

AVOIDING SMSF TRUST DEED DISASTERS

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1. Introduction

This paper is to accompany the PowerPoint presentation entitled 'Avoiding SMSF Trust Deed Disasters' presented as a webinar for Television Education Network in April 2022.

This paper will consider the following:

- 1.1 Key provisions in the SMSF trust deed and importance of trustee awareness
- 1.2 Understanding the investment power in the trust deed – is it appropriate?
- 1.3 The challenge of keeping the trust deed current
- 1.4 Is the trust deed ambiguous or poorly drafted?
- 1.5 The trust deed and death benefits – general
- 1.6 The trust deed and death benefits – binding nominations
- 1.7 Amending the trust deed correctly.

2. Key provisions in the SMSF deed and importance of trustee awareness

- 2.1 The terms of the SMSF trust deed contain the governing rules of the SMSF in accordance with which it is to be administered by the trustee, and is therefore one of the most important documents in the life cycle of an SMSF. The trustee's overriding duty at law is to carry out the terms of the trust deed in the interests of the beneficiaries as a whole. The trustee owes fiduciary obligations to the beneficiaries¹ and must avoid any conflicts of interest or unauthorised profits from the use of its position, property or confidential information.²

¹ See eg, *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41, at 68.

² See eg, *Breen v Williams* (1996) 186 CLR 71.

- 2.2 The trustee is bound to give effect to the settlor's intention as expressed in the trust instrument which is the governing rules by which the trustee must be guided. A failure to follow the terms of trust would prima facie, result in the trustee being liable for a breach of trust. An SMSF, being a 'private' type of trust is no exception.
- 2.3 Trustees must familiarise themselves with the SMSF trust deed as part of their obligations in its administration. We were reminded of this by McMillan J in the recent Victorian Supreme Court decision *Re Marsella; Marsella v Wareham (No 2)* [2019] VSC 65 at first instance, particularly where trustee discretionary power needs to be exercised in good faith and not for an improper purpose.
- 2.4 The trust deed is usually structured in the following sections:
- (a) The purpose of the trust, with reference to the sole purpose test;
 - (b) The trustee and procedural requirements including trustee covenants under section 52 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**the SIS Act**) and trustee powers;
 - (c) Appointment and removal of trustees;
 - (d) Members' rights;
 - (e) Contributions, transfers and rollovers;
 - (f) Investment powers;
 - (g) Payment of benefits: lump sums and income streams;
 - (h) Payment of death benefits including preparation of binding nominations;
 - (i) Family law issues concerning members; and
 - (j) Amendment of terms and wind up of the SMSF.
- 2.5 One of the most important provisions in the SMSF trust deed is that the SMSF is established and administered for the 'sole purpose' as set out in section 62 of the SIS Act. This is usually a clause that is located at the beginning of the SMSF trust deed. The sole purpose test requires the trustee to ensure that the sole or primary purpose of the SMSF is to:
- (a) provide old age pensions to the members; or
 - (b) provide benefits to members (and/or their dependants).
- 2.6 An SMSF must be maintained in a manner that complies with the sole purpose test under section 62 of the SIS Act at all times during its lifetime. This extends to all activities undertaken by the SMSF, including acquiring and investing the assets of the fund and paying benefits to members.
- 2.7 Another key thing that trustees ought to be aware of is whether the trust deed has been properly executed. For instance:
- (a) Have all necessary parties to the deed in fact signed the deed?
 - (b) Were the parties' signatures appropriately witnessed, if this is a requirement in the governing jurisdiction?

- (c) Where there have been a chain of documents prepared over the years including amendments or changes of trustees, were the changes properly made in line with the trust deeds' procedural requirements? For example, were all the necessary parties' consents obtained and were all necessary parties in fact party to the change of trustee or amendment documentation?

These issues will be discussed later in paragraph 8 of this paper.

3. Understanding the investment power in the trust deed

- 3.1 At law, trustees are obliged to invest trust funds, even where the instrument does not provide for an express direction to this effect.³ The duty to invest must be exercised in the manner authorised under the trust instrument, legislation or Court order. In the SMSF context, the main source of authority and power is the SMSF deed.
- 3.2 In order for trustees to verify whether certain investments are permitted within the SMSF, the terms of the SMSF trust deed will have to be carefully reviewed as any investments made in an SMSF should be expressly allowed under the terms. It is therefore appropriate to have a 'broad' investment power to enable the trustee to flexibly invest members' funds within the boundaries of the SIS Act and related law.
- 3.3 One of the main benefits of investing within an SMSF is the control and flexibility afforded to members in respect of the types of investments held within the fund. Accordingly, I take the view that the investment powers in the SMSF deed ought to be drafted in a permissive and broad manner to allow the trustee flexibility in choosing which investments are most appropriate for the SMSF (and of course, in accordance with the SMSF's investment strategy).
- 3.4 In addition, banks and other financial institutions in the context of limited recourse borrowing arrangements are likely to refer to and closely review the trustee's investment powers under the trust deed to verify that those intended investments are permitted within the SMSF in question, and to ensure that it will be able to enforce any agreements or contracts against the trustee in the event of a future breach or default.
- 3.5 Further, prescriptive and narrowly drafted investment clauses (eg by attempting to include a comprehensive list of permissible investments) should be avoided, especially where the trustee wishes to enter into 'less vanilla' investments such as property developments, or where new classes of assets such as bitcoin and other cryptocurrencies gain prominence in the open market.
- 3.6 As part of the investment powers of the trustee, the terms of the SMSF trust deed should further empower the trustee with the following associated powers (which again, should be permissive rather than prescriptive to provide the trustee with flexibility):
- (a) borrow, including enter into limited recourse borrowing arrangements with external lenders or related parties;
 - (b) lease property owned by the SMSF and to lease or sublease property;

³ See eg *Adamson v Reid* (1880) 6 VLR € 164 at 167 per Molesworth J.

- (c) transact with related parties; and
 - (d) hold and delegate (power of attorney to banks) any authorities, powers or discretion it may have under the SMSF trust deed to an appointed person, firm or company.
- 3.7 Given the significant uptake in limited recourse borrowing arrangements in recent years, it is critical to ensure that the trustee is appropriately empowered to enter into these arrangements under the SIS Act and related laws. SMSFs were only permitted to enter into such borrowing arrangements from 2007 when superannuation laws were changed.
- 3.8 SMSFs whose trust deeds pre-date 2007 are therefore not likely to include provisions permitting the trustee to enter into LRBAs. Where an SMSF trust deed does not expressly authorise LRBAs to be entered into, its terms will need to be updated prior to the arrangement being entered into.
- 3.9 Furthermore, the initial 'instalment warrant' provisions under subsection 67(4A) of the SIS Act have been repealed and are now replaced with the 'limited recourse borrowing arrangement' provisions in section 67A of the SIS Act and where LRBAs are to be entered into, the SMSF deed will need to be flexible enough to allow for this.

4. The challenge of keeping the trust deed current

- 4.1 As noted above, an SMSF trustee's power is governed by the trust deed and it is critical to ensure that its terms are kept up to date in line with the current law and as laws change.
- 4.2 Superannuation law often changes and the trust deed is not just a 'set and forget' document. The deed will need to be reviewed periodically, particularly where:
- (a) investments are made;
 - (b) bank borrowings are entered into;
 - (c) there are third party dealings with the trustee including management agreements and property developments done within the fund;
 - (d) pensions are commenced within the fund and determining whether they ought to be reversionary or non-reversionary; or
 - (e) a member attends to their estate and succession planning and needs to address the payment of their superannuation entitlements (death benefits) on their death.
- 4.3 In recent years and following on from the (significant) changes to superannuation law in 2017,⁴ there was the introduction of:
- (a) the transfer balance cap;
 - (b) limitations imposed on non-concessional contributions cap, depending on a member's total superannuation balance;

⁴ See *Treasury Laws Amendment (2017 Measures No 2) Act 2017* (Cth).

- (c) different types of contributions that could be made such as the down-sizer contributions and catch-up concessional contributions; and
 - (d) the move from 4 to 6 member SMSFs.
- 4.4 Given these issues, in modern SMSF deeds and to ensure that the trust instrument can 'weather' changes in law, it would be appropriate for SMSF deeds to be drafted flexibly and broadly, unless the need arises to tailor the terms of trust to narrow the trustee's powers or exclude certain beneficiaries.
- 4.5 For instance, following on from the above, it would be appropriate for terms of trust deeds to contain express powers and clauses that are worded flexibly. For instance, it would be preferable to see:
- (a) membership numbers in the fund as permitted under superannuation law in place from time to time (noting that the maximum number of members of the fund recently changed);
 - (b) contributions of *any* kind to the extent permitted under superannuation law (noting that the thresholds types of contributions may change over the years like we saw following the 2017 changes);
 - (c) different types of pensions and income streams that can be commenced within the SMSF to the extent permitted under superannuation law (noting the defined benefit legacy pension provisions in regulation 1.06 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**the SIS Regs**)); and
 - (d) broad investment powers that enable the trustee to invest in a broad range of assets and not simply being limited to shares, equities, cash or real estate. As noted above, 'newer' types of investments such as digital currency are being invested in more and more and subject to the SMSF's investment strategy, obtaining financial advice and complying with the sole purpose test, the trustee should be at liberty to consider these investments if it is appropriate to do so.
- 4.6 Where the terms of trust are drafted too narrowly, it would be easiest to amend the terms of trust by deed of amendment in line with the amendment procedures outlined in the SMSF deed.

5. Is the trust deed ambiguous or poorly drafted?

- 5.1 Unfortunately, I have come across too many poorly and ambiguously drafted trust deeds over the years particularly in the context of family disputes. For instance, the deed may provide multiple inconsistent definitions, directions and procedures to be followed and the trustee is left 'scratching their head' as to what to do next. Other times, there may be contention around the payment of death benefits including:
- (a) the validity of the binding death benefit nomination; or
 - (b) whether the trust deed in question provides the trustee with sufficient flexibility and discretionary power in paying out the death benefits in the absence of a valid binding death benefit nomination.
- 5.2 A trustee may contemplate a particular course of action or exercise of power but it may be unclear whether the terms of trust expressly authorise such power to be exercised. Ambiguities may exist in the trust deed and there may be differing interpretations between multiple beneficiaries.

- 5.3 Obviously, where all relevant parties are in agreement and the issue is caught in the estate planning phase before any problems arise, the cheapest and most efficient means of addressing the defect would be to amend the terms of trust in line with the procedural requirements under the deed.
- 5.4 However, in the context of disputes and where the trustee may be faced with multiple aggrieved beneficiaries' or members' requests and/or interpretation of a provision, the trustee is at liberty to seek directions or judicial advice from the Court on any question in relation to the management or administration of the trust⁵ (including SMSFs).
- 5.5 The power to apply to the Court is available to a trustee or a beneficiary with a substantial interest in the matter. A trustee who acts in accordance with judicial advice or directions where all relevance is placed before the Court on the facts substantially as submitted, is deemed to have discharged their duty in the subject matter of the application. In the context of the trustee's exercise of discretionary power, the Court will not force the trustee to exercise power in a particular way and the Court in providing its advice, is confined to the terms of the trust deed.⁶
- 5.6 An example I have encountered in a dispute setting is that the terms of the trust deed were so ambiguously drafted in relation to the payment of death benefits. There was no binding death benefit nomination on foot, and there was a challenge to the deceased member's Will and distribution of wealth. The trust deed provided the following:
- (a) the member was able to make a binding death benefit nomination (with conflicting procedural requirements to be followed, and definitions used throughout the document);
 - (b) the requirement for a binding nomination to be followed if one was in fact made prior to a member's death; and
 - (c) in the absence of a binding nomination, two conflicting provisions:
 - (i) one which required the death benefits to be paid to the member's dependants (without expressly stating whether all and in what proportion dependants must be paid or only those dependants at the trustee's discretion can be paid); and
 - (ii) another which seemed to allow the trustee to make payment into the deceased's estate.
- 5.7 The domestic partner commenced a family provision application against the estate and also threatened proceedings against the SMSF trustee on the basis that they should be entitled to 100% of the death benefits under the terms of the SMSF deed. Matters eventually settled at mediation but this could have all been avoided if the SMSF member had properly amended the trust deed during their lifetime.

⁵ See for example, section 63 of the *Trustee Act 1925* (ACT), section 63 of the *Trustee Act 1925* (NSW), section 96 of the *Trustee Act 1973* (Qld), section 91 of the *Trustee Act 1936* (SA), section 92 of the *Trustee Act 1962* (WA) and rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic). See also *Re Permanent Trustee Australia Ltd* (1994) 33 NSWLR 547 at 548.

⁶ See *Gonzales v Claridades* (2003) 58 NSWLR 2011 at 218.

- 5.8 Furthermore, if the trust deed does not contain a proper power and there is no other means of amending its terms to provide the trustee with the relevant power, another avenue of relief available in Victoria is to make an application under section 63 of the *Trustee Act 1958* (Vic) to authorise the trustee to deal with trust property in a particular way. The Court can exercise its powers if the relevant transaction is:
- (a) 'in the management or administration' or property vested in the trustees;
 - (b) 'expedient'; and
 - (c) not otherwise able to be effected because of an absence of power, meaning that the trustee must not otherwise already have the power under general law or statute.
- 5.9 As can be seen, trust deed deficiencies or ambiguities can create very costly disputes to resolve and sometimes the trustee will have no choice but to seek directions from a Court to minimise exposure from personal liability. It would obviously be best to avoid these issues from the outset by ensuring the SMSF deed is appropriately constituted with the necessary powers and discretions that one would expect. Prevention is far better and cheaper than a cure.

6. The trust deed and death benefits – general

- 6.1 In the absence of a binding nomination, the payment of a member's superannuation death benefits is a matter for the exercise of trustee discretion subject to the terms of the SMSF deed, and the provisions of the SIS Act and SIS Regs. The form and manner in which the death benefit can be paid is dependent on the terms of the SMSF deed which must be reviewed to ensure that any action taken by the trustee to pay a deceased members' death benefits is in line with those terms.
- 6.2 Unless there is a bespoke set of circumstances, it is desirable to see flexibly drafted death benefit payment clauses, enabling the trustee to make payment to the usual beneficiaries (dependants and/or the member's deceased estate) as permitted under superannuation law.
- 6.3 Under the SIS Regs, a member's superannuation death benefits must be cashed as soon as practicable on the member's death.⁷ The compulsory cashing requirement means that a member's superannuation death benefits must come out in one form or another and can take place as either or a combination of the following forms (subject to the relevant trust deed):
- (a) A lump sum (either a single, or interim lump sum and final lump sum) to one or more lump sum dependants including the member's legal personal representative as trustee for their deceased estate; or
 - (b) One or more pensions/income streams to a member's income stream dependant.
- 6.4 Subject to the terms of the relevant SMSF trust deed:

⁷ See regulation 6.21(1) of the SIS Regs.

- (a) Lump sums⁸ can generally be paid to a member's spouse, children (of any age), step-children (providing the "connecting parent", ie the child's parent is still surviving),⁹ any person financially dependent on the deceased member prior to their death and the legal personal representative as trustee of their deceased estate.
 - (b) Income streams¹⁰ can generally be paid to a member's spouse, children (under the age of 18 years), children (between 18-25 years old and who were financially dependent on the member prior to the member's death) and children who suffer a significant disability.¹¹ Such disability must be:
 - (i) attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments;
 - (ii) is permanent or likely to be permanent; and
 - (iii) results in:
 - (A) A substantially reduced capacity of the person for communication, learning or mobility; and
 - (B) The need for ongoing support services.
- 6.5 Note that where income streams are paid to children under the age of 25 years, they must be commuted to lump sums upon the child attaining the age of 25 years unless that child is suffering a significant disability. Further, a child is generally able to call for their entitlement to the lump sum upon attaining the age of 18 years. This is an important consideration particularly where child pensions are to be paid from the fund.¹²
- 6.6 The trustee should consider whether the SMSF deed allows the trustee to make payment among persons (or estate) that a member intends to benefit on their death. As mentioned above, the trustee's powers (including that to pay a member's death benefits) is governed by the SMSF deed and it is absolutely critical that the terms of trust are carefully and closely reviewed in the estate planning exercise to ensure that a member's death benefits can be paid in line with their estate planning intentions. It is not good enough to simply 'assume' that all trust deeds will allow a trustee to make payment in a particular manner as a member hopes, or worse still, to leave matters 'to chance' in the hope that a member's death benefits will be paid in line with their supposed intentions. 'Near enough' is not good enough.
- 6.7 Notably, the provisions of the SIS Act and SIS Regs are merely permissive and specify which individuals are able to receive death benefit payments; the trust deed could provide more prescriptive provisions about who can receive or cannot receive. Each trust deed is different and in a more complex world we live in, deeds are often bespoke or tailored to address a member's estate planning objectives which may restrict or force the payment of death benefits in a particular set of circumstances.

⁸ See in particular, regulation 6.22 of the SIS Regs.

⁹ See further ATO ID 2011/77.

¹⁰ See in particular, subregulations 6.21(2A) and (2B) of the SIS Regs.

¹¹ As described in subsection 8(1) of the *Disability Services Act 1986* (Cth).

¹² Also see the tax rules in Division 294-E of the *Income Tax Assessment Act 1997* (Cth).

7. The trust deed and death benefits – binding nominations

- 7.1 More modern trust deeds generally expressly allow members to make a binding death benefit nomination to bind the trustee to make payment of their death benefits on death.
- 7.2 Where a nomination is to be made as part of the member's estate planning, specific legal advice should be obtained. A binding nomination is a legal document and should not be regarded as simply a 'form' to 'fill in'. The legal practitioner must review the terms of the SMSF trust deed to determine whether:
- (a) the SMSF trust deed permits members to prepare binding death benefit nominations;
 - (b) what formal/procedural requirements need to be followed to make a binding nomination for it to be valid and enforceable against the trustee, for example:
 - (i) who the benefit can be paid to;
 - (ii) the proportion of the total death benefit payable to each beneficiary (with the total of all proportions adding up to 100% of the death benefit);
 - (iii) signing and execution requirements (for example, signed and dated by the member in the presence of two witnesses);
 - (iv) declarations or express statements by the member to the effect that the nomination is binding on the trustee and complies with the provisions of the SIS Act and the SIS Regs;
 - (v) declarations or express statements by the member to the effect that the nomination is lapsing or non-lapsing;
 - (vi) whether the nomination needs to be executed by the trustee or accepted by the trustee by minute or resolution; and
 - (vii) whether it has to be given or delivered to the trustee.¹³
- 7.3 Lessons learnt from recent disputes I have been involved with are that the terms of the SMSF trust deed should not prescribe overly onerous or complicated procedural and formal requirements that the member and/or trustee must satisfy before the binding nomination can be considered binding upon the trustee.
- 7.4 Another issue that should be verified is whether binding nominations made under the SMSF deed are to automatically lapse after 3 years of their making. This is dependent on the terms of the trust deed – older trust deeds often expressly specify that nominations are to lapse after 3 years. A nomination made under such terms will therefore lapse after such time. Obviously, the way of getting around this is simply updating the deed prior to making the binding nomination, for the avoidance of doubt.

¹³ See *Cantor Management Services Pty Ltd v Booth* [2017] SASCFC 122 which highlighted that procedures requiring nominations to be "given" to trustees may be satisfied where, (in that case) the nomination was held at the corporate trustee's registered office address. It should follow from that case that the "given" requirement would be satisfied if the nominations were in fact held at the individual trustees' residential addresses or otherwise having members serve the nominations on the trustees.

- 7.5 A question I am often asked is whether a non-lapsing binding nomination can be made under an SMSF deed that is silent on the lapsing issue. It is now accepted at common law that the '3 year lapsing rule' (among other prescribed formalities) in regulation 6.17A of the SIS Regs does not automatically apply to SMSFs¹⁴ unless the SMSF deed expressly incorporates the provision or specific formalities that need to be followed.
- 7.6 Going on from the above, it is preferable to see death benefit provisions of trust deeds drafted in the most flexible and least prescriptive manner. In this regard, it is preferable for deeds to be drafted without:
- (a) any lapsing requirement. Modern trust deeds may go further to expressly state that nominations do not lapse notwithstanding the provisions of regulation 6.17A of the SIS Regs; and
 - (b) any ambiguous or onerous procedures to be followed to make a binding nomination. Requiring nominations to be 'given' to or 'accepted' by the trustee may set parties up for disputes where it is not certain whether the nominations have been given or served on the trustee prior to the member's death.
- 7.7 Another interesting question that has been raised in recent times is whether a power of attorney is able to make or revoke a binding death benefit nomination on a member's behalf.
- 7.8 We have been given some judicial guidance on this point in the Queensland decision of *Re Narumon Pty Ltd*.¹⁵ In that case, Mr Giles (the deceased member) prepared a binding death benefit nomination on 5 June 2013 which nominated 47.5% of his death benefits to be paid to his wife Mrs Giles, 47.5% to his son and 5% to his sister Mrs Keenan (notably, Mrs Keenan as Mr Giles' sister was not a SIS dependant). The nomination stated that it would lapse 3 years after the date of signing (ie on 5 June 2016). In March 2016, Mrs Giles and Mrs Keenan signed an "extension of binding death benefit nomination" document to renew the 2013 binding nomination. They also signed a new binding death benefit nomination, nominating Mrs Giles and the son to each receive 50% of the death benefits (after realising that Mrs Keenan was not a SIS dependant and was not eligible to receive superannuation death benefits directly from the fund).
- 7.9 The Court held that the new binding death benefit nomination was void on the basis that the attorneys were in a position of conflict as the recipients of benefits under the binding nomination and further, the power of attorney did not expressly authorise the conflict. However, the Court held that the renewal document was valid, with the remaining 5% (which Mrs Keenan was nominated to receive), to be paid at the trustee's discretion. Specifically in relation to attorneys acting, the Court also noted:
- (a) although the trust deed was silent as to whether an attorney could make a binding nomination on behalf of a member, the preparation of a BDBN is a 'financial matter' that could be exercised by an attorney under the *Powers of Attorney Act 1998* (Qld);

¹⁴ See eg, *Re Narumon Pty Ltd* [2018] QSC 185; *Munro v Munro* [2015] QSC 61. Also see Commissioner's view in SMSFD 2008/3 at paragraph 1.

¹⁵ [2018] QSC 185.

- (b) an attorney making a binding nomination in favour of themselves will be void as the attorney needs to avoid conflicts of interest unless the power of attorney expressly authorises a conflict; and
 - (c) an attorney confirming/extending/renewing/making a binding nomination on the same terms as their last nomination is authorised.
- 7.10 The Queensland Supreme Court's findings in *Re Narumon* were subsequently affirmed in 2020 in *Re SB; Ex Parte AC*¹⁶ where the Court confirmed that the making of a binding nomination is a 'financial matter' (rather than a testamentary act) that was capable of being exercised by an administrator.
- 7.11 Where an enduring power of attorney is proposing to make a binding death benefit nomination on behalf of a member, a review of the trust deed and the enduring power of attorney documentation is crucial. In particular:
- (a) Are there any special conditions or limitations included in the power of attorney?
 - (b) Does the power of attorney authorise a conflict, expressly allowing an attorney to make a binding death benefit nomination in favour of themselves?
 - (c) What does the trust deed say? Does the trust deed preclude attorneys from making binding death benefit nominations or otherwise prescribe particular procedures to enable nominations to be made?

8. Amending the trust deed correctly

- 8.1 As mentioned above, the SMSF trust deed is not a 'set and forget' document. It needs to be periodically reviewed and updated, given the ever-evolving tax and superannuation law.
- 8.2 Where trust deeds need to be amended, the procedures need to be properly followed. Most if not all trust deeds contain an amendment power to enable the trustee to vary the terms of trust. If the trust deed does not contain an amendment power, if appropriate and necessary, an application can be made to the Court to vary the terms.¹⁷
- 8.3 Each trust deed is different and accordingly, each trust deed's amendment procedure is different. In practice, I have come across the following 'common' procedures in relation to amendments:
- (a) the trustee may amend the terms of trust unilaterally;
 - (b) the trustee may amend the terms of trust with the consent of the members, founder or principal employer;
 - (c) the founder or principal employer may require the trustee to amend the terms of trust; and/or
 - (d) all members needing to be provided written notice of the proposed amendments to the trust deed.

¹⁶ [2020] QSC 139.

¹⁷ See eg sections 63 and 63A of the *Trustee Act 1958* (Vic).

- 8.4 Unfortunately, I have also come across many amendment deficiencies that were only discovered on a member's death (often in a dispute setting) and/or when reviewing the SMSF documents as part of the member's estate planning to ensure that binding nominations can be made.
- 8.5 The most common issue I have found is that there may have been a 'break in the chain' of documents prepared over time. For instance, take the following scenario:
- (a) an SMSF was established by deed made in 2000;
 - (b) an amendment was done in 2007 under the 2000 deed. The 2000 deed allowed the trustees to amend the trust deed with the consent of the founder, but the 2007 deed of amendment was only signed by the trustee;
 - (c) the trustees of the SMSF were then changed in 2009 from individual trustees to a corporate trustee and a change of trustee deed was prepared that referred to the change of trustee procedures in the 2007 deed;
 - (d) in 2015, account-based pensions were commenced within the fund and the procedures under the 2007 deed were followed and signed off by the corporate trustee purportedly appointed in 2009; and
 - (e) in 2020, the members addressed their estate planning and make binding nominations. To enable non-lapsing binding nominations to be made, the 2007 terms are updated.
- 8.6 Where the procedural requirements have not been followed to amend trust deeds or change trustees,¹⁸ there is a significant risk that:
- (a) any binding death benefit nomination made under a later governing deed may be challenged on the basis that the later deed has not been properly adopted under a prior deed;
 - (b) any reversionary pension is invalid under a later deed for similar reasons; and/or
 - (c) any trustee decision made has not been valid in circumstances where change of trustee documentation has fallen short of the procedural requirements under the relevant governing rules in place at the time of the purported change.
- 8.7 Where a discrepancy is identified in the review process, practitioners should consider rectifying the matter by either:
- (a) the preparation and execution of confirmatory deeds to rectify the defect and ratify the adoption/change, as far as possible; and/or
 - (b) having amendment documentation drafted in such a way to comply with all historical deeds (and in particular, the last validly made deed).
- 8.8 Often clients provide us a copy of the latest SMSF deed and we make the assumption that such deed has been validly adopted. Whilst we can make this assumption, such assumptions are not always correct and this may not be

¹⁸ See also other examples, *Perry v Nicholson* [2017] QSC 163; *Re Narumon Pty Ltd* [2018] QSC 185.

known until disputes arise after death. Ideally, it would be prudent to review the chain of documents and address any issues prior to implementation of the estate plan. However, not all clients wish to incur such costs, in which case the legal practitioner ought to expressly confirm the clients' instructions in writing.

9. Conclusion

- 9.1 As noted above, a trustee's paramount fiduciary duty is to follow the terms of the trust deed. Given that superannuation and tax laws are constantly evolving, it is important to ensure that the terms of the SMSF deed are periodically reviewed every few years or when there are significant changes to the law.
- 9.2 It is not enough for the trustee (or any advisor) to simply 'assume' that the trust deed contains all the necessary powers to enable a trustee to invest in a particular manner or to enable a member to make a binding death benefit nomination. Its terms ought to be reviewed and if necessary, amended.
- 9.3 Unless a bespoke or tailored SMSF deed is warranted by the member's circumstances or objectives, it is preferable for SMSF deeds to be drafted broadly and flexibly to provide the trustee with discretion to exercise powers within the boundaries permitted under superannuation law. Modern drafting should also ensure that SMSF deeds can 'weather' changes to law, particularly where discrete changes are made such as changes to the maximum number of members in an SMSF.
- 9.4 Where the terms of the SMSF trust deed are unduly restrictive, terms should be amended to provide the trustee with a greater degree of flexibility, particularly the case for old pre-2007 SMSF deeds which may not properly reflect extensive changes to superannuation law since then.
- 9.5 Where deficiencies are picked up in the estate planning a review exercise, prevention is far better than a cure. Do not leave things to chance in the hope that disputes will not arise. Often disputes arise over the smallest of things and it is only the family and relationships that will suffer in the end.

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