SMSF SMART

SMSF | Kylie Wright| June 2020

Presenter – Kylie Wright

Wealth Management Partner

- Certified Financial Planner®
- SMSF Specialist Advisor™
- Graduate Diploma in Financial Planning (completing Masters)

Kylie Wright
CFP
Partner – Wealth Management

Presenter – Bernard Whebell

Forensic Auditor

- Bachelor of Economics, University of Queensland (1990)
- Bachelor of Business (Accountancy), Queensland University of Technology (1995)
- Graduate Certificate in Business (Forensic Accounting) (2015)
- Graduate Diploma in Applied Finance (2016)
- Chartered Accountant (1997)
- CA Business Valuation Specialist
- CA Forensic Accountant
- Registered Company Auditor
- Registered SMSF Auditor

Bernard Whebell CA BV
Partner – Audit & Forensics

Disclaimer

The information has not been prepared to take into account your specific objectives, needs and financial situation.

The information may not be appropriate to your individual needs and you should seek advice from your financial adviser before making any investment decisions.

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"This presentation has been prepared on a general advice basis only"

Agenda

- Why we present the SMSF Financials to you and not just mail them
- Contributions
- Access to superannuation
- Pensions - everything you need to know!
- Transfer Balance Cap issues and can you have too much in super?
- Investment strategies - will yours stand up to the increased focus from the ATO?
- Property issues including rent relief for tenants (due to COVID-19)
- Insurance in SMSFs
- Estate planning and your SMSF
- Who should be Trustee (individual versus corporate)
- Administration best practice
- What key issues the Auditor sees, and how you can safeguard your fund

SMSF Smart

What SMSF Trustees need to know.

Trustee Duties

By law, each trustee has duties and obligations to:

- act honestly in all matters concerning the SMSF;
- exercise skill, care and diligence in managing the SMSF;
- act in the best interests of all SMSF members;
- **take appropriate action to protect SMSF assets and manage them separately from the trustee's own affairs;**
- comply with the SMSF trust deed and review and update it as required;
- **be responsible for and control the SMSF, even where the trustees outsource the required expertise or one trustee is more actively involved in the day-to-day running of the SMSF**;
- **have a documented investment strategy that considers all the circumstances of the fund, and review and update the investment strategy as the members' financial situation, needs and objectives require;**
- **consider insurance for fund members as part of the fund's investment strategy;**
- understand which investments are restricted and that SMSF investments must be made solely to pay retirement benefits to members or the members' dependants if a member dies;
- accept and document contributions in accordance with the superannuation laws;
- ensure the SMSF's money is invested appropriately (even if the trustee outsources the investment to an advice provider);
- keep proper and accurate tax and superannuation records (e.g. minutes of all investment decisions) and allow members to have access to such information and records;
- **comply with the superannuation and tax laws (and the Corporations Act for corporate trustees);**
- value the fund's assets at market value for the purposes of preparing financial accounts and statements;
- have the SMSF audited annually by an independently approved auditor;
- comply with the reporting obligations to the ATO (e.g. report contributions from members, lodge annual returns, report on any changes to trustees, directors or members of the SMSF; lodge a business activity statement if the SMSF is registered for Goods and Services Tax (GST));
- pay the supervisory levy and the SMSF's income tax liability when due;
- refrain from entering into contracts or behaving in a way that hinders trustees from performing or exercising functions or powers;
- refrain from entering into transactions that circumvent restrictions on the payment of benefits; and
- ensure that the money in the SMSF is only accessed by members when the trust deed and law allow it.
- within 21 days of becoming an SMSF trustee, they will need to complete the ATO's trustee declaration.

Obligations and duties of a SMSF Trustee.

Non-compliance

The following courses of action are available to the ATO to deal with SMSF trustees who have not complied with super laws:

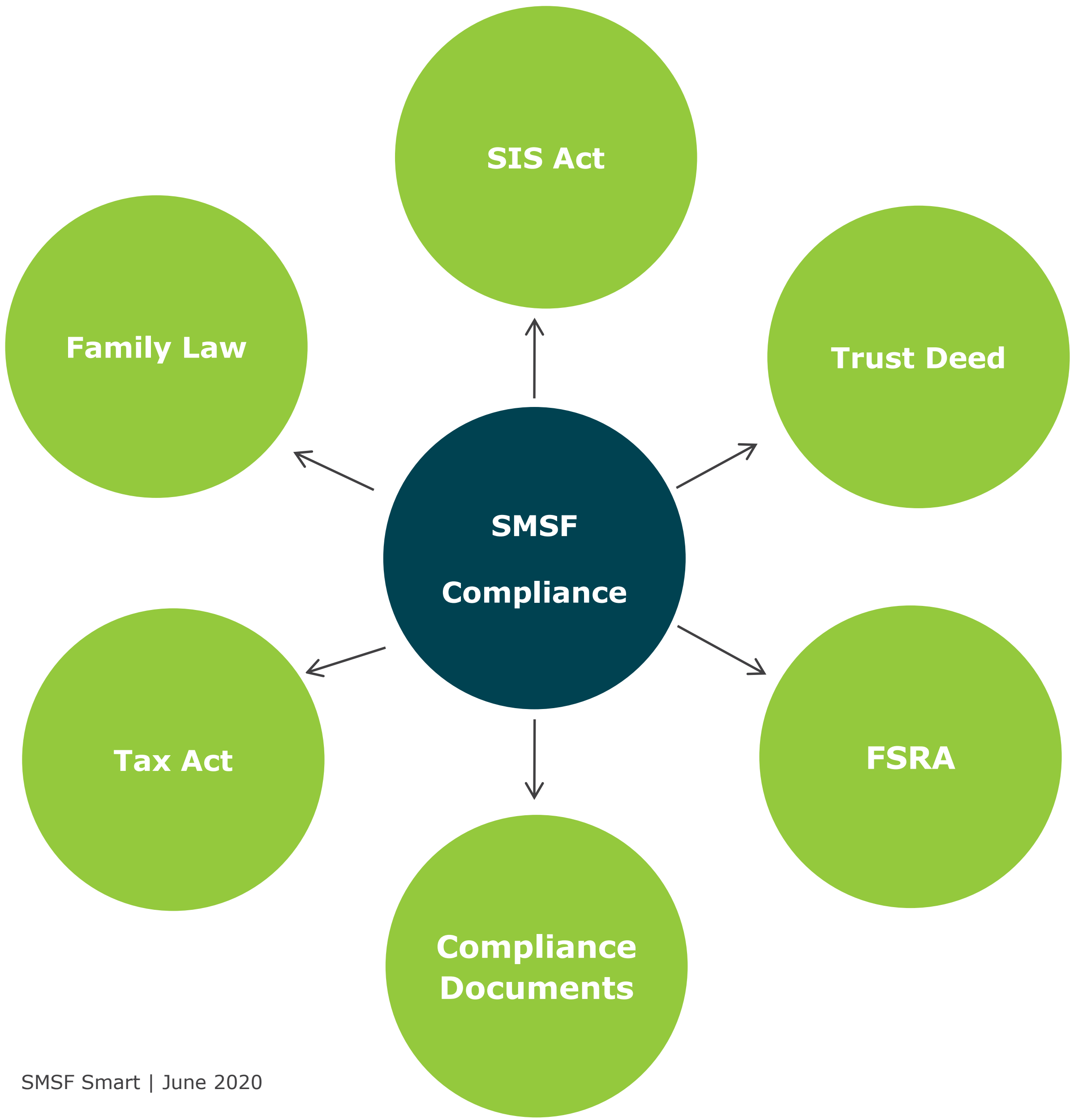
- Education direction
- Enforceable undertaking
- Rectification direction
- **Administrative penalties**
- Disqualification of a trustee
- Civil and criminal penalties
- Allowing the SMSF to wind up
- Notice of non-compliance
- Freezing an SMSF’s assets.

Penalties can apply.

ATO Activity

SMSF Enforcement Action	2017-2018	2018-2019	2019/2020 (to 31/01/20)
Education Direction	32	45	**95**
Rectification Direction	31	34	**74**
Enforceable Undertaking	138	131	**58**
Notice of Non-Compliance	11	26	**21**
Disqualified Trustees	257	145	**127**
No SMSFs with Penalties imposed	169	146	**84**
Net Admin Penalties raised	$1.7M	$3.1M	**$3.3M**

Why we present the SMSF Financials



- Legislation constantly changing
- ATO focus constantly changing
- Trustee Education
- What if questions…..

Trustee obligations are onerous -

make sure you are getting the most out of your SMSF.

Contributions - Concessional

- $25,000 concessional contribution
  - Carry Forward if **total super balance at 30th June prior year is < $500,000** and you had unused concessional contributions

	18/19	19/20
Cap	$25,000	$40,000
Contribution	$10,000	$10,000
Carry Forward/available	$15,000	$30,000

Contributions – non Concessional Contributions

- $100,000 p.a. Non concessional contribution
  - Bring Forward – depends on total super balance at **30th June prior year** and age:

Total Super Balance	Contribution Available < 65	Contribution Available > 65
< $1.4M	Access to $300,000 cap over 3 years	$100,000
$1.4M - $1.5M	Access to $200,000 cap over 2 years	$100,000
$1.5M - $1.6M	Access to $100,000 cap over 1 years	$100,000
> $1.6M	NIL	NIL

News Flash!

- On Friday 29 May 2020, the Government registered a legislative instrument which amended SIS regulations with regards to the work test and spouse contributions.
- The Regulations give effect to the first **two** elements of the measure*:* ***Superannuation – improving flexibility for older Australians*** announced in the 2019-20 Budget, effective from 1 July 2020:
  1. Increasing the age at which the work test starts to apply (from 65 years to 67 years) and;
  2. The age limit for spouse contributions (from 69 years to 74 years).
- The changes apply to contributions made in the **2020-21 financial year, and later financial years**.
- **Note:** *These regulations are still subject to disallowance but we do not expect this to be the case.*
- *The third element of this budget measure is not law yet – increasing the age limit for accessing the bring forward non-concessional contributions cap for people aged 65 and 66 – and will be implemented through amendments to the Income Tax Assessment Act 1997. This is currently before the House of Representatives. We expect the third element to be passed before 1 July 2020 when Parliament sits in June.*

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Contributions – Down Sizer Contributions

- Age 65 or older, meet **all** of the eligibility requirements, may be able to contribute up to $300,000 EACH into super
- The amount you are contributing is from the proceeds of selling your home, in Australia, where the contract of sale exchanged on or after 1 July 2018. Note: a home does not include a mobile home;
- You are 65 years old or older at the time you make a downsizer contribution (there is no maximum age limit);
- Your home was owned by you or your spouse for 10 years or more prior to the sale;
- The proceeds (capital gain or loss) from the sale of the home are at least partially exempt from capital gains tax under the main residence exemption;
- You have provided your super fund with the Downsizer contribution into Super form either before or at the time of making your downsizer contribution;
- You make the downsizer contribution within 90 days of receiving the proceeds of sale (date of settlement);
- You have not previously made a downsizer contribution to your super from the sale of another home.

Downsizer contributions can be made regardless of your total super balance.

Access to Super

- **COVID-19** - $10,000 prior to 30/06/20 and $10,000 post 01/07/20 **IF**
  - You are unemployed.
  - You are eligible to receive one of the following:
    - jobseeker payment
    - youth allowance for jobseekers (unless you are undertaking full-time study or are a new apprentice)
    - parenting payment (which includes the single and partnered payments)
    - special benefit
    - farm household allowance.
- On or after 1 January 2020 either
  - you were made redundant
  - your working hours were reduced by 20% or more (including to zero)
  - you were a sole trader and your business was suspended or there was a reduction in turnover of 20% or more.

Access to Super - Normal Rules

You can access your super when you have met **a condition of release**:

- when you turn 65 (even if you haven't already retired), or
- when you reach preservation age (over 57, but depends on your birthday) **and retire.**

You may meet a partial condition of release under the transition to retirement rules, while continuing to work.

There are very limited circumstances where you can access your super savings early.
These circumstances are mainly related to specific medical conditions or severe financial hardship

Date of birth from	Preservation age	Date when preservation is met from
January 1962	57	1 January 2019
July 1962	58	1 July 2020
January 1963	58	1 January 2021
July 1963	59	1 July 2022
January 1964	59	1 January 2023
July 1964	60	1 July 2024

After meeting a **condition of release** you can access your super as a:
Pension, or
Lump Sum.

Pensions – everything you need to know

Transition to Retirement Pension

- must be aged over preservation age
- Pension will be taxable if < age 60
- Earnings in the Fund remain taxable
- May be appropriate if you are working less or have debt that you are paying off
- Pension income capped at 10% p.a. maximum

Account Based Pension

- must be aged over preservation age and retired OR
- Over age 65
- Pension is tax free if over age 60
- Commencement Value is up to $1.6M (Transfer Balance Cap)
- Earnings in the Fund are tax free

The Government has reduced the minimum annual payment required for account-based pensions by

50%

in the 2019/20 and the 2020/21 financial years.

Pensions – everything you need to know

- **Must draw a minimum pension based on age**

Age	Annual payment as % of account balance 24/03/19 – 30/06/21	% from 01/07/2021 onwards
55—64	2%	4%
65—74	2.5%	5%
75—79	3%	6%
80—84	3.5%	7%
85—89	4.5%	9%
90—94	5.5%	11%
95+	7%	14%

Pensions – everything you need to know

Reversionary Pension?

- If trust Deed allows, you can make your Pension reversionary to your spouse or partner
- If you pass away, the pension will continue to pay to the reversionary pensioner without having to go through Probate – provides peace of mind and security of income
- You may NOT want to have a Reversionary Pension if you have specific Estate outcomes you are wishing to achieve
  - *Pay my Super into my Estate so it can be in a Testamentary Trust*
  - *Pay my super to my children from my first marriage*
- What does you Pension Minutes say about this?

Transfer Balance Cap – Can you have too much in Super?

$1.6M in Pension phase → 0% Tax Rate

$1.6M in Accumulation phase → 15% Tax Rate

$3.2M Total FUND → 7.5% Average Tax Rate

Transfer Balance Cap – Issues

- Based on amount at commencement of Pension (maximum $1.6M)
- If market value drops it doesn't change your TBC amount
- Your TBC only changes if you cease pension
- TBC is the sum of all pensions (i.e. could have a MLC Pension and a SMSF pension)
- If you receive a Reversionary Pension you still only have a $1.6M TBC> Therefore you have 12 months to decide to roll all or part of your original pension back to Accumulation phase.

Investment Strategy

- SISR 4.09 - *The trustee of the entity must formulate, review regularly and give effect to an investment strategy that has regard to the whole of the circumstances of the entity including, but not limited to, the following*
- risks involved in making, holding and realising, and the likely return from your fund's investments regarding its objectives and cash flow requirements
- composition of your fund's investments including the extent to which they are diverse (such as investing in a range of assets and asset classes) and the risks of inadequate diversification
- liquidity of the fund's assets (how easily they can be converted to cash to meet fund expenses such as the cost of managing the fund and income tax expenses)
- fund's ability to pay benefits (such as when members retire and require a lump sum payment or regular pension payments) and other costs it incurs
- whether to hold insurance cover (such as life, permanent or temporary incapacity insurance) for each member of your SMSF.

"When formulating your investment strategy, it is not a valid approach to merely specify investment ranges of 0 to 100% for each class of investment. You also need to articulate how you plan to invest your super or why you require broad ranges to achieve your investment goals to satisfy the investment strategy requirements." ATO 02/2020

Investment Strategy

✓ Risk

✓ Liquidity

✓ Insurance

✓ Diversification

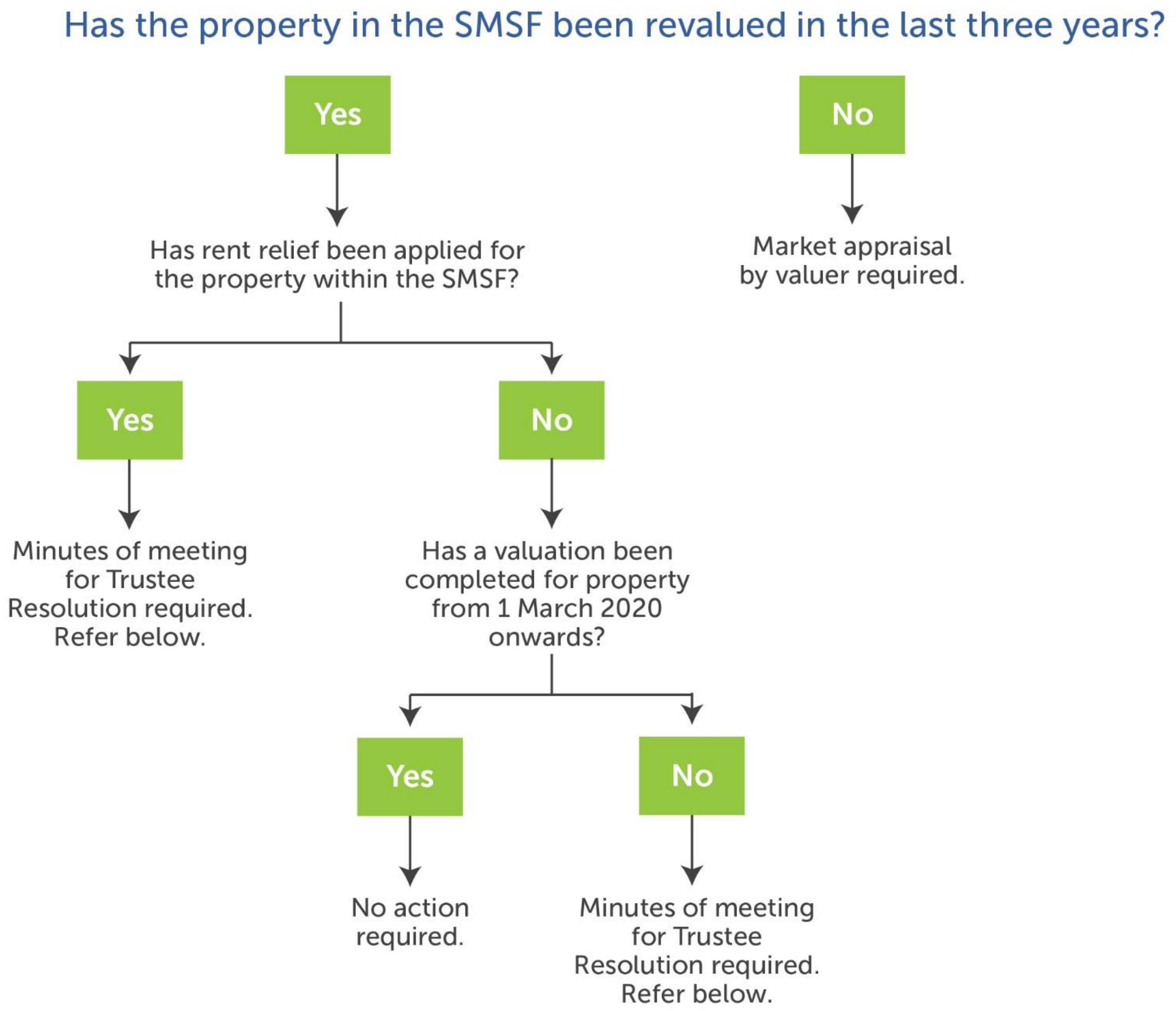
✓ Member's Circumstances

Property Issues?

- Can only be related party tenant if the property is Business Real Property
- Rent must be at Market Value
- SMSF can only purchase property from (or related entity) for market value if it is Business Real property
- No problems owning residential property in a SMSF as long as purchased from unrelated third party and rented to unrelated third party (Swiss Chalet Case)
- COVID-19 property issues

COVID-19 property valuation requirements

Property Issues – COVID 19 impacts?



COVID-19 pandemic is considered a 'significant event' that may change property value.

Property Issues – Rent Relief?

- **Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (28/05/20)**
- The main purposes of this regulation are to:
  - mitigate the effects of COVID-19 on small business tenants and landlords under **affected leases**
  - establish a process for resolving lease disputes.
  - The Code is given effect, and the regulations apply to, lease arrangements **between 29 March 2020 and 30 September 2020.**
- During this period, businesses with **affected leases**:
  - may not be evicted or have their lease terminated for non-payment of rent or outgoings
  - must have rent reduced in proportion to their lost turnover (at least 50% of the rent reduction offered must be in the form of a waiver, leaving the rest to be deferred)
  - may not have their rent increased
  - may not be penalised for reducing trading hours or not opening
  - may not have a claim made by their landlord on a bank guarantee or security deposit for unpaid rent or outgoings.

Rent Relief

Example

Months remaining on Lease			6.00
Current Annual Rent (GST Exclusive)		$	60,000.00
Turnover reduction	50%	$	30,000.00
Net Rent		$	30,000.00
Rent Free/Rent Waiver	50%	$	15,000.00
Rent Deferral	50%	$	15,000.00
Future Rent per month (until Pandemic ended) (GST Exclusive)		$	2,500.00
When Turnover recovered		$	5,000.00
Rent Deferral for remainder of Term**		$	625.00
		$	5,625.00

Insurance in Super

Can be appropriate.

Things to consider:

- *Premiums will reduce retirement benefits – if you can afford to have the cover outside of Super, this may be better.*
- *Tax consequences – Tax if Death Benefit paid to adult non dependant children*
- *Tax on a TPD payment which reduce the size of the payment at a time when you really need it (non*
- *Death and TPD are able to be received tax free outside of super*
- *For TPD can be in a situation where Insurance is paid out to the Super Fund, then you need to prove to the SMSF that you can access -*

Estate (& Incapacity) Planning - SMSF

Death:

1. **Nomination of Beneficiary** – tells the Trustees who you prefer to receive your super. Trustee will most likely be your Executor. They do not have to abide by this.
2. **Binding Death Benefit Nomination** – legally Binding – Trustee must pay as you have directed.
   - May be Lapsing (every 3 years) or non-lapsing depending on your Trust Deed

Taxes – tax free to spouse or dependant child.

- If being paid to adult children 17% Tax to adult non dependant children
- Consider Recontribution strategy to assist in managing this.

Incapacity – who is in charge of your SMSF if you lose capacity?

- EPOA, Legal guardian???

Katz V Grossman NSW Supreme Court

dec. 28/07/98

Evelin Katz

Ervin Katz

dec. 19/09/03

Daniel Katz

Linda & Peter Grossman

The importance of a Binding Death Benefit Nomination (BDBN).

Estate Planning post 01/07/2017

$1.6M in Pension phase → **Can revert to spouse & continue paying**

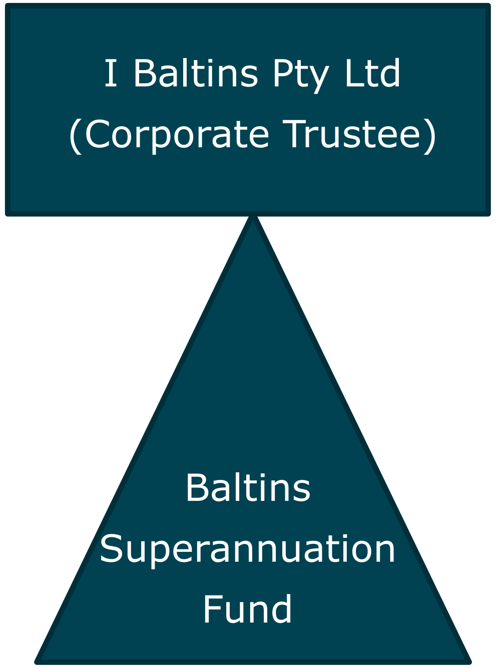
$1.6M in Accumulation phase → **MUST be paid out of Super**

$3.2M Total FUND → **Amount held in super therefore halves - $1.6m REMAINS**

Who should be Trustee?

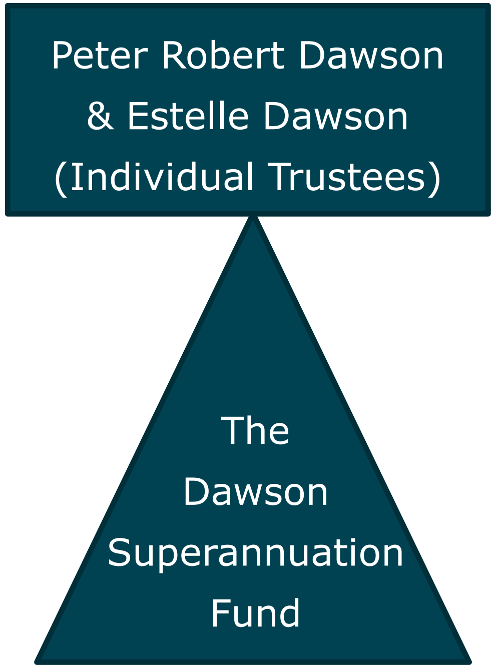
- SISA S17A - All members must be Trustees…
- Can’t be a Trustee by yourself
- *Therefore putting a Company in as trustee from the start is better in the long term. If the Trustees change then the shares are transferred and resign as a Director, but no change to Trustee.*
- Reasons why a Trustee may change:
  - Death
  - Divorce
  - Incapacity
  - Moving Adult children in or out of the Fund
- When you change Trustees all Investments of the Fund, must be renamed :
  - E.g. **Bob and Julie Smith** ATF Smith Family Super Fund **TO**
  - Bob Smith and **Karen** Smith ATF Smith Family Super Fund
- Far simpler to have a Company in from the start (or change now while everyone is happy and healthy rather then trying to change ownership in the event someone has just passed away or become incapacitated).

McCabe as Syndic for the Victor Chang Cardiac Research Institute Ltd v The Baltins Superannuation Fund [2017] NSWC 1671



- Ilze Marija Baltins – sole director of the corporate trustee and sole member of the fund who had never married and had no children = died in June 2015
- Company was deregistered 15 November 2015
- Plaintiff, Terence Sean McCabe, was granted letters of administration in 2017
- Deceased's last will gave the whole of her estate, including the assets of the super fund, to the Victor Chan Cardiac Research Institute Ltd
- Plaintiff's position was that the fund was without a trustee and, due to complications in relation to the reinstatement of the Company, was seeking the Court to appoint himself and Ms Janina Ruth Jancu (CFO of the Institute) as trustees
- Clause 9.4 of the rules of the fund in force at the time of death provided for the appointment, removal and replacement of trustees with the unanimous agreement of the members of the Fund
- Clause 2.12.1 of the rules provided that a person ceases to be a Member when the person dies
- Court ruled that the two individuals be appointed trustees of the fund and the assets of the fund vest in them accordingly
- A potential issue for sole trustee, sole director funds and estate executors

Dawson v Dawson – [2019] NSWSC 826



- Peter & Estelle Dawson (first defendant) – established fund in 2005 but separated in 2012
- Prior to Peter Dawson's death on 24 November 2015, his son Tony Allen Dawson (plaintiff) was appointed a trustee of the fund in Peter Dawson's place. At that time Tony Dawson was his father's financial manager and guardian and held his power of attorney.
- Some years later Estelle Dawson and the executor of Peter Dawson's estate, George Holland (second defendant) signed a Deed of Confirmation in relation to he Fund dated 6 April 2018 which purported to ratify the appointment of the second defendant as a trustee of the Fund to replace the plaintiff with retrospective effect from the date of Peter Dawson's death
- Defendants position was that the change in trustee occurred automatically as a result of Peter Dawon's death.
- The particular issues in dispute that need to be determined are:
  1. whether the plaintiff was appointed a trustee of the Fund in his personal capacity or in his capacity as power of attorney for Peter Dawson;
  2. whether the plaintiff's appointment as trustee of the Fund has ceased (either following the death of Peter Dawson or at some later date); and
  3. whether the second defendant was validly appointed as trustee of the Fund as a replacement of the plaintiff (either with effect from the death of Peter Dawson or some later date).

Admin Best Practice

Keep good records

Minute your decisions

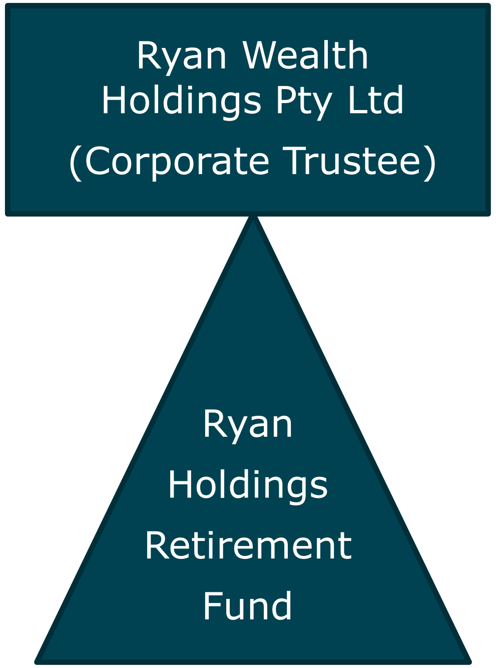
If you think you made a mistake – tell us as soon as possible, so we can assist in rectifying it. Mistakes fixed in the same financial year in which they occurred are less likely to be an Audit issue.

Audit

- Your responsibility - you are required to have an **<u>independent audit</u>** completed each financial year
- Auditors' responsibility - to provide an independent assessment of the Fund's compliance.
- Financial audit and a Compliance audit
  - This is why the auditor needs investment statements and audit certificates as well as copies of all trust deeds and minutes of trustee's decisions.
- Where you as a trustee have failed to adhere to (and breached) the superannuation legislation the auditor will notify you of this, and where possible provide guidance on potential solutions . Where a breach is significant, or repetitive your Auditor is also required to lodge a contravention with the ATO.
- Your auditor is bound by professional and legal obligations and therefore a robust audit process must be followed every year, even where you may not have had a prior contravention.
- A thorough and robust audit is always in your best interests. *Picking up on any Audit concerns in a timely manner allows the Trustees to fix compliance issues as soon as possible, and can stop minor issues becoming major ones.*

Audit responsibilities of a SMSF Trustee

Ryan Wealth Holdings Pty Ltd v Baumgartner – [2018] NSWSC 1502



- Ms Trudy Crittle was sole shareholder and director of the corporate trustee and sole member of the fund
- David Keith Baumgartner and KJ Equities Pty Ltd were the SMSF auditors for 2007 to 2009
- Ms Crittle claimed that as a result of the failures of the auditor irregularities went undetected for many years and when they were ultimately discovered the opportunity to redeem funds arising from a series of failed investments had been lost
- Ms Crittle also claimed the auditor’s conduct was in breach of their duties in contract and in tort, in contravention of their obligations as auditors under the SIS Act, misleading and deceptive and in breach of Commonwealth and State legislation

Ryan Wealth Holdings Pty Ltd v Baumgartner [2018] NSWC 1502

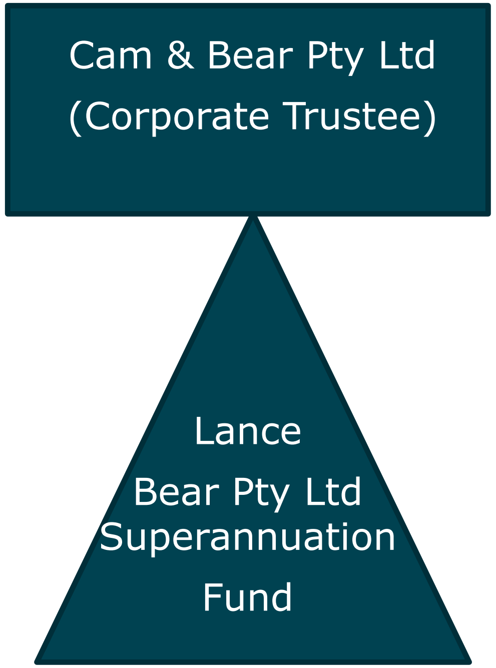
Family law settlement saw Ms Crittle invest, through the SMSF, over $7m in accordance with advice from financial advisor, Mr Christopher Moylan

In 2006 fund entered into a series of investments by way of unsecured loans pursuant to a series of facility agreements

Between 2012 to 2014 a number of the persons and entities associated with the property ventures, with respect to the loans and investments were placed into bankruptcy or liquidation

- Defendants unsuccessfully argued that Mr Moylan and his firm, Moylan Business Services (MBS) had prepared the financial reports of the SMSF for of the years and therefore owed the plaintiff a duty to exercise reasonable care and skill, out to have been aware that the financial reports did not fairly present the financial position of the SMSF and that he knew the loans were in default and had not been serviced or repaid and that, knowing those things, MBS must necessarily have had a high degree of culpability in adopting in the special purpose financial reports an inappropriate method of valuing the loans.

Cam & Bear Pty Ltd v McGoldrick – [2018] NSWCA 110



- Dr Lance Bear and his wife, Ms Jennifer Campbell, were members of the Lance Bear Pty Ltd Superannuation fund which was established around 1990 and over time had various trustees
- Mr John McGoldrick was the auditor of the fund for the financial years ended 30 June 2003, 2004, 2005, 2006, 2007 and 2008
- In or around 1996 Dr Bear was persuaded by a family friend, Mr Anthony Lewis to move the fund over to Mr Lewis and that Lewis Securities could manage the investments and Databank Investment Services Pty Ltd, in which Mr Lewis owned 35%, could do the administration
- One of Mr Lewis' companies was LSL Holdings
- Dr Bear would make regular contributions to the fund by way of cheques payable, at Mr Lewis' request, to "Lewis Securities".
- Dr Bear said that he assumed that LSL Holdings P/L was holding the cash amounts for the fund.
- According to Dr Bear, from about 1996 until 2008, he understood from his conversations with Mr Lewis, and from financial accounts that he received, the Funds' assets consisted of cash amounts and shares. The accounts would disclose these deposits under the group heading "Other Assets" with the individual asset description being "Cash – LSL Holdings P/L (Lance)" or "Cash – LSL Holdings P/L (Jenny)"

Next Steps

Questions or Concerns?

Resources

- SMSF Connect

https://www.ulton.net/resources

- SMSF Trustee information:

https://www.ato.gov.au/Super/Self-managed-super-funds/

- Trustee Declaration:

https://www.ato.gov.au/uploadedFiles/Content/SPR/Forms/Trustee%20declaration_SPR_n71089_19272.pdf

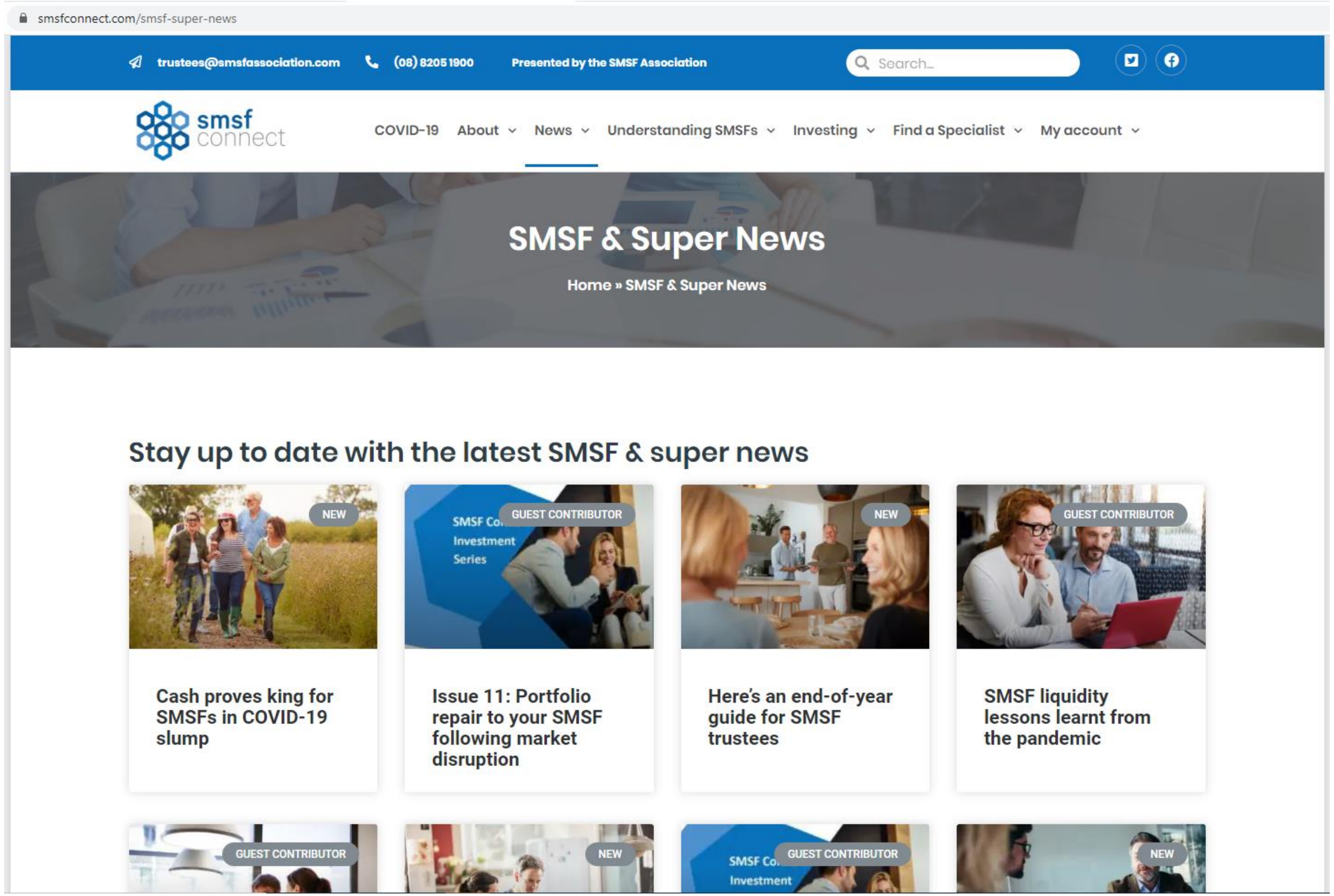
- Superannuation – improving flexibility for older Australians

https://www.legislation.gov.au/Details/F2020L00645?_cldee=a3dyaWdodEB1bHRvbi5uZXQ%3d&recipientid=contact-d867291ec278e61180d1000d3ad070fe-90dcb3ebb4894488b8076ba28bc36556&esid=e16821c0-96a3-ea11-8114-000d3ad070fe

- Business Real property

https://www.ato.gov.au/law/view/document?docid=SFR/SMSFR20091/NAT/ATO/00001

SMSF Connect



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