

An update on SMSFs and granny-flats

Legislation was enacted just before the end of the financial year that means from 1 July 2021, it is now possible to have up to 6 members in a SMSF. In this podcast, we look to the benefits and risks of raising fund membership. We also explore changes made to the capital gains tax treatment of granny flat arrangements that also took effect from that date.

Matt: - Today I would like to summarise the changes to granny flat arrangements from 1 July 2021. This change received Royal Assent on 30 June 2021 and is now law.

In a nutshell, this change provides a targeted capital gains tax exemption for certain formalised non-commercial granny flat arrangements.

As a bit of background, while the term ‘granny flat’ generally refers to separate dwelling in the backyard of a family home, a granny flat arrangement refers to the payment of money or assets for the right to live for life in a property owned by another party – generally an adult child.

The specifics of granny flat arrangements varies. In exchange for a life interest, a granny flat arrangement could involve transferring the title of a home, or paying for the construction and fit out of premises in someone else’s home or a separate structure on the same title, or purchasing a property in another person’s name. Also in some scenarios additional funds are paid to the other party in exchange for the life interest which from a Social Security perspective are subject to a reasonableness test.

Up until recently, many have side stepped the CGT consequences by not formalising a granny flat arrangement. However as was identified in a 2017 Australia Law Reform Commission report into elder abuse, informal granny flat arrangement can result in financial abuse as the life interest is difficult to prove. So the aim of removing the CGT consequences is to encourage future granny flat arrangements to be formalised, as this provide certainty and security for the long-term housing arrangements of older and disabled Australians.

To eligible for the CGT exemption, the individual conferred with the right to occupy a dwelling for life must either have attained their age pension age, or they require assistance with carrying out most day-to-day activities due to a disability and this assistance is likely to continue for at least 12 months.

For exemption to apply, the formal granny arrangement must also be of a non-commercial nature, such as when the individual conferred with the granny flat right is not paying rent or any funds to the property owner or is only paying for their share of household running costs.

To be formal, the arrangement must be in writing and whilst there is no requirement to be in a particular for to include specific terms, the arrangement should at minimum deal with basic matters such as who are the parties, the circumstances where the arrangement could be varied or terminated and what happens upon variation or termination. Again whilst not a specific requirement, most would consider it prudent for a solicitor to create the granny flat agreement.

Where eligible, the exemption from CGT will apply to CGT events which occur on or after 1 July 2021, even if the arrangement was entered into before this date. However there is no relief for previous CGT events which have occurred prior to 1 July 2021.

6 Member SMSF

Hello and welcome to today's BT TechKnow podcast.

My name is Neil Sparks, and I am the National Manager SMSF strategy at BT,

On June 17th the Treasury Laws Amendment (Self-Managed Superannuation Funds) Bill 2020 passed through the House of Representatives and the Senate. The six-member bill amends the *SIS Act, Corporations Act, ITAA 1997* to increase the maximum number of allowable members in SMSFs from four to six. and will take effect from 1st July 2021

Today I will take a look at some of the most important issues to consider when either setting up a new SMSF or adding more members to an SMSF

Start with the first consideration

Should you?

Is it a good idea to add your children (Adult or not) into your SMSF?

Why

1. One family super fund,
2. Investment choice & control
3. Family wealth & intergenerational transfer
4. Fixed costs

Why Not

1. Compliance
 - Admin complexity
 - Voting,
 - Dispute resolution,
2. Culpability - Fines & Penalties
3. Control
 - who & how
 - Elder abuse
 - Removing a member/s
4. Investments
 - Horizon
 - Strategy
 - Liquidity
 - Attitudes, crypto etc

Maybe start the adult children in their own SMSF (Accumulators fund) and keep your Pension fund separate.

Next, Can the person be added as Trustee (member) ? – **Disqualified person** – Undischarged bankrupt, or Conviction for fraud/dishonesty

AML/CTF – identify the new members –

Complications when adding members 5 & 6 to SMSF as it dilutes the ownership and control percentage below 25% , you will need to consider the alternative individual test (membership balance)

Trustee Structure

Really only 1 choice- Corporate Trustee – explain

Advantages

- Single member fund

- Asset protection, limited liability
- Administrative Fines & penalties lower
- LRBA bank requirement
- Ability to pay lump sum S19(3)
- Estate & succession control
- Administrative efficiency
 - Assets registered in company name (S52)
 - Number of directors required to sign documents
 - State based Trustee act places limits on Trustee numbers

Disadvantages

- Increased cost at establishment
- ASIC annual fee \$56*
- Compliance costs

Trust Deeds & Constitutions

Regular review of the funds Trust Deed is important and any/all Trust deed amendments must be retained.

- **Powers of Appointment and/or Removal**
 - How to remove a Trustee/Member willingly or unwillingly?
- **Voting Powers**, general law rule that where there is more than one trustee, decisions must be unanimous unless the trust deed provides otherwise;
 - individual trustees decisions will be determined by majority resolution by each trustee being entitled to cast one vote. If this results in equal votes, each trustee will be entitled to one vote for each whole dollar in the account of the member that the trustee represents.
 - If a determination still results in equal votes, the person elected as chair of the meeting will have the casting vote.
- **Moving benefits**
 - Decisions about the change in trustee or directors of the fund, reviewing investments and investment strategies as well as transferring benefits to the new fund.
- **Death Benefits**
 - Trust Deeds that follow section 17A(3)(a) can risk giving control over death benefit payment decisions to the surviving trustee, especially where there is no valid binding death benefit nomination (BDBN) in place.

Company Constitution

- Appointment and removal of a director is critical to the decision making powers of a corporate trustee and therefore control of the SMSF.
- To appoint or remove a director requires a majority of voting shares, the constitution should allow different share classes to plan for differentiated voting, dividend and capital rights.
- the SIS Act does not prescribe who must own the shares in a corporate trustee.
- The distribution of voting rights amongst the shareholders needs to be carefully considered as part of a member's overall estate plans where there is a corporate trustee.
- Consider how the Trust Deed and Constitution work in conference if you want to remove a member

Investment Strategy

is an important compliance document for an SMSF. The expectation is that the Investment strategy is formulated, implemented and reviewed regularly.

A good investment strategy will focus on the risk & return, diversification, liquidity and cash flow and the insurance needs of **ALL** members

When considering adding more members to an SMSF remember to draft a NEW investment strategy.

Issue to consider when adding new (younger) members

- Risk appetite
- Investment horizon
- Investment attitude, think non traditional assets (CRYPTO etc)

- Insurance needs

The ATO has a focus on Investment strategies and compliance

Advisers can access the BT SMSF Investment strategy template if they need help (talk to your BDM)

Strategies

1. SMSF Liquidity - Adding more Contributing members
 - Loan repayments direct property LRBA
 - LRBA - property improvements
 - Pension payment liquidity
 - Death Benefit asset retention strategy (Contribution & rollover)
 - Allocation from reserve accounts
2. Multiple LRBA's

Admin

Make all changes in accordance with the Trust Deed and Constitution

ALL TRUSTEES AND DIRECTORS MUST:

Give written consent

SISA S118, an individual is ineligible for appointment as a trustee or director of a corporate trustee of an SMSF unless they have consented to the appointment in writing, and Sign a Trustee declaration

SISA S104A , Since 2007, anyone becoming a trustee or director of corporate trustee company of SMSFs must sign a trustee declaration confirming that they understand their duties.

- The ATO 'Trustee Declaration' must be signed within 21 days of the appointment
- Trustees are required to retain the declaration for at least 10 years and be able to provide the declaration for inspection by the ATO.

Admin penalties will be applied for both not signing and not retaining the declaration

SIS Reg 11.07AA

Trustees must notify the ATO within 28 days if there is a change in:

- Trustees, or Directors of the corporate trustee
- Members
- Contact details (contact person, phone, email address and fax numbers)
- Address (postal, registered or address for service of fund notices)
- Fund status

ATO Change of Details for Superannuation Entities (NAT 3036).

Inform ASIC where a change is made to a corporate trustee

- Company detail changes must be made online.
- Notify ASIC within 28 days of the change
- Notify ASIC of changes to shareholding in corporate trustee

SMSF investments need to be in the name of the trustee(s) of the fund. When the trustee changes, the name recorded on the investment accounts also needs to be changed.

Changing directors of a corporate trustee company will not require any change to the investments

If the decision is to wind up the SMSF and rollover to an APRA fund instead of making changes to meet the definition of an SMSF (S17A) there is no need to change the name on the assets.

Review the funds investments before making changes you may decide to dispose of certain assets that no longer meet the funds investment objective than change details.

ATO new fund establishment interim procedure

The ATO has not yet finalised the necessary changes to the Australian Business Register (ABR) to allow SMSFs to register more than four members or to add a fifth or sixth member.

interim solution, to allow additional members to be registered.

- From July 1, SMSFs will need to follow existing processes to register a new SMSF through the ABR, to include members one to four.
- Trustees will then be required to lodge with the ATO, a paper “Change of Details for superannuation entities form” (NAT3036) to provide the details of member(s) five and/or six.
- Once processed, the ATO will update their systems to allow members to request rollovers into their SMSF.
- Once the ABR functionality caters for the law change, the ATO will proceed to update an SMSFs details, with no further action required from the trustee(s).
- the need for manual intervention by the ATO does raise the risk that impacted SMSFs may face delays in registering their fund or additional members. For this reason, the ATO is encouraging SMSFs to wait till the ABR is updated.

Conclusion

- More members - Is it bigger and better or just more complicated?
- Read (& understand) the Trust Deed, update if necessary & retain all versions
- Nail the administrative parts

Call to Action

If you want to learn more I have just completed a Webinar on this topic it is available on the BT Academy, go to BT.com.au/professional and follow the links to the BT Academy webinar series. Search for Episode 30 - Does Kevin Bacon need an SMSF?

Remember if you have any technical advice strategy questions, you can call our BT Technical Services team on 1800 655 901 or send the team an email at technical@btfinancialgroup.com.

You can also join us for our fortnightly BT Academy technical webinars where we dive in more depth into various technical and regulatory matters.

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