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Your Money

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Failure to keep your SMSF trust document abreast of super rule changes could lead to financial penalties

Update that old DIY deed



NICK BRUINING

Self-managed superannuation funds have been warned to get their houses in order as a raft of changes come into force on January 1.

With up to 80 per cent of funds possibly holding out-of-date documentation, failure to keep trust deeds up-to-date could involve the fund facing penalties including the disallowance of valuable tax concessions.

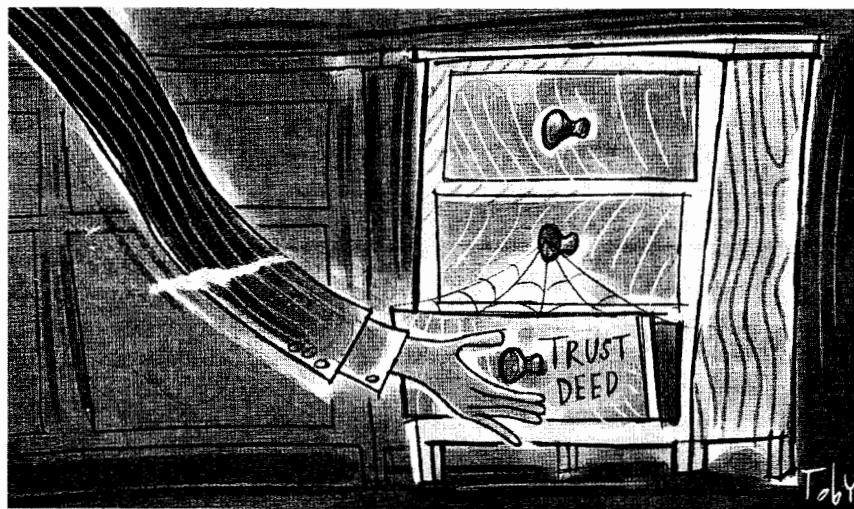
In some cases, trust deeds have not been looked at since the funds were first established, with many based on the rules as they existed five and, in some cases, 10 years ago.

Brett Davies, a Perth-based specialist superannuation lawyer, says that trustees of a superannuation fund have an obligation to ensure that they are operating within the rules.

"At the first level, we have various Acts of Parliament including the Superannuation Industry (Supervision) Act (SIS) and the Income Tax Act," Mr Davies said.

"These Acts require the superannuation fund to have a trust deed which sets out the rules of the specific fund concerned. What's not often understood is that whilst the Act may permit something, unless your trust deed also permits the same thing, you are breaking the law with potentially dire consequences."

Trust deeds are often bought "off



the shelf" from solicitors and firms specialising in documentation and reflect the rules as they stand at that time. Unless they are updated regularly, they can soon become out of date.

Gary Ogden, a City Beach-based chartered accountant who audits a big number of SMSF funds, says trust deeds are a constant problem.

"Auditors are required to check that the fund is operating within the rules and in most cases they are," Mr Ogden said.

"Nonetheless, up to 80 per cent of the trust deeds we see don't reflect all the rules as they stand. This could become a problem if your circum-

stances change such as you become divorced or you intend starting a new term allocated pension in the new year."

While the rules are constantly changing, Mr Davies says that significant changes over the past few years include:

- New market-linked or term allocated pensions (TAP) (2004).
- Acceptance of government co-contributions (2003).
- Changes to contribution acceptance rules, for example, members aged over 65 (2004).
- Divorce and super splitting (2003).
- All members must be trustees (1999).

- Permitting spouse memberships (1997).
- Expanding the in-house asset rules to related parties (1999).
- Providing for complying lifetime and term pensions (1998).
- Binding nominations for death benefits (1999).
- Full preservation of superannuation (1999).
- Permitting the acceptance of the \$500,000 capital gains tax retirement component (1997).

Upcoming rules changes include the provision of splitting tax deductible contributions with your spouse and changes to the way a TAP can vary payments from year to year.

"While some more recent deeds may have an effective catch-all clause to reflect changes to the SIS Act and the regulations, these only reflect the mandatory changes," Mr Davies said.

"Changes such as binding death nominations or splitting spouse contributions are optional extras and are unlikely to be captured by these clauses."

Superannuation trust deeds can be altered by a resolution of the trustees of the fund. This can be done on an ongoing basis or by adopting a new deed to replace an old one.

"Depending on the changes and how long ago the deed was last updated, the simplest solution may be to simply replace the deed with a new up-to-date version," Mr Ogden said.

"Alternatively, you could check what specific areas that are relevant to you need updating and then make those changes."

"You need to be careful that you're not paying for things that you'll never use. For example, binding death nominations may be a good thing, but if you have no dependents then they become irrelevant."

Mr Davies says the costs will vary and in most cases stamp duty will have to be paid in addition to the legal costs.

"The process involves reviewing the original deed, variations of the deed and the last financials. The lawyer needs to be careful that in the process, they are not creating a new SMSF otherwise there may be stamp duty and capital gains tax liabilities," Mr Davies said.

Costs to update a deed will range from around \$550 to \$1100.