

The Super Concepts Trust Deed – Does it measure up?

From time to time you may read articles in the media or receive information about changes to the superannuation rules. Invariably the question arises as to whether the trust deed of your self managed superannuation fund (SMSF) is flexible enough to cope with some or all of these changes. At Super Concepts we make every effort to ensure that any deed we provide is flexible enough to cope with the myriad of changes to the superannuation law. However, there are often times when the trust deed requires amendment to meet new rules, such as the introduction of new types of pensions which may not have existed the last time the fund's trust deed was reviewed.

Here are some of the questions we are asked at Super Concepts to give you an idea of the flexibility of the current trust deed (SC0809). Previous Super Concepts trust deeds provide a similar level of flexibility to enable you to run your fund successfully. However, if you wish to ensure your deed is absolutely up to date then updating to the current Super Concepts deed may prove worthwhile.

Will the Super Concepts trust deed permit individuals or a company to be a trustee of the fund?

Yes, the Super Concepts trust deed permits the trustee to be either individuals or a company to be a fund trustee (clause 7). Actually, about one third of our clients have a company act as trustee while the remainder are individuals of their SMSF.

What happens if there is a conflict between the Super Concepts trust deed and the superannuation legislation?

If there is a conflict between the trust deed and the superannuation law then the law prevails (clause 3.3). This occurrence should be rare as the provisions of the deed provide enough flexibility to ensure the requirements of the legislation are met at all times.

Is it possible to appoint and remove trustees of the fund?

Yes, the Super Concepts trust deed allows the appointment and removal of the trustee or founder of the fund (clause 8). The appointment of a trustee, as a legal personal representative of a member, may be necessary should a member die or if a child under 18 wishes to become a member. The removal of a trustee may be necessary where they no longer qualify, as in the case of bankruptcy, or in the case of divorce of a fund member or members.

Does the Super Concepts trust deed provide procedures for the holding of trustee meetings?

Yes, the deed provides procedures for trustees to follow for the holding of meetings (clauses 9 and 16). This includes the form of notice of meeting to be provided to the trustees, quorum and how meetings are to be conducted, including voting entitlements.

Do the provisions of the trust deed provide the trustee with indemnity in certain circumstances?

Yes, the trustee is indemnified against any claim arising out of any act or omission in connection with the deed of the exercise or performance of the trustee's powers, discretions and duties (clause 11).

How are members admitted to the fund under the deed?

There are two ways in which a person can be admitted as a member of the fund. The first is when the person completes an application form which is accepted by the trustee. The second is by a contribution is accepted by the trustee in respect of a member (clause 15).

Is it possible to have different classes of members of the fund?

Yes, it is permissible for different classes of members (clause 15.8). For example, there may be pension members and lump sum members in the fund.

Does the deed provide for disclosure and reporting to members?

Yes, the deed requires the trustee to provide certain information to members when they join the fund, each financial year and on the occurrence of significant events which may affect the operation of the fund. (clause 19)

Are the general powers of the trustee set out in the deed?

Yes, the general powers of the trustee are provided for at clause 20 of the deed. These include the management and control of the fund, keeping of accounts, dispute resolution and powers of investment.

What does the trust deed permit the trustee to invest in?

The Super Concepts trust deed permits the trustees of the fund to invest in a wide range of investments including shares, bonds, property, insurance policies and authorised trustee investments (clauses 22 and 23).

Am I able to have specific investments recorded in my name in the fund?

Yes, the Super Concepts trust deed allows you to have particular investments held in your name. This may be worthwhile if you are in pension phase or have a different investment strategy to other members of the fund (clause 24).

Does the trustee of the fund allow the appointment of qualified professionals if they are required under the superannuation rules?

Clause 27 of the Super Concepts trust deed permits the appointment of actuaries, auditors, custodians, investment managers and other qualified advisers if necessary.

Is it possible for the trustees to receive remuneration for services they provide?

No, as long as the fund is a self-managed superannuation fund it is not possible for the trustees to receive payment for the services they provide as trustee (clause 28).

Is it possible for the trustee to be reimbursed for expenses they incur on behalf of the superannuation fund?

Yes, it is possible for the trustees to be reimbursed for expenses they incur on behalf of the fund (clause 28).

What accounting records are the trustees of the fund required to keep for purposes of the trust deed?

The trustees are required to maintain accounting records that correctly record and explain the transactions and financial position of the fund for the financial year (clause 30). The fund is required to be audited each financial year (clause 31) and returns are required to be prepared and provided to the Regulators (clause 32).

If I am in dispute with another trustee, how can the dispute be resolved?

The trustee must establish a complaints procedure if required by the Act. In any case an enquiry or complaint must be handled by the trustee within 90 days of receipt (clause 33).

Does the Super Concepts trust deed permit the establishment of separate accounts when a member is in pension phase and also contributing to the fund in accumulation phase?

Yes, it is possible for the trustee to maintain an accumulation and pension account for a member at the same time (clauses 35 and 36). There is no restriction on the number of accounts that can be maintained for a member. However, it is usual for a member to have one accumulation account and a pension account for each pension that is being paid to them.

Is it possible to split contributions under the Super Concepts trust deed?

Yes, there is a special provision in the deed which permits a member to split contributions to a spouse's account subject to the provisions of the legislation (clauses 35, 36 and 46).

Can I create reserves under the terms of the Super Concepts trust deed?

Yes, it is possible to create reserves under the terms of the Super Concepts trust deed. These are referred to as equalisation accounts under the deed and can be used to deal with investments, contributions, pensions or any other reserves as permitted by the superannuation legislation (clause 37).

How are the investment returns and earnings calculated under the terms of the deed?

Clause 38 of the Super Concepts trust deed requires the trustees to determine the investment return of the fund to be determined on a fair and reasonable basis between the members and depending on the various kinds of benefits to which they are entitled.

Is it possible for an employer-sponsor to be admitted as an Employer for purposes of the trust deed?

Yes, clause 39 of the trust deed permits an employer-sponsor to be permitted as a participating employer of the fund after completing a Participating Employer Admission Form or making a contribution to the fund.

What provisions in the trust deed govern member and employer contributions?

Member and employer contributions are governed by clauses 42 and 43 of the trust deed. The trust deed also permits the acceptance of other contributions such as child contributions, the co-contribution and spouse contributions provided they are permitted by the superannuation legislation.

How can a contribution be made to the fund under the terms of the trust deed?

Contributions can be made in cash or as an *in specie* transfer of investments (clause 45). The clause ensures that only investments which are permitted by the superannuation legislation can be transferred *in specie*.

Have the new rules relating to the provision of Tax File Numbers been incorporated into the Super Concepts trust deed?

Yes, the new TFN provisions have been incorporated into the trust deed to ensure the member quotes his or her TFN and that only ineligible contributions are required to be refunded. Where a TFN is not quoted tax may be deducted from the contribution at the maximum rate (clause 45).

Does the trust deed require after tax contributions to be allocated to a member's account within a certain time?

Clause 45 of the Super Concepts trust deed requires the trustee to allocate after tax contributions made by a member within 28 days after the end of the month in which they were made.

What types of benefits are provided by the deed?

The Super Concepts trust deed is able to provide a wide range of benefits to members and their beneficiaries either directly or indirectly. These benefits can be paid as lump sums or pensions.

Benefits can be paid in the following circumstances (clauses 48 to 54):

- Retirement;
- On reaching preservation age (currently age 55);
- Death of the member;
- Permanent Incapacity;
- Temporary incapacity; and
- Other circumstances as prescribed by the superannuation legislation.

If I am suffering a terminal illness is it possible for me to receive a payment under the new rules?

Yes, it is possible to be paid a terminal illness benefit under the terms of the trust deed (clause 54).

Is it possible to commence a Transition to Retirement pension if I use the Super Concepts trust deed?

Yes, clause 49 permits the payment of Preservation Age Benefits to cover all types of pensions once a member reaches their preservation age. These pensions include Transition to Retirement account based pensions and market linked income streams.

Does the Super Concepts trust deed provide for various types of death benefit nominations?

The Super Concepts trust deed provides for four types of death benefit nominations in clause 51. The nominations are:

- Binding death benefit nomination which lapses each three years;
- Non-lapsing binding death benefit nomination;
- Non-binding death benefit nominations; and
- A statement of wishes.

Each of these nominations serves a useful purpose depending on the member's circumstances. It is worthwhile to seek professional advice on which type of nomination is appropriate.

Does the Super Concepts trust deed meet the new requirements that require the payment of lump sums to non-dependant children?

Yes, the changes to the superannuation legislation which restrict the type of benefit payable to a non-dependant child on the death of a member are included at clause 50.3 of the Super Concepts trust deed.

Are same sex and de facto relationships recognised by the Super Concepts trust deed?

Yes, the Super Concepts trust deed permits the payment of a member's death benefit to partners of same sex and de facto relationships including their children (clause 1 definition of 'spouse' and 'dependant').

Is it possible for the fund to borrow for purposes of instalment warrants under the Super Concepts trust deed?

The Super Concepts trust deed has provisions which permit the fund to invest in an instalment. The relevant clause depends on the type of instalment warrant used for purposes of the borrowing. Where the instalment warrant involves a loan which is used to acquire the investment then clause 23.2 permits the trustee to borrow as permitted by the superannuation legislation. If the instalment warrant also includes a derivative such as a call option then clause 23.8 relating to the use of derivatives is also relevant.

I wish to have a pension which provides a reversion to my surviving spouse. Is that possible under the provisions of the Super Concepts trust deed.

Clauses 50, 51 and 55 permit a pension to be paid to a member which takes into account their wishes at the commencement of the pension. In addition, on a member's death an option is available which permits a beneficiary to be paid a pension or lump sum if permitted by the superannuation legislation.

Can I postpone the receipt of the pension?

Yes, it is possible to postpone the commencement of a pension, subject to the superannuation legislation, as agreed between the member and trustee.

Am I permitted to commence more than one pension under the Super Concepts trust deed?

Yes, it is possible to commence more than one pension. In fact, you may have as many pensions as you wish and at the same time have an accumulation account in the fund (clauses 35 and 36).

Is it possible for me to commence a pension from the fund and at the same time contribute to the fund?

Yes, it is possible for you to draw down a pension from the fund and contribute to the fund at the same time. However, under the superannuation law you are unable to add contributions to your pension at any time. Before you add the contributions or other amounts your pension is required to be converted to accumulation phase and then a new pension commenced with any additional contributions or rollovers.

Can I have my legal personal representative acting under a Power of Attorney act on my behalf as trustee of the fund?

Yes, clause 8 of the trust deed permits a legal personal representative of a member to act on the member's behalf as a trustee.

I commenced an allocated pension prior to 1 July 2007. Will the Super Concepts trust deed permit future calculations of the pension to be made as an account based pension?

Clause 55 of the trust deed provides that the Pension Agreement relating to an allocated pension must specify all of the requirements of the "minimum standards" specified in the Act. As part of the requirements of the superannuation legislation it is possible to have the allocated pension convert to an account based pension without the need to commute the pension. As an alternative a member may wish to commute the pension and include additional amounts which are used to commence a new account based pension.

Will the Super Concepts trust deed allow benefits to be paid other than in cash?

The trust deed permits a lump sum to be paid *in specie* (by the transfer of fund investments) (clause 56). However, under the superannuation legislation pensions must be paid in cash. Therefore to be consistent with the superannuation law it is not possible to pay a pension by the transfer of fund investments.

Wanting to update your Super Concepts Trust Deed?

If you wish to update your trust deed, contact us on 1800 625 644 or complete our application form located on our website www.superconcepts.com.au