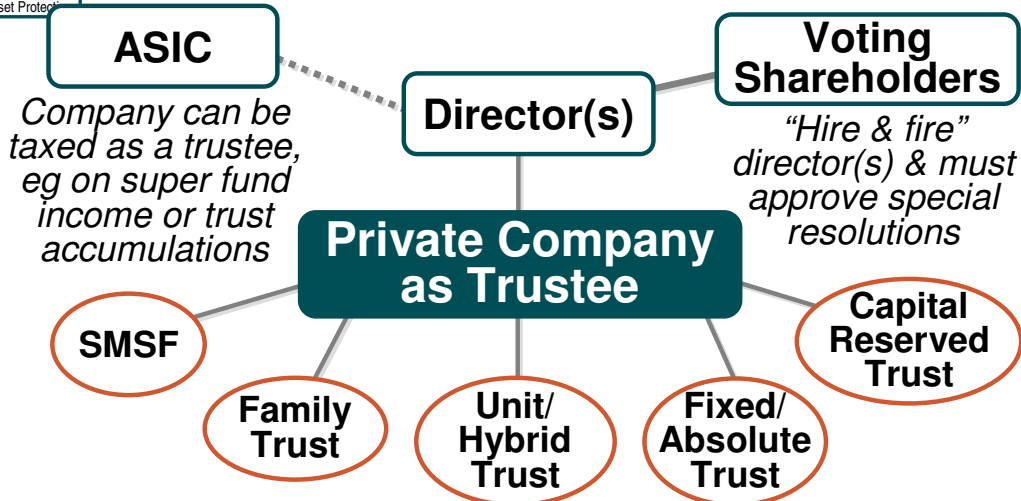
Income, Capital profits, Benefits, Pensions and Annuities

The trustee is taxed on all fund income at 15% (contributions and investment phase – 10% for most taxable capital gains) and 0% (benefits phase). Contributions are also taxed at 15% to the extent that the employer or self employed member has been able to claim an income tax deduction and both those concessional contributions and most other (non-concessional) contributions are subject to annual limits. Benefits are paid by way of a lump sum, pension or annuity.

Restrictions

The trustee must formulate and review an investment policy for the fund in the light of the circumstances of the members. Significant constraints apply to the operation of the fund, eg sole purpose test and borrowing and lending restrictions.

Private Company as Trustee



Company's tenure as trustee determined by terms of trust, eg control by fund members, appointors or voting unitholders

Major Reasons for a Corporate Trustee of an Australian SMSF or Trust

Clear delineation between personal and self managed superannuation fund ("SMSF") or trust ownership of assets. # No need to change legal ownership if a member, beneficiary or unitholder dies or ceases to be involved. # Limited liability for shareholders – not responsible for debts of the company unless a personal guarantee has been given – a company usually has an indemnity against the assets of the fund or trust for expenses and liabilities legitimately incurred. # Degree of limited liability for directors – can be very important that company does not continue to trade while insolvent. # Removes the need for a second trustee of a single member SMSF.

Director(s)

Administer the fund or trust (and are also responsible for the company's own compliance obligations, eg annual ASIC returns. Private companies can have a single director and shareholder if permitted by company constitution. In the event that a single director dies or loses decision making capacity, under subsection 201F(2) of the *Corporations Act 2001*, the director/shareholder's legal personal representative can appoint a replacement director.

Taxation

The liability of the company to pay tax on behalf of the SMSF or trust varies, depending on both the tax legislation and the type of trust. For example, if GST is applicable, all trustees will need to lodge returns and pay GST. On the other hand, a trustee of an SMSF pays income tax on behalf of the fund in contributions and investment phase and withholds and remits tax in respect of certain death benefit payments, but non-superannuation trusts only pay income tax on accumulated income and allocations to minor or other beneficiaries lacking capacity.

SMSFs – Further Reading

**Australian Master Estate
Planning Guide –
Chapters 9 and (in the
Premium Edition) 44**

**You Can't Take It
With You –
Chapter 15**

The latest version of this Pocket Summary is at
www.mooreslegal.com.au/services/estateplanning/pocketsummaries

Further Reading

- *Australian Master Estate Planning Guide* – Allan Swan, to be published (in both a Standard and Premium Edition) by CCH in 2012.
- *Estate Planning Documents* – Allan Swan, Moores Legal (includes many of the Pocket Summary series).
- *You Can't Take It With You* – Andrew Simpson, Wrightbooks.
- *Tax Issues in Family Law Property Settlements* – Peter Szabo, Moores Legal.

Australia-wide Seminar, Workshop & other Presentations – Allan Swan

EPSTTAP Introductory: • Estate Planning – The A-Z (includes pages 1 & 3 of this Pocket Summary) • Self Managed Superannuation Funds – The A-Z (all) • Trusts – The A-Z.

EPSTTAP Advanced: • Estate Planning – Case Studies • Estate Planning Masterclass (1 & 3) • Superannuation – Death Benefits & Binding Nominations (1 & 3) • Testamentary Trusts – Drafting the 6 Major Types • Trusts & Deceased Estates – Income & Capital Distributions • AMEPG Chapter Workshops.

Allan's local Moores Legal client, community & discussion group topics are:

- Estate Planning – Protecting & Enhancing Wealth • Estate Planning – Vulnerable Family Members • Family Trusts – Income & Capital Overview • Farm Succession – Avoiding Tax Pitfalls & Anticipating Disputes • Providing an Estate Planning Service for Clients • SMSFs – Instalment Warrants, Pensions & Binding Death Benefit Nominations • Tax & Business Structures Overview (1 & 4) • Update – Estate Planning, Superannuation, Trusts, Tax & Asset Protection.

To book Allan for any of these topics, contact Lilian Bruère on 03 9843 2153. All Pocket Summaries are copyright and are for general information purposes only and should not be relied on as (or in substitution for) legal or other professional advice.