



# Updating Legislative Changes to Self Managed Superannuation Funds (SMSFs) in 2009

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## Overview

Major legislative and regulatory changes in respect to complying loans to self managed superannuation funds (SMSFs), Conditions of Release re Terminal illness Benefits, Interdependency of Dependants and related Dependant protection warrant a review of any current SMSF Deed.

Trustees of SMSFs which utilise the ili SMSF Trust Deed can make changes to the Operating Rules of their SMSF without a Deed Amendment. Other SMSF Trust Deeds may require costly and an administratively cumbersome Deed Amendments.

What follows is a short overview of the implications and actions that should be considered in respect to updating the operating rules of a Self Managed Superannuation Fund, based on the updated 2009 ili Operating Rules of an SMSF and some suggested actions to mitigate risk.

## 1 Advising Clients of Legislative and Regulatory Changes of SMSFs

**Implication:** In many instances in any engagement to provide services, especially financial services in today's turbulent times a failure to follow-up a client may lead to a complaint which if not correctly handled may result in a dispute ending up in a successful claim for damages.

**Action Required:** To minimise the potential for complaints, disputes or claims ensure that you advise clients about legislative changes and the impact if any on their particular circumstances.

## 2 Changing Global Circumstances

**Implication:** Changing commercial circumstances may necessitate the need for a review.

**Action Required:** In any review consider changes emanating from a decrease in asset values, increase in debts, need for creditor protection, changes to personal circumstances - (e.g. divorce, blended family, new spouse, new children or other circumstances). Furthermore



**consider the Superannuation Fund or the SMSF Trust Deed in respect to changes emanating from legislative or regulatory change and in particular whether the SMSF Trust Deed including Operating Rules can incorporate such changes.**

### **3 Changes Effecting the Operating Rules of an SMSF**

**Implication:** Many SMSF Product Disclosure Statement (PDS) Documents do not meet initial, let alone ongoing PDS Disclosure requirements if there are changes that are made to the Deed or Operating Rules.

**Action Required:** Review the PDS and Trust Deed and change Superannuation Funds or amend the SMSF Trust Deed if such a Fund is inappropriate to today's times.

### **4 Changes to Legislation and Simplification of Operating Rules of an SMSF**

**Implication:** In many instances updating and changing the Operating Rules of an SMSF have been considered too costly or administratively cumbersome to implement. Hence reliance on "catch all provisions" within a Trust Deed to infer that the SMSF is subject to relevant legislation. This could be a misuse of the "catch all provisions". Failure to act or advise the Trustee of an SMSF of changes may lead to an unnecessary dispute resulting in a claim. All Trustees of their respect SMSFs need to be informed

about respective changes concerning their Fund. As an SMSF is considered to be a Retail Fund (regardless if the underlying asset invested by the Trustee) the responsibility for such advice rests with the advisor who holds the relevant authorisations under the Corporations Act.

**Action Required:** If you are the appointed Adviser as noted in the Corporations Act you need to update the Trustee of the SMSF as to changes or run the risk of failing to disclose. The alternative is to rely on the continuous disclosure requirements of the Corporations Act. As an SMSF is a Retail Fund under the Corporations Act notification and changes to the Operating Rules need to occur.

### **5 Payment - Lump Sum, Pension or both and changes to the Definition of Interdependent Beneficiary**

**Implication:** Maximum flexibility is obtained when the trustees of a Superannuation Fund have the power and discretion to pay lump sums, pensions or a combination of both to Dependents.

**Action Required:** With the changes to the definition of an Interdependent Beneficiary, ensure the Trust Deed gives the trustee the power and discretion to payout a lump sum, pension or both in such situations.



## 6 Conditions of Release

**Implication:** In light of changes to Conditions of Release requirements in respect to Terminal Illness payments the Operating rules of the Trust need to be reviewed. Otherwise a Member or their representative may not be able to access funds if a Terminal Condition of Release is satisfied.

**Action Required: Change funds, or update the Operating Rules of the SMSF Fund to ensure that in the event of Terminal Illness, Benefits will be available for the Terminally ill Member and their Dependants. Furthermore where applicable ensure the correct Life Insurance product will enable release of policy proceeds in the event of Terminal Illness.**

## 7 Debts within an SMSF and Life Insurance

**Implication:** Recent amendments to Section 67(4) of the Superannuation Industry (Supervision) Act (1993) have enabled SMSFs to borrow. In the event of death of the Member paying the contributions in respect of the asset subject to the borrowing, the loan may need to be recalled.

**Action Required: Consider Life Insurance correctly structured to repay the loan against the Asset held in the Security Trust and prevent unnecessary Capital Gains Tax on realisation or premature sale and possible Lost Values.**

## 8 Protection of Beneficiaries and Creditor Protection

**Implication:** The Bankruptcy Act 1966 (Cth) protects contribution payments to superannuation funds but not Death Benefits. If the Dependant Beneficiary in the event of death is at risk from commercial creditors or in a risk occupation, the clawback provisions of the Bankruptcy Act may apply.

**Action Required: Ensure all contribution strategies to superannuation are within the Bankruptcy Act provisions. As well ensure all Death Benefit recipients are not at risk of the clawback provisions applying to the receipt of Death Benefits.**

## 9 Payment to a Superannuation Death Benefits Trust

**Implication:** Unless a Superannuation Fund or an SMSF Trust Deed enables lump payments to be made to a Superannuation Death Benefits Trust maximum flexibility in respect to Lump Sum Death Benefits and income to minor Dependants may not be achieved especially in respect to Dependants nominated by a deceased member who may be at risk.

**Action Required: Review and change the Superannuation Funds or amend the SMSF Trust Deed if such changes are important for your client's particular needs and circumstances.**



## **10 Binding Nominations (BNs)**

**Implication:** BNs have the potential to ensure benefits flow to the intended beneficiary in certain circumstances that are not at risk from Creditors.

**Action Required: Given the changes to the definition of an interdependent, and problems that could occur if Dependants who are Creditors receive payments check and change to a Superannuation Fund or SMSF Trust to incorporate BNs where appropriate.**

## **Conclusion**

To order the 2009 updated ili SMSF Trust Deed Operating Rules please visit <http://www.ili.com.au/updateoperatingrules.html> to order online or to download instruction sheet please visit [http://www.ili.com.au/pdf/update\\_operating\\_rules.pdf](http://www.ili.com.au/pdf/update_operating_rules.pdf). For any further information on ili please visit [www.ili.com.au](http://www.ili.com.au).

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