

## **EXPLANATION OF THE MAIN PROVISIONS OF THE SUPERREGISTRY SMSF TRUST DEED**

The following is an outline of the main provisions of the trust deed.

### **(a) Clause 2 - Purpose**

In order to be a regulated fund under SIS, the trust deed must require either that the trustee be a constitutional corporation or that the benefit payable on retirement is an old-age pension. In order to provide maximum flexibility, the trust deed contained in the Service caters for both approaches.

Members can obtain payment of their benefits either as a lump sum or as an income stream.

Clause 2.3 contemplates the situation in which the Trustee considers that it is not possible or not reasonably practicable for the Fund to continue to be a SMSF, or if all the Members so request in writing. In that case, the Trustee and the Members are to do all such things as are required for the Fund to become another type of regulated superannuation fund.

### **(b) Clause 3 - Covenants**

Clause 3 sets out the covenants which are required under section 52 of SIS to be given by all trustees and directors of corporate trustees (see section 4(b) of Chapter 2 for further details).

### **(c) Clause 4 - Interpretation - Definitions**

This clause contains the definition of terms and phrases used in the trust deed. Defined terms and phrases throughout the trust deed are indicated by the use of capitals.

### **(d) Clause 5 - Interpretation - General**

Most of the clause is self-explanatory. Clause 5.6(a) provides that the provisions of the Deed are to be read subject to the relevant law (SIS and other applicable legislation as defined in Clause 4 of the trust deed). Note should also be made of clause 5.6(b) which is a wide deeming provision, deeming the requirements of the relevant law to be incorporated into the trust deed where they are not expressly incorporated, to the extent required for the fund to operate as a SMSF, to qualify for concessional tax treatment, and to satisfy requirements of the Regulator. However, the deeming provision does not operate to incorporate a provision if to do so would constitute a breach of the variation power granted by clause 37.

**(e) Clause 6 - General Provisions**

These are general provisions dealing with the powers and rights of trustees and members. Also, clause 6.4 provides that, where required by the relevant law, the trustee shall have in force arrangements to deal with inquiries and complaints from members as required under the relevant law (Section 101 of SIS). At present, a SMSF is **not** required to put in place such formal arrangements.

Clause 6.5 empowers the trustee to undertake and complete any actions in relation to the Fund required in accordance with the Family Law Act 1975 and the regulations which govern superannuation and family law. The power enables the trustee to elect, from time to time, that the deed will not have operation to permit the trustee to establish new interests in the fund, upon the request of a spouse.

**(f) Clause 7 - Proper Law**

This clause specifies the law of the State or Territory which is to govern the construction and application of the deed in any proceedings. The clause refers to Schedule A which is where the State or Territory is specified.

**(g) Clauses 8, 9 and 10 – Membership of Fund, Membership Notification Requirements and Cessation of Membership**

Clause 8 contains provisions in relation to the admission of members.

Clauses 8.1, 8.2 and 8.3 deal with the admission of members to the Fund, and are aimed at ensuring that the SMSF rules are always satisfied.

Members are also required to provide information to the trustee for the purposes of the fund.

Clause 9 requires the trustee to provide new, existing and former members with all information prescribed under SIS. The information which must be provided is discussed in section 6 of Chapter 2 of this Service.

Upon admission a member is bound by the trust deed, is required to provide certain specified information, and remains a member until the happening of one or more of the events specified under clause 10.1 (which are tied to the SMSF requirements). Sub-clause 10.2 provides that a member must, in conjunction with the trustee, ensure that the member ceases to be a member in certain circumstances which would otherwise lead to a breach of the SMSF requirements. Note that the trustee is able to determine that a member should not cease to be a member upon payment or transfer of all of their benefits, or upon benefits ceasing to be payable (clause 10.1(b) and (c)). The trustee might exercise this power if, for

example, a member had received their benefit, but intended to make additional contributions in the near future.

**(h) Clause 11 - The Fund**

This clause defines the assets which make up the fund and vests the fund in the trustee.

**(i) Clause 12 - Fund Accounts**

This clause establishes three types of accounts:

- (i) accumulation accounts (including sub-accounts),
- (ii) an income account; and
- (iii) reserve account/s (the trustee has power to establish reserve account/s, but is not required to do so).

**(j) Accumulation Account**

An accumulation account is established in respect of each member or beneficiary in the fund. Clauses 12.2 and 12.3 detail the amounts that are credited and debited to the individual accumulation accounts.

**(k) Single Income Account**

A single income account is established into which all the income of the fund is paid annually and to which debits are posted. The provisions of clause 12.4 determine the manner of allocating the income, and requires the trustee to determine the fund earning rate (paragraph 12.4(c) of the Trust Deed). It is necessary for the trustee to establish the fund earning rate by reference to the income derived by the fund and credited to the income account, reduced by specified debits including taxation, and taking into account such provisions or reserves for future contingencies as the trustee considers reasonable. It is not necessary for the fund earning rate to reflect the total earnings of the fund in a particular year, enabling the trustee to establish a reserving strategy if desired.

**(l) Reserve Account**

The trustee may determine to retain some of the income, to be held in unallocated reserve. A reserve account may be established for this purpose pursuant to sub-clause 12.5. This can be held as a reserve for future contingencies, to balance or smooth the earnings of the fund, to augment the fund earning rate, to make anti-detriment payments and for other purposes referred to in clause 12.5. Amounts from a forfeiture account established under clause 26.3 can also be transferred to the equalisation account.

**(m) Clause 13 - Fund Records, Disclosure and Investigation**

This clause provides for the maintenance and retention of records of the fund. Under SIS, the trustee is required to keep sufficient financial records to prepare prescribed accounting statements and for those statements to be properly audited. SIS also requires that certain information be retained by the trustee for a period of ten years (see Chapter 2 of this Service for further details). The Corporations Act 2001 also prescribes certain disclosure obligations for both current and new members.

**(n) Clause 14 - Fund Trustee - Appointment and Removal**

Under SIS, all funds must either have a constitutional corporation acting as trustee or individual trustees. A disqualified corporation or individual is not eligible to act as a trustee.

Clauses 14.1 and 14.2 are drafted to meet these requirements.

Clauses 14.3-14.6 expressly build the main SMSF member-trustee requirements into the structure of the trust deed itself. Clauses 14.3 and 14.4 make allowance for single member funds. Clause 14.5 ensures that as far as possible the required member-trustee balance is not disturbed when a new trustee or director is appointed, and clause 14.6 does the same in relation to the cessation of a person as a trustee or director.

Clause 14.8 builds into the trust deed the flexibility permitted by the SMSF requirements in respect of fund members who are minors, have a legal personal representative (**LPR**) because the member is under a legal disability, or have granted another person an enduring power of attorney, or who have died.

Clause 14.9 operates to install the person or persons or company named in Schedule A as the initial trustee.

**(o) Clause 15 – Trustees' Investment Powers**

Clause 15 of the trust deed sets out the trustee's investment powers, and its obligations in relation to investments.

Clause 15.1 of the trust deed sets out those investments which qualify as authorised investments. All investments of the fund are required to comply with the relevant SIS requirements (including the prohibition on acquisition of assets from members, in-house assets rules, arm's length requirements, sole purpose test and prohibition against loans and financial assistance to members and relatives). These requirements are discussed in part 7 of Chapter 2.

Clause 15.4 permits the trustee to provide member investment choice and can be utilised to establish asset specific and other investment strategies.

**(p) Clause 16 - Trustee's Powers of Management**

This clause provides that the trustee has all the powers given by law and then specifies a number of additional powers. These include the power to seek modifications of, or exemptions from, the application of any of the provisions of the relevant law.

The clause gives the trustee full discretion in relation to the exercise of its powers. Despite this, the trustee's discretion may be limited by law such as by the anti-discrimination legislation at both State and Federal levels. The trustee's powers may also be delegated to any other person to the extent permitted under SIS.

Clauses 16(c) and (d) permit the trustee to borrow, to use a nominee/custodian, and to grant security, as permitted under the relevant law (section 67(4A) of SIS).

**(q) Clause 17 - Limitation of Liability**

Clause 17 provides that the trustee and trustee directors are not liable for any acts or omissions in relation to the fund, save in circumstances such as where there is a failure to act honestly, or where the trustee or director intentionally or recklessly fails to exercise the degree of care and diligence that the trustee or director was required to exercise. However, the application of this provision is subject to compliance with SIS.

Under section 56 of SIS, a provision in a Trust Deed would be void in so far as it would have the effect of exempting the trustee from, or indemnifying the trustee against, liability for breach of trust in circumstances of this type. Section 56 further provides that a trustee may not be indemnified against any liability for a monetary penalty under a civil penalty order, and this is dealt with in clause 17.1(c).

**(r) Clause 18 - Indemnity of Trustee**

Clause 18 provides an indemnity to the trustee. However, the SIS limitations contained in Section 56 apply to indemnity provisions in the same way as they do to limitation of liability provisions. Consequently, the comments made in relation to clause 17 above, also apply to clause 18.

**(s) Clause 19 - Remuneration and Reimbursement**

This clause provides that the trustee may not charge professional fees in relation to the performance of the normal activities of trustees. This is a requirement for all SMSFs. However, the trustee is entitled to be reimbursed for expenses properly incurred on behalf of the fund.

**(t) Clause 20 - Appointment of Actuary, Auditor and Managers**

This clause empowers the trustee to appoint actuaries, auditors, administration managers, investment managers, custodians and such other consultants and officers as it considers desirable for the proper administration of the fund or necessary for compliance with the relevant law.

**(u) Clause 21 - Actuarial Investigations**

Clause 21 makes it clear that the trustee is not bound to act in accordance with any advice provided by the actuary, unless required by the relevant law to do so.

**(v) Clause 22 - Contributions to Fund**

Clause 22 deals with the general rules governing the acceptance of contributions by the trustee, including those prescribed by SIS. It also (together with the definition of "Contributions") specifically addresses the ability of the Fund to accept employer contributions, spouse contributions, child and other contributions such as co-contributions in any form permitted by the regulator.

Contributions may be accepted in the form of cash or assets. It should be noted, however, that the ability of members to make in specie contributions is limited by Section 66 of SIS (see part 7 of Chapter 2 of this Service).

**(w) Clauses 23, 24 & 25 - Transfers and Roll-overs to and from Approved Benefit Arrangements, and Without Consent**

These three clauses allow for the whole or a portion of a member's or beneficiary's crystallised benefits or uncrystallised benefit-entitlement to be transferred to, or received from, other superannuation and similar funds (including as a consequence of a contribution splitting application lodged by a member). The clauses also allow for internal transfers and roll-overs.

Clauses 23 and 24 clearly distinguish between the circumstances where the consent of the member or beneficiary to the transfer as required and where consent is not required.

The respective sub-clauses operate on the basis of the definitions of "Benefit" and "Benefit Entitlement" in clause 4.

**(x) Clause 26 - Forfeiture of Benefit Entitlement**

This clause provides for a member's benefit entitlement in the fund to be forfeited in certain specified circumstances.

Clause 26.1 sets out the circumstances in which the benefit entitlements are able to be forfeited. These include purported assignment, vesting of the benefit in another person, insolvency, inability to personally enjoy the whole or a portion of the benefit, or fraud.

However, the Bankruptcy Act 1966 (Cth) also has a significant impact on the accessibility of superannuation entitlements by trustees in bankruptcy. In this respect, the Bankruptcy Act significantly limits the operation of provisions such as Clause 26 which purport to forfeit a bankrupt's beneficial interest in a regulated superannuation fund. At the same time, lump sum benefit payments out of, and benefit entitlements in, a regulated fund are now protected from claims of creditors. It should be noted that under the Bankruptcy Act a trustee in bankruptcy can recover any contributions made to an eligible superannuation fund on or after 28 July 2006 by the person who later becomes bankrupt, or by a third party on that person's behalf (such as an employer), if the contribution was made before the commencement of that person's bankruptcy to defeat creditors.

A trustee in bankruptcy can issue a notice to the trustee of an eligible superannuation fund that has received the contribution instructing the trustee to "freeze" the void contribution. The Bankruptcy Act specifies procedures which the trustee in bankruptcy must use in order to recover the value of the contributions.

As a result, the application of clause 26 is expressed to be subject to the relevant law (which is defined to include the Bankruptcy Act), which prevents trustees from acting so as to alter adversely a member's right or claim to accrued benefits, and requires minimum benefits to be maintained until certain events occur (such as payment out as a benefit).

Accordingly, great care must be taken in applying clause 26, and legal advice should generally be obtained before this is relied upon. Nonetheless, the clause is included in the trust deed as it may provide an avenue for protection of members' interests in some circumstances.

**(y) Clauses 27, 28, 29, 30, 31 and 32 - Pension Provisions**

The trust deed is drawn so as to enable the payment of benefits by way of a lump sum or as one of several types of income stream.

The types of income stream benefit payable under the deed include an account-based pension/non-commutable account-based pension (see clauses 28 and 29), and, any other type of pension which is acceptable under the relevant law (clause 31). A market-linked pension may also be paid in the limited circumstances allowed under SIS (clause 27.2(c)). If these deed provisions are adopted on a variation of an existing trust deed, where pensions are already in payment, then these pensions will continue

to be paid on their existing terms and conditions, unless and until the member requests that the pension be paid on different terms.

The non-commutable account-based pension is available to members who attain Preservation Age but have not yet satisfied a condition of release. Annual payments cannot be more than 10% of the account balance at the start of the financial year (or at the date the income stream commenced).

The treatment of amounts remaining to the credit of a pensioner's account upon the death of the pensioner where there is no reversionary beneficiary is dealt with in clause 28.2 (account-based pensions), and 30.2 (market-linked pensions).

Commutations of these pensions are provided for in clauses 28.3 (account-based pensions) and 30.3 (market-linked pensions). . Sub-clause 28.3(b)(ii) enables the pensioner to request that instead of the amount of the commutation of the pension being paid to the pensioner, the amount may be retained in the Fund and applied to the credit of an accumulation account on behalf of the pensioner.

As an alternative, clause 27.3(c) permits the trustee to purchase or pay an annuity as the means of financing its pension obligations, where the relevant law permits. The trustee may also choose to use a lump sum benefit to acquire an annuity payable to the member outside the fund as the most appropriate means of providing an income stream benefit (clause 27.1(b)).

The Service includes packages of pension documents.

**(z) Clause 32 - Transfer In Specie**

When a member leaves the fund upon becoming entitled to a benefit or, in circumstances where a member's uncrystallised benefit entitlement is to be transferred to another fund, it is sometimes preferable to pay the benefit in specie rather than to realise assets and pay the benefit in cash. This clause allows the trustee to transfer assets in specie in these circumstances.

**(aa) Clause 33- Payment of Benefits on Death**

Clauses 33.1 and 33.2 enable trustees to accept binding death benefit notices and non-binding death benefit notices. Clause 33 provides for death benefits to be paid in the following manner:

- (i) where the trustee is given a binding death benefit notice by a member or beneficiary, the trustee must pay or apply the benefit in accordance with that notice; or

- (ii) otherwise, the trustee may pay the benefit to one or more of the deceased's dependants (including a nominated dependant) and the legal personal representative in such proportions as the trustee in its discretion determines.

Death benefits may exist in relation to the death of a member with either an accumulation account balance or in receipt of a superannuation income stream.

Schedule C of the trust deed includes forms for the giving of Binding and Non-Binding Death Benefit Notices, and these are also provided in the ancillary documentation. Subscribers should note that the requirements set out in the SIS Regulations in respect of binding death benefit notices (such as the need to "refresh" them every three years) do not apply to SMSFs.

**(bb) Clause 34 - Payment of Benefits**

Clause 34 deals with the rules and procedures in relation to the payment of benefits. An important limitation, which is stated in clause 34.10, is that the trustee is not able to pay out any benefits where such a payment would cause the fund to breach any provisions of the relevant law.

**(cc) Clause 35 - Payment of Taxation and Levies**

This clause allows the trustee or, with the agreement of the trustee, an insurer or other appropriate organisation, to deduct tax from benefits, contributions, shortfall components and fund income. Any taxation is then payable to the relevant authority. This includes payment of the surcharge. While the superannuation surcharge has been abolished and does not apply to any contributions on or after 1 July 2005, surcharge assessments are still being issued by the ATO in respect of previous financial years. Clause 35.4 removes possible doubts regarding the power of the trustee to pay the superannuation contributions surcharge. The provision should be read in conjunction with the definition of "Taxation" in clause 4.

**(dd) Clause 36 - Policies of Assurance**

This clause empowers the trustee to effect individual or group policies with an insurer and to debit the premium to the income account or individual member's accumulation accounts.

There is also a provision to allow the trustee to impose limitations or conditions in respect of a member where the insurer has refused to insure a member or has imposed limitations or conditions on the terms of insurance.

**(ee) Clause 37 - Variation of Trust Deed**

The variation power allows amendments by deed, oral declaration or written resolutions. Note that amendments may be prospective or retrospective.

**(ff) Clause 38 - Winding up of Fund**

Clause 38.1 sets out the circumstances in which the fund may be wound up, and clause 38.2 provides details of the steps which must be followed.

In the event of winding up, surplus assets (if any) may be used to provide additional benefits to members, former members, dependants and former employers as the trustee determines to be appropriate. Note, however, that the relevant law significantly restricts the circumstances in which payments can be made to employers. Legal advice should generally be taken before any such payments are made.

**(gg) Clause 39 - Membership Classification**

Clause 39 of the trust deed allows the trustee, in its discretion, to create classes of membership with different rights, entitlements, conditions of eligibility and Benefits.

**(hh) Clause 40 – Guardian**

Clause 40 allows the members, by instrument in writing, to appoint a person or entity to act as “Guardian” of the fund. Such Guardian must give consent to the exercise by the trustee of whatever powers, rights, decisions, discretions, appointments and other authorities granted to or conferred on the trustee under the deed as are specified by the members. Advice should generally be taken before members exercise their entitlement to make such an appointment to ensure that relevant governance, succession and estate planning issues are taken into account.

**(ii) Clause 41 - Treatment of Preserved Benefits**

This clause ensures that preserved benefits must be maintained in the fund unless clauses 23, 42 or 43 apply.

**(jj) Clause 42 - Payment of Preserved Amounts**

This clause permits the trustee to pay preserved benefits in circumstances as stated in the clause and also permitted by the relevant law but which may not be expressly incorporated into the trust deed.

**(kk) Clause 43 - Payment of Non-Preserved Amounts**

This clause permits the payment of benefits which are not subject to any cashing restrictions at any time subject to a minimum amount which may be determined by the trustee to discourage small withdrawals.

**(ll) Clause 44 - Compulsory Payments of Benefits**

This clause incorporates the SIS compulsory cashing rules and also incorporates the flexibility permitted in these circumstances under the SIS Regulations. At present, the only compulsory cashing requirement under SIS is on the death of a member.

**(mm) Clause 45 - Benefit Augmentation**

Where benefits are forfeited or where the trustee has adopted a reserving policy to smooth investment returns or for some other permitted purpose, there will be a balance in the fund reserve account.

If a benefit becomes payable prior to the reserve account being applied to an individual member's accumulation account, the trustee may determine to augment the member's benefit by an amount from the reserve account.

**(nn) Clause 46 – Dealing with Benefits**

Clause 46.2 of the trust deed provides that benefits may be retained in the fund until:

- (i) the member or beneficiary requests payment;
- (ii) the member dies;
- (iii) there is a requirement to make the payment under the relevant law (note that compulsory cashing requirements other than on death have been abolished); or
- (iv) the trustee elects to pay the benefit to the member or beneficiary.

The clause enables the trustee to continue to hold benefits notwithstanding that a condition of release has occurred.

**(oo) Clause 47 - Retirement**

Retirement benefits are triggered where the member retires from employment or any event prescribed under SIS occurs e.g. a member attains the age of 65 and requests that the benefits be paid.

**(pp) Clause 48 - Incapacity**

- (i) Permanent Incapacity

This clause provides that a member who suffers permanent incapacity may receive a benefit equal to the total balance of their accumulation account or such part of such amount as the member requests. Permanent incapacity is defined in clause 4.

(ii) Temporary Incapacity

The benefit payment on temporary incapacity is an income benefit. Under SIS, temporary incapacity benefits may not be paid directly from the member's accumulation account, and they therefore effectively must be insured benefits. The benefit must be paid as a non-commutable income stream, and be paid monthly.

**(qq) Clause 49 - Early Retirement from Employment**

Upon retirement prior to the member's normal retirement age, but having reached preservation age, members become entitled to fully vested benefits in all circumstances. Members can take only a part of their entitlements.

**(rr) Clause 50 – Other Termination of Employment**

This clause provides that where a member terminates gainful employment with an employer prior to their preservation age, and where no other benefit is payable, the trustee may at the member's request pay a benefit if allowed under the relevant law.

**(ss) Clause 51 - Payment on Death**

Clause 51 provides for the amount in a deceased member's accumulation account to be paid according to clause 33. One or more interim lump sum payments can be made if desirable. Specific provision is included for the making of anti-detriment payments (defined in clause 4).

**(tt) Clause 52 – Payment on Terminal Medical Condition**

A member suffering from a terminal medical condition (as defined in SIS) can receive a benefit, being the amount standing to the credit of their Accumulation Account.

**(uu) Clause 53 – Other Benefit Payment Events**

This clause deals specifically with the payment of benefits in the event of severe financial hardship, on compassionate grounds, and where some other condition of release has been met.

**(vv) Schedules**

The trust deed in the Service contains three Schedules. The nature and use of these Schedules is as follows:-

- (i) Schedule A must be completed when the trust deed is being prepared for an individual client. Subscribers will note that the trustee of the fund will be specified in Schedule A, as will the date of the deed, the name of the fund and the proper law governing the fund.
- (ii) Schedule B sets out the form of membership application, which can be changed at any time in accordance with clause 8.2 of the trust deed.
- (iii) Schedule C sets out forms for Binding and Non-Binding Death Benefit Notices.