



# **The *Strategist* SMSF**

**A Living Super deed**

## **Abercrombie Super Fund**

**Commencement Date:**

- **Product Disclosure Statement**
- **Deed of Establishment**
- **Rules of the Fund**

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## Introduction

Thank you for choosing the *Strategist Deed* to operate your self managed superannuation fund ('SMSF'). We know you have made the right choice as the *Strategist Deed* has been developed by key industry experts that cover all aspects of SMSFs.

Legal structuring, asset protection, investment options and administrative management have all been keenly debated in order to bring you this document from a wide breadth of experience in the SMSF arena. The people who have been involved in this process are proud of their work and as such we would like to take the opportunity to introduce them to you. Please see below.

Most SMSF deeds are created by an individual who may have a very narrow and singular focus regarding this important area. We believe that although this is an easier way to deliver a product it lacks credibility and robustness. Our aim in delivering the *Strategist Deed* is to provide a document that has been debated and tested by the best in the industry.

Most importantly, with the introduction of "Living Super" we are also committed to keeping this important document up to date at all times, thus protecting you as a trustee from having a non-compliant trust deed.

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# Abercrombie Super Fund

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# PRODUCT DISCLOSURE STATEMENT

## 1. Introduction

Self Managed Superannuation Funds ("SMSFs") are very popular with Australians wanting to take control and manage their own superannuation assets. There is a considerable amount of legislation that governs SMSFs. So too are there various regulators such as the Australian Taxation Office ("ATO") and the Australian Securities and Investment Commission ("ASIC"). To commence or be a part of a SMSF is a big responsibility and one not to be taken lightly. The responsibility extends to each member of a SMSF having to become a trustee of the fund or if the fund has a corporate trustee – a director of the trustee company under the *Superannuation Industry (Supervision) Act 1993* ("SIS Act").

## 2. The *Strategist* SMSF

This *Strategist* SMSF trust deed package contains information and the governing rules to operate your own self managed superannuation fund. It has been designed to enhance your understanding, as a member and a trustee, of the benefits and strategies available within a self managed superannuation fund, or SMSFs as they are commonly known. As well, it highlights the important obligations for the trustee that go hand in hand with these benefits.

In May 2006 the government announced sweeping changes to superannuation known as the *Simpler Super* reforms. These reforms have introduced new benefits and opportunities for members of a SMSF that are generally available from 1 July 2007. The *Strategist* SMSF trust deed package allows for these new benefits. Nevertheless the *Simpler Super* regime is a constantly evolving legislation which means that the information and governing rules in the *Strategist* SMSF are regularly reviewed and updated to reflect all new changes. A service called *Living Super* is available to the trustees of a *Strategist* SMSF that keeps them informed of any new changes and ensures that their governing rules are up to date.

Before establishing a *Strategist* SMSF, it is vital that a potential member do the following things:

1. Read the information in this product disclosure statement, commonly referred to as a PDS and the governing rules. These documents provide the potential member with all the benefits that are payable by the trustee of the fund, when those benefits may be paid and how they will be paid. They also cover how a member's benefits are taxed or may be exempt from tax, the risks involved in being a trustee and member of a SMSF and how a SMSF compares to other superannuation fund investments;
2. Watch the DVD that is supplied with the *Strategist* SMSF, which covers many of the issues in the PDS in an audiovisual format; and
3. Read the ATO's publication "DIY Super: It's your money ... but not yet." This publication provides an excellent guide to trustees on what can and cannot be done in a SMSF.

## 3. Why the need to know so much?

The *Corporations Act 2001* provides that where a person is provided with a financial product they must receive a PDS. A PDS is a statement that contains information required by the *Corporations Act 2001* to provide a person with sufficient information to make an informed decision about acquiring a financial product. Importantly the PDS must provide information about any significant benefits in a fund to which any prospective or existing member may become entitled as well as the circumstances, process and timeframe in which those benefits may be provided.

A financial product in relation to a SMSF includes various superannuation interests including some of the following:

- ▶ making a contribution into a fund;
- ▶ paying a lump sum or pension from a fund;
- ▶ receiving a disability benefit from a fund;
- ▶ putting in place an investment strategy for a fund;
- ▶ paying out benefits after a member's death;
- ▶ making an investment that is a financial product;
- ▶ creating an insurance plan for the trustee of the fund.

It is important to understand that it is the trustee's responsibility to provide members and prospective members with a PDS. This is the case even though the members of the fund are trustees or directors of the corporate trustee.

#### 4. Superannuation Product Comparisons

A SMSF is one of a number of types of superannuation funds in which a person may accrue their retirement savings and receive retirement benefits.

The following table is an indicative guide that seeks to highlight the main differences between the most common forms of superannuation for a member of a superannuation fund. However before choosing any type of superannuation, a member should seek professional advice. A specialist superannuation adviser can provide a detailed understanding of the differences between various types of superannuation fund.

| <b>Feature</b>  | <b>Self Managed Superannuation Fund</b>  | <b>Retail Superannuation Fund</b> | <b>Industry Superannuation Fund</b>                  |
|---|--|-----------------------------------|--|
| Investment choice   | Unlimited*   | Limited                           | Limited  |
| Control of the fund   | Yes as trustee or director of a trustee company                                | No                                | No   |
| Compliance responsibilities                                 | Full responsibility for the member as trustee or director of a trustee company | None                              | None   |
| Fees payable:<br>- Establishment<br>- Ongoing               | Yes<br>Flexible  | Yes<br>% Funds under management   | Nil<br>% Funds under management or set fee per month |
| Pension types available                                     | Wide range *   | Restricted                        | Restricted   |
| Receive a pension* and continue contributing to super       | Yes  | May apply                         | May apply  |
| Death benefits available:<br>- Lump Sums<br>- Pensions      | Yes<br>Only to dependants  | Yes<br>Yes - Limited              | Yes<br>Yes - Limited                                 |
| Disability benefits available<br>- Temporary<br>- Permanent | Yes<br>Yes   | No<br>Yes - Limited               | No<br>Yes - Limited                                  |



| Membership       | Number of members limited otherwise wide provided the member acts as trustee or director of a trustee company | Conditions Applying | Conditions Applying |
|------------------|---|---------------------|---------------------|
| Spouse Splitting | Yes   | May apply           | May apply           |

\* Subject to compliance with the relevant laws

## 5. Are all SMSFs the same?

Not all SMSFs are the same. The governing rules of a SMSF provide the trustee with its powers, the members with their benefit entitlements and deal with the general operation of the fund. However the governing rules vary depending on the lawyer who has drafted the rules and whether they are regularly updated or not. For example many current SMSF governing rules do not allow for benefit payments in the event of temporary incapacity, taking a pension before retirement or splitting super contributions with a spouse. Many SMSFs will force a member to cash in their benefits or commence a pension upon the earlier time of reaching age 65 or full retirement. However this compulsory cashing rule in the super laws was abolished in 2006 allowing a person to leave their benefits in their SMSF if they do not need the income.

The governing rules of the *Strategist* SMSF have been specifically designed to provide a wide range of benefits to members, including those mentioned above and to provide trustees with flexible powers and simplify the operation of the fund. It is crucial that a member, trustee, director of a trustee company or prospective member read, understand and be aware of the rules.

## 6. The Purpose of the Fund

The fund is a SMSF. Many members of SMSFs may know their funds as family superannuation funds. This means that the members of the fund would normally only be family members. For example the members might be a husband and wife and their children. It may also include brothers, sisters, grandparents and other family members. The trustee may accept non-family members into the fund but as membership of the fund is limited it may be appropriate to restrict membership to immediate family.

The sole or core purpose of a SMSF must be to provide retirement benefits to the members or benefits to a deceased member's dependants or legal estate. Other purposes may be to provide members who have reached their preservation age - age 55 for those born before 1960 - with a transition to retirement pension even though the member is still working or incapacity benefits to members who are temporarily or permanently disabled. Benefits may be provided by way of lump sum or a pension or as a combination of lump sum and pension.

## 7. The Ten Key Benefits of a *Strategist* SMSF

The following benefits may arise where you choose to use the *Strategist* SMSF governing rules and have structured the SMSF to take full advantage of the benefits - this is the benefit of obtaining the services of a specialist SMSF adviser.

Caution: Please be aware that these benefits do not necessarily apply to any other SMSF governed by different rules including prior versions of the *Strategist* SMSF governing rules.

### 1. The fund lets you look after your family

For many people their family is the most important thing in their lives. As such, the provision of financial benefits to the family is a major concern and consideration. Where a family member is a member of a fund they may access a variety of superannuation benefits at certain stages of their lives. In addition a member may look after their dependants in the event of their death by way of a lump sum or income stream.

## **2. Providing a supplement to salary while working**

The governing rules provide a member of the fund with the ability to access their superannuation benefits before retirement as a transition to retirement pension. The transition to retirement rules provide that once a person reaches age 55 (if they are born before 1960 – a later age applies for those born after 1960) they can access all or part of their superannuation as a pension provided the pension cannot be converted to a lump sum. Once they retire they should be able to take part or all of their superannuation as a lump sum provided this has been documented in the terms and conditions of the pension.

## **3. Provide a secure income in retirement**

In retirement an income from alternative sources other than employment is a necessity. This may come from investments or from other sources such as social security. Upon retirement, a trustee may establish a pension to provide a member with a comfortable lifestyle for the rest of their life. The size and duration of the pension will depend upon a number of factors including the balance of the member's account at the time of retirement, the amount of pension income drawn each year and the assets funding the pension.

For example if the member commences an allocated pension or the new *Simpler Super* account based pension these pensions will only last as long as the underlying pension capital remains. Once the capital reduces to nil, then the pension ceases. However if the member only withdraws a minimum amount each year and the assets backing the pension perform well then the capital may actually increase rather than diminish.

Trustees seeking to pay a member a pension should ensure that they receive advice from a specialist SMSF adviser as the government has made a number of important changes to pensions paid from superannuation funds in the *Simpler Super* reforms that will commence from 1 July 2007. If the trustee breaches these rules the fund may be considered a non-complying SMSF and the trustee may be liable to serious financial penalties and possible imprisonment.

## **4. Offering a financial helping hand if your health deteriorates**

Health is one of those things that can never be taken for granted. A SMSF may provide members with income if they become seriously ill or incapacitated. This income is to compensate a member for lost income from employment. It may be payable for a certain period of time if a member is only temporarily incapacitated or until the normal age of retirement if a member is permanently incapacitated. As with retirement income the length and quantum of the income stream depends upon the balance of a member's account at commencement of the income stream. However the amount payable to an incapacitated member may be supplemented by reserves, this is known as self-insurance.

Additionally, a trustee may insure against a member becoming incapacitated so as to be able to pay a pension to a member if the member becomes incapacitated.

## **5. Investment choice**

One of the major reasons that SMSFs have become so popular is the ability of the trustee to invest the fund's assets so as to reflect a member's wishes. The governing rules of the *Strategist* SMSF provide the trustee with wide ranging investment powers allowing the trustee to invest in shares, property, trusts, options, bonds, overseas investments as well as property development ventures. However the trustee must ensure, in terms of any investment that:

- ▶ All investments are made on arm's length terms;
- ▶ The trustee may not lend to members or related parties;
- ▶ The trustee may not invest more than 5% of the assets of the fund in related entities such as a unit trust that the member controls or in shares of an employer that contributes to the fund;
- ▶ The trustee cannot borrow or use the assets of the fund as security for any borrowing;
- ▶ The purpose of any investment is to secure benefits for members in the event of their retirement, incapacity or for their legal estate or dependants in the event of a

member's death. Any investment seeking to provide a member or related party with a benefit not having one of these purposes is prohibited; and

- ▶ Generally the trustee cannot acquire an asset from a member or related party unless the asset is a listed share, managed fund, fixed term deposit or business real property.

#### **6. Low taxation fully sanctioned by the government**

A SMSF is very tax effective for its members if properly established and maintained particularly now that the *Simpler Super* reforms have, with effect from 1 July 2007:

- ▶ abolished the reasonable benefit limits ('RBLs') for the payment of benefits to members; and
- ▶ introduced the payment of tax free lump sums or pensions to members age 60 and over.

This means setting up the fund with the appropriate trustee/member structure for the purposes as mentioned previously and operating the fund as a 'complying' SMSF. A complying SMSF is a fund where the trustee does not breach any of the laws in the *SIS Act* and its regulations, which we will call the superannuation laws, during the income year. Further, the trustee must not breach any of the governing rules of the fund, which is the main reason why the trustee and members should make themselves familiar with the rules.

As a complying SMSF the fund will benefit from a concessional rate of tax of no more than 15% on its taxable income (assessable income less allowable deductions). The only exceptions to this relate to the taxation treatment of excess contributions and non-arm's length income received by the fund. These are discussed in more detail further on and in the section headed 'Taxation'.

If the fund is not maintained as a complying fund then the fund may be taxed at a rate of 45% which includes as fund income the market value of the assets of the fund.

A contribution made by an employer or a member where that member has claimed a tax deduction for the contribution will be included in the fund's assessable income. Another of the important *Simpler Super* changes has seen the introduction of a cap on the amount of contributions that can be made by or for the benefit of a member. Where contributions are made in excess of the relevant caps, the individual member is taxed on the excessive amount.

Where a capital gain is realised on the disposal of an asset held for more than one year, only two thirds of that gain will be included in the fund's assessable income.

Where assets are set aside to pay pensions to members then any assessable income including capital gains made by the fund on those assets is exempt from tax. Benefits payable to members, either as a lump sum, a pension or combination of both after attaining age 60 will be tax free. For those under age 60 benefits are subject to concessional rates of tax which are discussed further on.

#### **7. Looks after your family when you die**

For many families a SMSF is the most flexible, most targeted and the most tax effective vehicle to provide benefits to a member's spouse or children when the member dies. For example a fund may provide a minor dependant of a deceased member with a pension until the minor reaches age 25. This pension income is tax free to the minor if the deceased was over 60 when they died, or if the minor has no other assessable income and the amount is less than \$25,000. As with incapacity benefits referred to above, the quantum of the benefits payable to a member's dependants or their legal estate may be enhanced where the trustee has chosen to insure or self-insure against the member's life.

The *Simpler Super* reforms mean that a member of a SMSF may now leave their benefits in the fund for the remainder of their lives to draw upon at will. Any benefits remaining on death may be passed to a deceased member's dependants tax free. If the member was receiving a pension prior to death and the member had set up the pension to revert to their dependant upon death then the pension may continue and be paid to that dependant. If the deceased was over age 60 at the time the pension will be tax free in the dependant's hands. Otherwise it will be included in the dependant's assessable income but will attract a 15% tax rebate.

Further information about the payment of death benefits is provided below under the heading 'Estate Planning'. Dependant, for the purposes of these comments, is a tax dependant.

### **8. Access to the age pension**

Benefits from a fund are treated favourably for Centrelink purposes. In terms of the assets test, the member's account balance in the fund is not tested until the member becomes entitled to an age pension – for a male this is at age 65 and for a female it is currently at age 62 but increasing to age 65 by 2014 – or commences a pension from their member account. *Until 20 September 2007* a member may commence a partially assets test exempt pension from the fund. The only pension currently available in a SMSF that meets these criteria is a market linked pension.

The underlying capital from which such a pension is paid is discounted by 50% for assets test purposes and favourably treated for income test purposes. This may enable some members to access the age pension, on top of the private pension that they receive from a fund, if they choose to transfer the majority of their assets into the fund (subject to the investment restrictions and excluding the family home). However partially assets test exempt pensions will be abolished from 20 September 2007 under the *Simpler Super* reforms although existing pensions of this type may continue. Instead from this date a more generous assets test will apply. It follows, therefore, that you may plan your affairs now to take advantage of the more generous assets test to be introduced at that date.

### **9. Protection from creditors**

Protecting assets from creditors is a major concern for many people. One of the key benefits of a superannuation fund is that when a person gets into serious financial difficulty, a member's benefits may be protected from creditors. However clawback rules apply where a person has sought to escape their creditors by deliberately transferring assets or monies into a SMSF. One downside of bankruptcy is that a person cannot remain as a member of a SMSF if they are bankrupt, as this will jeopardise the fund's complying status. Should this arise the trustee should consider various actions including transferring the member's benefits to a commercial superannuation fund where they may also be protected. Another alternative is to remove the existing trustees and appoint a professional trustee, also known as an approved trustee.

### **10. Splitting benefits with a spouse**

A member of a SMSF may apply to the trustee to transfer some of their benefits to their spouse – including a de-facto spouse. It is only those contributions made since 1 January 2006 that can be split from one member to another. There is a limit on the amount of contributions that can be transferred. The limit is 85% of any deductible contributions made on behalf of the member and 100% of any non-deductible contributions made on or before 5 April 2007, including personal contributions during the prior financial year.

### **8. Trustee of the Fund**

A SMSF is a trust. A trust in its essence is a relationship or a set of obligations between the trustee and the beneficiaries of the trust. In a SMSF the beneficiaries are the members of the fund. The trustee holds and invests property, being contributions, rollovers and other monies received for the benefit of members under the terms of the trust deed and at some time in the future – subject to an event such as retirement, disability or death - pays benefits to the member, their dependants or estate.

As noted previously all members must be trustees or directors of a trustee company of the fund. As such a member, in their role as trustee, has significant influence and control in the fund. This is opposed to retail and industry based superannuation funds where the trustee stands apart from the members.

There are limited exceptions to the rule that a member must be a trustee. Where a member is a minor the law does not allow them to be a trustee or director of a trustee company. This means that their legal personal representative, parent or guardian must be appointed as trustee on their behalf until they reach age 18 if the fund is to remain a complying SMSF. Likewise where a person becomes mentally incapacitated and is unable to make sound

decisions, a legal personal representative may be appointed to take the incapacitated member's place as trustee.

There is an additional requirement that all trustees be members of the fund. This means, for example that a trustee company cannot have a director who is not also a member. As such it is generally advisable that where a trustee company is appointed that the company act as trustee of the SMSF only - not other trusts nor carry on investments or business in its own right.

There are limited exceptions to the rule requiring all trustees to be members of the fund. In the event of the death of a member the deceased member's legal personal representative - normally the executor of their legal estate - may be appointed as trustee from the time of the member's death until the time when any death benefits commence to become payable. This appointment will depend upon the terms of the trust deed of the fund. The rules of the *Strategist* SMSF (Rule 52) provide that the appointment as trustee of the legal personal representative is automatic on death of the member.

Furthermore, where there is only one member, there is a need to have more than one trustee since a person cannot be a trustee for themselves. As such in a single member fund, another person must be appointed as trustee provided they are not an employer of the member. Alternatively a trustee company with a sole director may be appointed as trustee.

Where trustees hold a meeting to decide various matters in the fund such as the establishment of an investment strategy, the making of investments, the acceptance of contributions, the payment of benefits and the like, the rules of the *Strategist* SMSF (Rule 7) provide that each individual trustee will hold that number of votes as is equal to the account balance of the members that they represent (including themselves). This should also be the case for a director of a corporate trustee where a *Strategist* special purpose SMSF trustee company has been established but may not be where another type of company has been appointed trustee.

Great care needs to be taken at the time of establishment of the fund as to the type of trustee. Although individual trustees do not cost anything in terms of establishment they may cost the fund and its members a considerable amount - see the following table.

#### ➤ **Benefits of a Trustee Company v Individual Trustees**

- ✓ One of the trustee's more important obligations under the *SIS* Act is to keep the assets of the fund separate from its own or those of the members. It is much simpler to manage this obligation if title to the assets is held in the name of a trustee company, particularly when holding real estate. Where there are individual trustees it is not often clear on the title deed whether the owners of the property are the trustees in their own names or in their capacity as trustees. This may lead to a dispute in the future or cause problems during an audit of the fund. A trustee company provides for greater asset protection.
- ✓ Where there are individual trustees and a trustee dies, retires or is removed then any assets of the fund in the name of the departed trustee must be switched into the names of the remaining trustees. Similarly, when a new member joins the fund and is appointed as a trustee. This can be time consuming and expensive.
- ✓ If a trust incurs a liability, the trustee's personal assets may be exposed. Normally a fund cannot borrow but nevertheless liabilities can still arise. For example, a contractor engaged to repair a rental property may suffer an injury and can sue the trustee for damages. As companies are subject to limited liability a trustee company will remove the risk that an individual trustee suffers a personal liability in these cases.
- ✓ A trustee company is able to pay members a lump sum as well as a pension. The *SIS* Act states that *where the trustees are individuals* then a pension and not a lump sum needs to be taken by the members. Practically though, the ATO does not generally enforce this rule where the trust deed of the fund with individual trustees provides for the payment of a lump sum. With the *Simpler Super* reforms allowing retiree members to draw upon their lump sum account at will for the remainder of their lives, a corporate trustee is recommended for SMSFs with members using this strategic lump sum option.



## **9. Responsibilities of the Trustee**

Being a trustee or director of a trustee company provides the member/trustee with a wide range of investment and other powers not seen in retail, employer and industry based superannuation funds. However, being a trustee is also about legal responsibility. This means at all times, a trustee is required to act honestly, prudently and in the best interests of members in relation to all matters concerning the fund.

Member and prospective members should be aware that both civil and criminal penalties can be imposed under the superannuation laws for any breach of these and other trustee responsibilities including breaking the fund's governing rules. Prior to accepting an appointment as trustee, it is important that a person consider the risks associated with such an appointment. The excuse that the trustee was not aware of the superannuation laws or the rules of the fund is not valid at law. This is particularly relevant now that as from 1 July 2007 a person becoming a trustee or a director of a trustee company of a SMSF must sign a declaration that they understand their duties attached to this role.

If a person is unwilling to take on the responsibilities as trustee or director of a trustee company then it may be advisable to become a member of a retail or industry based superannuation fund.

Some of the more important responsibilities of a trustee include but are not limited to:

- ▶ Act honestly;
- ▶ Act in the best interests of members and other beneficiaries;
- ▶ Keep the money and assets of the fund separate from the trustee's personal assets and money or those of another person including other trusts, companies and businesses that the member or trustee may have an interest in;
- ▶ Formulate and implement an investment strategy for the fund. This strategy must follow the fund's investment objective and should be detailed in writing;
- ▶ Abide by the rules of the fund at all times;
- ▶ Ensure that the trustee does not breach any of the superannuation laws;
- ▶ Ensure proper accounting including the maintenance of member accounts;
- ▶ Appoint an auditor and other specialists to the fund;
- ▶ Meet all regulatory obligations.

Failure to properly meet any of these responsibilities may render the trustee liable to a substantial fine and if the breach has been wilful, may result in a term of imprisonment. It is important therefore that the trustee seeks the help of a specialist SMSF adviser where appropriate.

Additionally, the Regulator of SMSFs – the ATO – may also determine the fund to be a non-complying fund and therefore lose its many concessional tax advantages.

The ATO has the power to remove the trustees of a SMSF who have not met their responsibilities and appoint their own trustee to manage and operate the fund thereby ensuring that it finds its way back to complying status.

## **10. Approved Trustee**

As mentioned previously there may be circumstances where it is appropriate or necessary to appoint an approved trustee in place of the members being appointed as trustee under the mechanism described above. For example if a member is prohibited by the superannuation laws from acting as a trustee or simply does not wish to assume the role and responsibility associated with being a trustee then an approved trustee may be appointed. The effect of the appointment is that the fund is converted from a SMSF to a "small APRA fund" or SAF as they are commonly known.

These funds are regulated by APRA rather than the ATO. While the rules of the fund may permit the appointment of an approved trustee it is usually the case that the newly appointed approved trustee will amend the deed and rules at that time to reflect the change in the type

of superannuation fund. A small APRA fund is a public offer superannuation fund and is therefore subject to more stringent regulation in the superannuation laws. The rules attached to this PDS are designed entirely to reflect the intention for a fund to be a complying SMSF.

## 11. Member Rights and Entitlements

Under the *Strategist* SMSF governing rules members have a number of rights and entitlements. It is incumbent upon members and trustees to make themselves aware of these entitlements and more importantly when and how they may be claimed. A thorough reading of the rules is required prior to any person being accepted as a member. The ATO requires the trustee to ensure that they know the rules of the fund as well as the superannuation laws that apply to the trustee. As was stated previously ignorance is no excuse!

Some of the more important rights and entitlements, subject to the superannuation laws include:

### ➤ **Membership**

Any person is able to become a member provided the person completes an application form stating that they have read the rules, agree to abide by the rules and will also accept appointment as trustee or become a director of the trustee company and the trustee accepts the person as a member;

### ➤ **Trusteeship**

As a member of the fund the member has the right to (and in fact must) become a trustee or appoint a person to become a trustee in their place if allowed;

### ➤ **Contributions**

A member or any other person such as an employer may contribute on behalf of the member. These contributions may be made in cash or by an in specie transfer of assets. The *Simpler Super* reforms have introduced significant changes in relation to super contributions. Prior to 1 July 2007 no limit existed on the amount of contributions made – whether taxable contributions such as those made by an employer or by the member themselves as a self employed or other eligible person; or non-taxable contributions such as a personal contribution made by a member from after tax income (also called undeducted contributions). However an age based limit applied to limit the tax deductibility of the employer, self-employed or other eligible member contributions.

The *Simpler Super* changes are incorporated in the *Income Tax Assessment Act 1997* ('Tax Act') and include:

- ▶ the removal of the age based limits from 1 July 2007 for employer and self employed member contributions;
- ▶ the introduction of a 'Concessional Contributions' cap of \$50,000 per person per year on what are known as 'concessional contributions':
  - This cap applies from 1 July 2007;
  - This cap or limit is imposed on the amount of employer, self-employed or other eligible member contributions made for the benefit of a member and taxed at the concessional rate (of no more than 15%) available to superannuation funds;
  - This cap will be indexed in increments of \$5,000 only in line with AWOTE;
  - An amount allocated from any reserve in the fund to a member's account from time to time may also be counted towards this cap;
  - Any contributions made in excess of the cap are taxed in the hands of the individual member at an extra 31.5%. The member is able to request the trustee to pay the tax from the member's entitlement in the fund;
  - Any excess contributions will be counted against the 'Non-Concessional' cap (see below);and
  - Transitional arrangements exist during the financial years from 2007/08 to 2011/12 whereby this cap is \$100,000 per person per year for members

turning 50 or more during that period. This is so as to allow people nearing retirement to fulfil expectations of amounts planned to be contributed to their fund during this period.

- ▶ the introduction of a 'Non-Concessional Contributions' cap of \$150,000 per person per year on the amount of undeducted or non-taxable contributions that may be made by a member:
  - This cap applies from 1 July 2007;
  - These contributions are generally not included in the assessable income of the fund;
  - These contributions are now known as 'non-concessional' contributions;
  - This cap will be indexed to equate to three times the value of the concessional cap;
  - Averaging rules will apply allowing a member under age 65 to contribute \$450,000 in one year providing no further contributions are made in the following two income years;
  - Any contributions made in excess of the cap each year are taxed in the hands of the individual member at an extra 46.5%. The member *must* withdraw money from the fund to pay the tax; and
  - Excess concessional or deductible contributions are counted towards this non-concessional contributions cap. ***(A very important word of caution: if excess concessional contributions are made and this results in the non-concessional cap to be exceeded then 93% tax may be paid on these excess concessional contributions. For example if a concessional contribution of \$60,000 and a non-concessional contribution of \$150,000 is made into a fund during the year ended 30 June 2008 then the \$10,000 excess will be counted towards the non-concessional cap. Therefore the tax payable on this excess contribution will be 15% concessional contributions tax plus 31.5% excess contributions tax per the concessional cap limits plus 46.5% excess contributions tax per the non-concessional cap limit.)***

More transitional arrangements exist for the period 10 May 2006 to 30 June 2007 to allow members to make undeducted contributions of up to \$1,000,000. Members aged 65-74 must meet the work test in the superannuation laws to be eligible to contribute.

There are two exemptions to these new contribution rules:

- (i) a member is able to contribute amounts up to a lifetime limit of \$1m (indexed) from the sale of assets qualifying under the small business capital gains tax (CGT) concessions. This exemption will also apply to pre-CGT assets that would otherwise have qualified but for their pre-CGT status or to assets sold as a result of the business owner suffering permanent incapacity; and
- (ii) a member is able to contribute the proceeds of any settlement received for injuries resulting in permanent disablement;

➤ **Transfers**

A member may transfer benefits into and out of the fund;

➤ **Investments**

A member may request the trustee to implement a separate investment strategy in the fund for the member;

➤ **Retirement Benefits**

The trustee may pay the member a retirement benefit by way of a lump sum or a pension. There is no longer a compulsory requirement for a retired member to withdraw benefits upon reaching age 65. This means that the member may make a choice to leave their benefits in the fund until their death after which the benefits may be paid to a dependant or to their estate;



➤ **Access to benefits while still working**

The trustee may commence a transition to retirement pension for a member that has reached their preservation age but still continues to work. The fund may still continue to accept contributions on behalf of the member in these circumstances thereby enabling the member to have both a member's accumulation account and pension account operating simultaneously;

➤ **Incapacity Benefits**

The trustee may pay the member an incapacity benefit in the event the member is temporarily or permanently incapacitated;

➤ **Death Benefit Nominations**

The trustee may accept a binding death benefit nomination from a member requiring the trustee to pay out the member's benefits in the event of the member's death to the dependants named in the nomination form. This nomination form must be renewed every three years.

The governing rules of the *Strategist* SMSF (Rule 16) also allow a member to provide the trustee with a written request to pay out their death benefits in a particular manner and form. Once this request is accepted, the trustee is required to pay the benefits in the event of the member's death to the dependants named in the written request in accordance with the member's instructions. Further this request forms part of the governing rules of the fund and may not be amended without the consent of the member making the request. The form is not required to be renewed every three years however the member may amend or revoke the request at any time;

Both options require the trustee to ensure that any death benefits paid are made in accordance with the superannuation laws otherwise the fund could become a non-complying fund.

➤ **Death Benefits**

The trustee may pay death benefits by way of a lump sum or a pension to the deceased member's legal estate or their dependants in such proportions and in such manner as the trustee sees fit unless a binding death benefit nomination or death benefit rule is operative.

## **12. Pension Entitlements**

A member or a dependant of a member may become entitled to be paid an income stream – called a pension from the fund. In a SMSF new pensions presently available include the allocated pension, the non-commutable allocated pension and the market linked pension but only until 20 September 2007. Formerly, there was another class of pensions available to members of a SMSF – defined benefit pensions – however these ceased to be available on 1 January 2006. Those that commenced prior to this date may continue.

From 1 July 2007 the rules governing these pension types will largely be replaced by new 'simplified and streamlined' pension rules introduced under the *Simpler Super* reforms. This means that from 1 July 2007 existing pensions may adopt the new minimum payment rules described below and will be taken to meet the new rules in the pension standards in the *SIS Regulations*. New pensions may commence under the new rules. From 20 September 2007 all new pensions must commence in line with the new rules.

There are two new categories of superannuation pension: an account based pension that commences with all or part of a member's account balance in the fund; or a non-account based pension. The latter has little application in a SMSF so will not be addressed in this PDS. The rules applicable to the new account based pension are covered below as well as the variation to these rules for a transition to retirement ('TTR') option. The implications for continuing defined benefit pensions are also addressed.

## 1. The new account based pension

The new pension:

- ▶ has a band for minimum payments of income each year per the table below;
- ▶ the account cannot be increased after the commencement date by the addition of contributions or rollovers to the underlying capital of the pension;
- ▶ is commutable<sup>1</sup> subject to special rules applying for transition to retirement pensions (see below);
- ▶ cannot be used as security for any borrowings (income or underlying capital);
- ▶ can be transferred upon death of the member to a dependant as a reversionary pension or the balance of the pension account may be cashed and paid as a lump sum to a dependant or to the estate of the member.

An important issue to highlight here relates to the transfer of a pension to a 'reversionary beneficiary' upon a member's death. The new pension rules prohibit the reversion or transfer of a pension to a dependant where that person is an adult child (25 or older) of the member unless they have a specified permanent disability and are in need of ongoing support. The new pension rules specify that a pension (of any type) WILL NOT satisfy the rules if this occurs which means that the trustee is in breach of the superannuation laws and could cause the fund to become a non-complying fund.

| Age of member | % of account balance to be taken |
|---------------|----------------------------------|
| Under 65      | 4                                |
| 65-74         | 5                                |
| 75-79         | 6                                |
| 80-84         | 7                                |
| 85-89         | 9                                |
| 90-94         | 11                               |
| 95+           | 14                               |

## 2. The transition to retirement pension

This pension operates in the same way with two important differences:

- ▶ The pension cannot be taken as a lump sum until the member meets a condition of release such as retirement, death, permanent disability or age 65;
- ▶ The maximum pension payment in any one year is limited to 10% of the member's account balance. For example if a 56 year old member commenced a transition to retirement pension on 1 July 2007 with a \$1.8M account balance then the minimum pension payment would be \$72,000 and the maximum amount available would be \$180,000.

## 3. Implications for defined benefit pensions

A defined benefit pension includes income streams such as a lifetime complying pension or a fixed term pension to name the most common. The lifetime options are generally non-commutable except in very limited circumstances. One option for a member is to roll the current lifetime pension into another non-commutable income stream.

Given that the new *Simpler Super* account based pensions are generally commutable (excluding TTR) and that the only other non-commutable lifetime pension remaining in a SMSF – the market linked pension – would cease to be available after 20 September 2007 a roll over could not occur except outside of the SMSF into a life insurance company pension product. This is not an attractive option as a member would sacrifice their capital in these circumstances. Therefore special rules were introduced under *Simpler Super* that allow a

<sup>1</sup> Commutable means the ability to convert the pension into a lump sum. Partial commutations are also available.

member to roll over their defined benefit lifetime pension into a market linked pension only and this will satisfy the new pension rules. The governing rules of the *Strategist* SMSF allow this to occur for any members wishing to take advantage of these new rules. There may be strategic and taxation advantages of doing this so a member is best served if they seek appropriate advice before taking any action.

### **13. Estate Planning**

A key feature of a SMSF is the ability of a member to directly provide for their dependants in the event of their death. A member may also direct some or all of their superannuation benefits into their legal estate on death and allow those benefits to be distributed according to the deceased's will. This includes a pension that may have been payable to a member at the time of their death.

A member may provide the trustee with binding and non-binding directions as to how their superannuation benefits are to be distributed in the event of their death. Such benefits are called death benefits and may be by way of lump sum or pension. The governing rules of the *Strategist* SMSF provide that a lump sum death benefit payment may consist of assets of the fund. The following provides an overview of the important aspects of estate planning in a SMSF.

#### **1. What happens on death of a member?**

As the member was a trustee or director of the trustee company at the time of death, then the governing rules of the *Strategist* SMSF (Rule 52) provides that the deceased member's executor is appointed as trustee or director of the corporate trustee. The purpose of this is to ensure that the member's death benefit nominations are carried out according to their wishes. However the appointment can only be in force until the death benefits commence to be paid out. At that time the executor must resign as trustee otherwise the fund may lose its complying SMSF status.

#### **2. Paying death benefits**

The distribution of superannuation benefits upon death of a member is not covered in a person's will. This is because the trustee generally has full discretion as to the payment of benefits and in the absence of any specific directions from the member must pay out the death benefits as soon as practical after the member's death. However as mentioned above there are a couple of different ways in which a member may communicate their wishes for the disbursement of their benefits. These are covered below and references are made to the relevant rule in the *Strategist* SMSF where appropriate:

##### **a. Non-binding death benefit nomination ('NBDBN') – Rule 14**

➤ A NBDBN is where the member requests the trustee to make certain payments to specified beneficiaries. This is generally done in writing in the application form when applying to become a member of the fund. However as the nomination is non-binding the trustee is not obliged to carry out the request.

##### **b. Binding death benefit nomination ('BDBN') – Rule 15**

A BDBN is where a member requests that the trustee pay all or part of their benefits to a nominated dependant or dependants which can include the estate of a deceased member. Typically, the member will nominate a percentage of benefits to be paid in each case. The BDBN must be made in writing, in a specified format and witnessed by two people who are not named beneficiaries in the BDBN. The trustee must accept a legally valid request and on the member's death the trustee is bound to pay those benefits in accordance with the member's nomination. The BDBN must be renewed every three years.

##### **c. Death benefit rule ('DBR') – Rule 16**

➤ If the member desires more certainty that death benefits will be paid in accordance with their wishes then they can request the trustee to establish a DBR. The member provides a written request to the trustee stating the amount, form and circumstances in which a benefit is to be paid to nominated dependants. The trustee must be satisfied that the request complies with the rules of the fund and all relevant legislation including the SIS Act and the Tax Act.

➤ Upon acceptance of the member's request the DBR is documented and incorporated as a rule of the fund. The member can amend or revoke a DBR at any time and it can only be amended or revoked with the consent of the member.

#### **d. Reversionary pension – Rule 17**

A reversionary pension is a pension payable to a member that reverts or automatically carries on in the name of the spouse, dependant or legal estate. A reversionary pension has built in estate planning however the decision as to whom the pension is to be transferred is generally made at the time of commencement of the pension. It is the pension documentation that guides what happens on the death of the pension member not a BDBN, NBDBN or DBR.

As mentioned earlier, the new pension rules prohibit the reversion or transfer of a pension to a dependant who is an adult child (25 or older) of the member unless they have a specified permanent disability and are in need of ongoing support.

#### **3. Who is a dependant?**

Both the SIS Act and the Tax Act provide a definition for a dependant. A dependant under the SIS Act (SIS dependant) includes a member's spouse (legal or defacto), their children and a person who is financially dependent on them. It also includes a person who is in an interdependent relationship with the member such as a sister living with a member or possibly a same sex partner of a member who lives under the same roof.

The SIS dependant differs from the dependant for the purposes of the taxation laws (Tax dependant) in that the tax definition excludes a child aged 18 and over unless they are financially dependent or in an interdependent relationship with the member.

This means that the tax treatment of benefits received by a SIS dependant who is not also a tax dependant may not be as advantageous. In fact the new pension rules restrict the definition even further by excluding as a reversionary pensioner an adult child of a member who is financially dependant or in an interdependent relationship with the member.

Consider the relationship between a 50 year old woman living with and caring for her elderly mother. This is clearly an interdependent relationship however any superannuation pension received by the mother would not be able to revert to the daughter under the new rules. A lump sum payment would be required.

#### **4. The importance of estate planning**

Until a SMSF estate plan is created for the member, the trustee will have full control of what happens to the member's superannuation benefits in the event of their death. As such, estate planning is vital in a SMSF and needs to be considered at the time a person becomes a member or soon thereafter and then reviewed regularly to capture changes in circumstances. As it is complex and the options are many, the member should seek specialist SMSF advice to assist them in creating and managing their SMSF estate plan.

## **14. Taxation**

One of the major benefits of commencing a SMSF is that a fund is concessionally taxed on its income and members and their dependants may be concessionally taxed on benefits received from the fund. Importantly these taxation concessions only apply where a fund is a complying superannuation fund during the income year. A non-complying SMSF is taxed at a rate of 45% on its income and capital gains. This once again emphasises the need for trustees to be vigilant in monitoring the compliance of the fund and ensuring that they abide by the governing rules of the fund and also the relevant superannuation and taxation laws.

The area of greatest change under the *Simpler Super* reforms has been the taxation of contributions received by the fund and benefits received by members and their dependants. These changes are effective from 1 July 2007 and are included below.

### **1. Taxation of the Fund**

- Broadly the trustee of the fund is taxed like any other taxpayer except that:
  - ▶ any taxable income of a complying superannuation fund is taxed at a 15% rate excluding non-arm's length income received by the fund which is taxed at a 45% rate. Previously known as 'special income', non-arm's length income may arise on income

received from a fund's investments in private companies or trusts or from other non-arm's length transactions undertaken by the fund;

- ▶ any capital gains earned by the trustee upon the disposal of an asset that has been held for more than one year is entitled to a 33 1/3% discount;
- ▶ tax-deductible or 'concessional' contributions are included in the assessable income of the fund up to a limit of \$50,000 per member per year (across all their superannuation fund interests). A \$100,000 cap applies during the period 1 July 2007 until 30 June 2012 for those aged 50 or more or turning 50 during this period. Any contributions received in excess of these thresholds will be subject to tax in the individual's hands at a rate of 31.5%;
- ▶ taxable income excludes any income or capital gains earned on assets that are being used by the trustee to provide pensions. These are exempt from taxation provided that the trustee has segregated those assets from the accumulation assets of the fund. Upon segregating, the fund will have two parts – the accumulation side and the pension side, each with different taxation consequences. If the trustee does not segregate the assets of the fund when a pension commences then the trustee is required to obtain an actuarial report each year that will ascertain the portion of the income and capital gains of the fund that will be tax exempt;
- ▶ the trustee may obtain a tax deduction for premiums paid for life insurance, permanent disability and temporary incapacity. The trustee may also receive a tax deduction for self-insurance provided an actuary determines the arm's length amount of the premium that could have been claimed. The *Strategist* SMSF governing rules allow the trustee to self insure (Rule 40);
- ▶ where a member dies or becomes permanently incapacitated prior to age 65 and while they are working the trustee may obtain a significant tax deduction based on a proportional amount of benefit paid to the member or the member's dependants or legal estate;
- ▶ where a member dies and the trustee has included some of the contributions on behalf of the member in its assessable income in prior years, then the trustee may be able to claim a tax deduction for any bonus payment made to the deceased member's dependants or legal estate to compensate them for tax paid on these contributions. However this bonus payment must be established by the trustee as being for the specific purpose of making such anti-detriment payments.

## 2. Taxation of Benefits to a Member

Benefits paid to a member are taxed according to their age, the type of benefit and the components that make up the member's balance in the fund. Prior to the introduction of the *Simpler Super* reforms and up until 30 June 2007 benefits have been taxed with reference to the lump sum or pension 'Reasonable Benefit Limits' or RBLs. These are now abolished with effect from 1 July 2007.

Further, the member's balance in the fund may have been made up of up to eight components with differing tax treatments. From 1 July 2007 there will only be two components - a 'taxable' component and a 'tax-free' component.

The tax free component includes:

- ▶ A consolidation of existing superannuation interests calculated as at 30 June 2007 as a fixed amount and includes any undeducted contributions, pre-July 1983 component, CGT exempt component, concessional component and post-June 1994 invalidity component. This is called the 'crystallised segment' of the tax free component; and
- ▶ Non-concessional contributions (undeducted) made on or after 1 July 2007 that have not been included in the assessable income of the fund. This is called the 'contributions segment' of the tax free component.

Tax free benefits received are *not* required to be included in a person's income tax return.

The taxable component is calculated to be the total of the member's superannuation interest in the fund less the tax-free component and will comprise an element taxed in the fund and in limited circumstances perhaps an element untaxed in the fund. An element taxed in the fund refers to that part of a member's benefits – contributions and earnings – that have been subject to tax in the fund, which is typically the case for members of a SMSF.

The following table summarises the tax treatment applicable to the *taxed* element of the taxable component of benefits received by members from 1 July 2007. The Medicare levy is also payable on top of any rate > 0% quoted below.

| Age  | Lump Sum   | Pension  |
|--|--|--|
| Age 60 and over                            | Tax free   | Tax free   |
| Preservation age <sup>2</sup> up to age 59 | 0% up to low rate cap of \$140,000 (2007/08 starting threshold & indexed thereafter)<br>15% tax on amount above low rate cap | Marginal income tax rates with a 15% tax rebate  |
| Below preservation age                     | 20%  | Marginal income tax rates with no 15% tax rebate with the exception of disability pensions |

### 3. Taxation of Death Benefits

There are significant taxation advantages of paying a death benefit directly from a fund to a dependant rather than through the deceased's legal estate. This is despite that the *Simpler Super* reforms have introduced various restrictions with respect to the payment of pensions to non-tax dependants. The following table summarises the rules that apply in relation to death benefits paid from the taxable component of a member's benefits and are applicable from 1 July 2007. The Medicare levy is also payable on top of any rate > 0% quoted below unless paid from the deceased's legal estate.

While a person may be receiving a tax free income stream while they are alive it may not seem important to keep track of the tax-free and taxable components. Upon death of a member however it may be important if paying out death benefits to a non-dependant (within the meaning of the Tax Act) as the tax-free component retains its status in the hands of the dependant.

| Age of Deceased Member | Death Benefit | Age of Recipient | Taxation Treatment <sup>3</sup> (of Taxed Element)  | Taxation Treatment (of Untaxed Element)   |
|------------------------|---------------|------------------|---|---|
| Any age                | Lump sum      | Any age          | Dependant: tax free<br>Non-dependant: 15% tax       | Dependant: tax free<br>Non-dependant: 30% tax   |
| Aged 60 and over       | Pension       | Any age          | Dependant: tax free<br>Non-dependant: Not allowable | Dependant: subject to marginal tax rates of the recipient with a 10% tax offset<br>Non-dependant: Not allowable |
| Under age 60           | Pension       | Aged 60 &        | Dependant: tax free                                 | Dependant: subject to   |

<sup>2</sup> Currently age 55 for those born before 1960 – please refer to the definition of Preservation Age in the rules of the fund.

<sup>3</sup> The tax free component of a member's death benefit will always be tax free.

|  |  |              |   |   |
|--|--|--------------|---|---|
|  |  | over         | Non-dependant: Not allowable                        | marginal tax rates of the recipient with a 10% tax offset |
|  |  | Under age 60 | Dependant: marginal tax rates with a 15% tax rebate | Dependant: marginal tax rates                             |
|  |  |              | Non-dependant: Not allowable                        | Non-dependant: Not allowable                              |

There are few circumstances in which a person may receive a death benefit that is sourced from an untaxed element in the fund. The most typical situation is where the trustee receives a payout on a life insurance policy held by the fund on the life of the deceased Member. Where the fund had claimed a tax deduction for the insurance premiums then a calculation is required to determine the proportion of the proceeds to be treated as an element untaxed in the fund.

### 15. Appointment of Specialists

The superannuation and taxation laws, particularly as they apply to SMSFs are complicated. Serious breaches may render a fund to be non-complying, which means that the fund is taxed on its income at a rate of 45%, and the trustee may be subject to financial and criminal penalties.

The rules allow a trustee to appoint managers, advisers, and to engage other specialists to assist the trustee in the management of the fund. It is highly recommended that the trustee appoint an experienced SMSF auditor and specialist SMSF adviser to look after the fund.

### 16. Costs and Expenses of the Fund

SMSFs can be costly to run depending on the size of the fund as most of the costs are fixed. For example the costs of administering a fund with assets of \$100,000 may be the same as a fund with \$2M in assets.

However administration costs, although important are not the only costs for a trustee to manage and operate a complying SMSF. Some other costs include but are not limited to:

- ▶ The acquisition of the deed and the rules and establishment of the fund as a regulated self managed superannuation fund;
- ▶ The potential acquisition of a trustee company – see above on why a special purpose trustee company is recommended;
- ▶ The provision of specialist advice to the trustee or members in relation to the establishment of the fund, restructuring of assets into the fund, plans for member retirement incomes, incapacity benefits or benefits payable in the event of the member's death;
- ▶ The provision of investment advice concerning the development and implementation of the fund's investment strategy;
- ▶ Brokerage and commissions payable in relation to investing the assets of the fund;
- ▶ The acquisition by the trustee of insurance for the fund for the benefit of members including life, total and permanent disablement as well as temporary incapacity insurance;
- ▶ Insurance where the assets of the fund include real property or valuables such as antiques or art;
- ▶ Accounting and audit fees in relation to the preparation of audited accounts and tax return as required by the superannuation laws;

- ▶ The provision of actuarial advice should the fund self-insure or the trustee pay a pension from a pool of the fund's assets not segregated for this purpose; and
- ▶ Maintaining currency of the rules of the fund and the product disclosure information supplied to members

Costs associated with any of the above may be obtained in a schedule from the provider of any financial services to the trustee.

## **17. Understanding the Governing Rules of the Fund**

A SMSF has a lifecycle and the governing rules of the *Strategist* SMSF have been designed to reflect this. This lifecycle at first requires the fund to be formed, a trustee appointed and members admitted. The fund will then receive contributions and may receive transfers of benefits from other superannuation funds. Once received the trustee then invests those monies or assets. The trustee must comply with the superannuation laws in all its operational activities. The SIS Act requires the fund to be audited each and every year. An important part of the lifecycle – the most important for members – are the benefits; when, how and the quantity that are to be paid to members. Although SMSFs can continue indefinitely the trustee may also terminate the fund.

To reflect the lifecycle of the fund the governing rules are contained in the following Parts:

|            |  |
|------------|--|
| Part One   | Establishment of the Fund                |
| Part Two   | Operation and Administration of the Fund |
| Part Three | Payment of Benefits by the Trustee       |
| Part Four  | Changes to the Fund                      |
| Part Five  | Winding up of the Fund                   |
| Part Six   | Interpretation                           |

For a more detailed look at what each part contains refer to the index at the start of the rules.

Great care has been taken to ensure that the rules remain as flexible as possible yet still ensure that they meet current standards of the superannuation laws as well as other laws that may impact on the trustee and members of the fund. These other laws include taxation, bankruptcy, family, social security and trustee laws.

Most rules have been divided into two parts. The first part provides a broad explanation of the rule. This explanation is designed to assist the reader to understand the purpose of the rule. Importantly the explanation does not form part of the rules; rather it is ancillary to them. The second part of each rule is the rule itself.

At the end of the rules are interpretative provisions. When reading the rules, if a particular term or word is capitalised then a definition may be found in Rule 62.



# Establishment of the Abercrombie Super Fund

## Explanation

A superannuation fund is a form of trust. Trusts are normally required to be established by deed. By execution of this Deed the Trustee formally establishes the Fund.

To benefit from concessional taxation rules the sole purpose of the Fund must be the provision of superannuation pension benefits or retirement, incapacity or death benefits to Members (or relatives of deceased Members). The Fund might also be able to provide pension benefits to members prior to the retirement of the member. However the Fund should not be formed to carry on a business.

In order for this Deed to be admissible as evidence in a court of law it may have to be stamped in the local jurisdiction of the Trustee.

The Deed does not contain the rules of the Fund. Rather the rules of the Fund are contained in a separate document and unlike the Deed can be (and should be) amended from time to time to reflect legislative changes.

## THE DEED

**THIS DEED** is made on \_\_\_\_\_

BY:

Catherine Mary Albery ("Trustee")

Lloyd Albery ("Trustee")

## WHEREAS

- A The Trustee is that person who has executed this Deed or if more than one person those persons collectively.
- B The Trustee wishes to establish a superannuation fund ("the Fund").
- C By execution of this Deed the Trustee signifies its consent to its appointment as the first Trustee of the Fund and acknowledges that it has read and agree to be bound by the rules of the Fund.
- D The Trustee intends that the Fund should be a complying self managed superannuation fund as defined for the purposes of the *Superannuation Industry (Supervision) Act 1993*.

## **NOW IT IS HEREBY AGREED**

### **Initial Trustee**

- 1** The Trustee if allowed by the rules of the Fund to be appointed as a trustee of the Fund is hereby appointed as the trustee of the Fund.

### **Establishment of the Fund**

- 2** The Trustee hereby agrees to receive contributions and any other amounts paid to it on behalf of members and will hold those contributions and any income thereon according to the rules of the Fund.

### **Name of the Fund**

- 3** The name of the Fund will be **Abercrombie Super Fund** or such other name as the Trustee might in writing determine.

### **Rules of the Fund**

- 4** The rules of the Fund are those rules attached to this Deed, any amendment of or substitution of those rules, and any other rule that is deemed by any law to be a rule of the Fund.

### **Purpose of the Fund**

- 5** The Fund is to be maintained solely for the provision of one or more of those purposes referred to in section 62 of the *Superannuation Industry (Supervision) Act 1993* as core purposes or ancillary purposes including any purpose that the Regulator (as defined by the *Superannuation Industry (Supervision) Act 1993*) approves in writing.

### **Complying Self Managed Superannuation Fund**

- 6** The Fund must at all times do those things that would cause it to be a "complying self managed superannuation fund" as defined for the purposes of the *Superannuation Industry (Supervision) Act 1993* and must not do those things that would or might cause it not to be a "complying self managed superannuation fund" as defined for the purposes of the *Superannuation Industry (Supervision) Act 1993*.

### **Successor Acts**

- 7** A reference to an Act includes a reference to any successor act to that Act.

**This Deed establishing the Abercrombie Super Fund is hereby executed as a deed on**  
\_\_\_\_/\_\_\_\_/200\_\_\_\_

**by**

**Lloyd Albery as Trustee**

\_\_\_\_\_  
(Signature)

**in presence of**

\_\_\_\_\_

\_\_\_\_\_  
(Signature of Witness)

**Catherine Mary Albery as Trustee**

\_\_\_\_\_  
(Signature)

**in presence of**

\_\_\_\_\_

\_\_\_\_\_  
(Signature of Witness)

# THE RULES OF THE FUND

Note – terms capitalised are defined in the Definitions.

## Part One: Establishment of the Fund

### Purpose of the Fund

#### Rule 1. The Fund must satisfy the sole purpose test

##### Explanation

- *The Fund must be established and must be maintained solely for the provision of Core Purposes or for the provision of Core Purposes and Ancillary Purposes of the 'sole purpose test' in the SIS Act.*
- *The SIS Act defines Core Purposes to include the provision of Benefits to a Member upon his or her retirement or to the Legal Personal Representative or Dependants of the Member in the event of the Member's death.*
- *The SIS Act also provides that the Trustee may maintain the Fund for both Core Purposes and for Ancillary Purposes. An Ancillary Purpose may include the provision of Temporary or Permanent Incapacity Benefits to a Member where the Member terminates employment as a consequence of ill health.*
- *An Ancillary Purpose also includes the provision of such Benefits as the Regulator has approved in writing.*

##### Rule

The Trustee must ensure that the Fund is maintained for one or more of the Core Purposes or for one or more of the Core Purposes and for one or more of the Ancillary Purposes and for no other purpose.

### Appointing the Trustee

#### Rule 2. Who may and may not be a Trustee

##### Explanation

- *The Fund must have a Trustee.*
- *Section 17A of the SIS Act must be satisfied in order for the Fund to be a Self Managed Superannuation Fund. This section requires that:*
- *each Member must be a Trustee or if the Trustee is a company each Member must be a director of that company;*
- *a person who is not a Member may not be a Trustee or a director of a company which is a Trustee,*
- *except that a Legal Personal Representative may also be a Trustee.*
- *On the Death of a Member the Legal Person Representative of that Member should be appointed as a Trustee or as director of a company that is a Trustee – see Rule 52.*
- *For single member funds another person is required to be appointed as a Trustee, not being an employer of the Member unless also a relative of the Member.*

*However these Rules do not allow – for the purposes of administrative simplicity – for a company to be a Trustee if a Member is also a Trustee.*

*If a company is appointed Trustee the constitution of that company should be compatible with the Rules.*

*Any person accepting appointment as a Trustee or director of a company that is the Trustee must read and agree to the Rules.*

*A disqualified person may not be a Trustee. A disqualified person may include a person who has committed a civil or criminal offence or is bankrupt.*

*If a natural person is a Trustee a company cannot also be a Trustee.*

## **Rule**

### **Who may be a Trustee**

- 2.1. Natural persons may be Trustees or a company may be the Trustee but natural persons and companies cannot both be Trustees.
- 2.2. Subject to this Rule and Rule 52 below (which applies on death of a Member) an individual may only be a Trustee if the individual is a Member.
- 2.3. Subject to this Rule and Rule 52 below (which applies on the death of a Member) a company may only be a Trustee if all the directors of the company are Members.
- 2.4. Notwithstanding Rule 2.2 and Rule 2.3 if there is only one person who is a Member then:
  - (a) that Member or the Legal Personal Representative of that Member and one other natural person who is a Relative of the Member or is a person who is not an employer of the Member may be the Trustee; or
  - (b) a company may be the Trustee the sole director of which is the Member or the Legal Personal Representative of the Member or the company may have two directors one of which is the Member or the Legal Personal Representative of the Member and another person who is a Relative of the Member or is a person who is not an employer of the Member.
- 2.5. If the Member is under a legal disability then that Member cannot be appointed as a trustee but the Legal Personal Representative of that Member may be appointed as a Trustee.
- 2.6. If the Regulator appoints a person or company as a Trustee that person or company may be a Trustee.
- 2.7. Notwithstanding any other provisions of these Rules a person or company shall not be appointed as a Trustee unless they have provided the Trustee with a written consent to that appointment and have acknowledged that they have read and agreed to be bound by the Rules.
- 2.8. Notwithstanding any other provision of these Rules an Approved Trustee may be appointed as the Trustee.

### **Who may not be a Trustee**

- 2.9. A person cannot be a Trustee if:
  - (a) at any time
    - (i) the person was convicted of an offence against or arising out of a law of the Commonwealth of Australia, a State or a Territory of Australia or a foreign country, being an offence in respect of dishonest conduct; or
    - (ii) a Civil Penalty Order was made in respect of the person; or
  - (b) the person is an insolvent under administration; or

- (c) a Regulator has disqualified the person (for the purposes of section 120A of the *SIS Act*) and the Regulator has not waived that person's status as a disqualified person.

**2.10.** A company cannot be a Trustee if:

- (i) the company knows, or has reasonable grounds to suspect, that a person who is, or who is acting as a Responsible Officer of the company has been disqualified by the Regulator (for the purposes of section 120A of the *SIS Act*); and
- (ii) the company knows or has reasonable grounds to suspect that:
- (1) the person is not eligible under section 126B(1) of the *SIS Act* to apply to APRA for a declaration waiving his or her status as a disqualified person; or
- (2) the person is so eligible under section 126B(1) of the *SIS Act* to apply to APRA for a declaration waiving his or her status as a disqualified person but that person will not make an application under subsection 126B(3) of the *SIS Act* seeking a waiver of that status; or
- (b) a receiver, or a receiver and manager, has been appointed in respect of property owned by the company; or
- (c) an official manager, deputy official manager or administrator has been appointed in respect of the company; or
- (d) a provisional liquidator has been appointed in respect of the company; or
- (e) the company has begun to be wound up.

**2.11.** Notwithstanding Rules 2.9 and 2.10 above a person or company can be appointed as a Trustee if that appointment as a Trustee is authorised by the Regulator.

### **Rule 3. Appointment of a Trustee**

#### **Explanation**

*This Rule provides the mechanism for appointing those persons eligible to be appointed as Trustees. This Rule also allows an individual to be replaced as a Trustee by a company which is a Trustee and for a company which is Trustee to be replaced as Trustee by an individual.*

*Trustees of the Fund will be personally liable for any liabilities incurred by the Fund (although they may be entitled to indemnity by the Fund). Where there is more than one Trustee each Trustee is jointly and severally liable for the liabilities of the Fund. As a consequence persons causing the establishment of the Fund might prefer that a company be appointed the Trustee of the Fund rather than individuals being appointed Trustees of the Fund.*

#### **Rule**

- 3.1.** Upon establishment of the Fund a person is appointed as Trustee provided that that person:
- (a) has agreed to be Trustee by reason of execution of the Deed; and
- (i) has consented in writing to become a Member or is the Legal Personal Representative of a person and has agreed in writing to that person becoming a Member; or
- (ii) if the Fund has only one Member – is a Relative of the Member or is a person who is not an employer of the Member;
- (b) has agreed to be bound by the Rules;
- (c) is eligible to be appointed a Trustee; and,

- (d) has read the Product Disclosure Statement.
- 3.2.** Upon establishment of the Fund a company is appointed as Trustee provided all the following conditions are met:
- (a) the company and its directors have agreed to be Trustee by reason of execution of the Deed;
    - (i) all directors have consented in writing to become Members or they are the Legal Personal Representative of a person and have agreed in writing to that person becoming a Member; or
    - (ii) if the Fund has only one Member and two directors - the director that is not a Member is a Relative of the Member or is a person who is not an employer of the Member;
  - (b) the company and its directors agree to be bound by the Rules;
  - (c) the company is eligible to be appointed a Trustee; and
  - (d) all the directors have read the Product Disclosure Statement.
- 3.3.** Subject to the provisions of these Rules where the Trustee accepts a person as a Member, that person or a Legal Personal Representative of that person is appointed as a Trustee unless that person or a Legal Personal Representative of that person becomes a director of a company which is the Trustee.
- 3.4.** On appointment of a person as a Trustee or on appointment of a company as a Trustee after 30 June 2007 that person or each director of that company shall sign a declaration in that form as required by the Act certifying that he or she understands their duties as a trustee of a self managed superannuation fund or as a director of a company which is a trustee of a self managed superannuation fund.
- 3.5.** If a person is a Trustee or a director of a company which is a Trustee and another person is appointed after 30 June 2007 as a Trustee or as a director of a company which is a Trustee then that person must ensure that the newly appointed person signs a declaration in that form as required by the Act certifying that he or she understands their duties as a trustee of a self managed superannuation fund or as a director of a company which is a trustee of a self managed superannuation fund.
- 3.6.** Any such declarations referred to in Rules 3.4 and 3.5 shall be kept for at least 10 years or such longer period so far as it is relevant and shall be available for inspection by the Regulator if so required.
- 3.7.** Upon retirement of a Trustee and at the direction of that Trustee one of the following is appointed as Trustee in place of the Trustee who has retired:
- (a) if that Trustee is a person - another person who is a Member or a Legal Personal Representative of a Member or a company of which the Member or the Legal Personal Representative of the Member is a director; or
  - (b) if that Trustee is a company - a company all the directors of which are Members or are Legal Personal Representatives of Members
- provided that person or company is not already a Trustee.

## Becoming a Regulated Superannuation Fund

### Rule 4. The Trustee must ensure that the Fund is a Regulated Superannuation Fund

#### Explanation

*To obtain a tax concession the Fund must be a Complying Self Managed Superannuation Fund, A Self Managed Superannuation Fund will not be a Complying Self Managed Superannuation Fund if it is not a Regulated Superannuation Fund.*

#### Rule

The Trustee must cause the Fund to at all times be a Regulated Superannuation Fund.

## Trustee Operations and Obligations

### Rule 5. Removal and Retirement of a Trustee

#### Explanation

*The purpose of this Rule is to provide a mechanism for the removal or retirement of a person or company as a Trustee.*

#### Rule

- 5.1. A Member may retire as a Trustee provided:
  - (a) a company of which the Member is a director is appointed as Trustee; or
  - (b) a Legal Personal Representative of that Member is appointed as a Trustee.
- 5.2. If the Fund has only one Member, a person who is not a member and who is a Trustee may retire as a Trustee provided that another person who is a Relative of the Member or is a person who is not an employer of the Member is appointed as a Trustee.
- 5.3. A company may retire as a Trustee provided:
  - (i) all the directors of that company are appointed as Trustees; or
  - (ii) another company is appointed as a Trustee, provided the directors of that company are also directors of the company retiring as Trustee.
- 5.4. Notwithstanding any Rule a Trustee may retire as Trustee of the Fund if an Approved Trustee is or has first been appointed as the Trustee of the Fund;
- 5.5. Subject to these Rules and the Act a person or company is removed as a Trustee:
  - (a) if the Trustee is a Member – upon that person ceasing to be a Member;
  - (b) If the Trustee is a Member – upon that Member becoming incapable of acting as Trustee unless a Legal Personal Representative of that Member is appointed as a Trustee in place of that Member;
  - (c) if the Trustee is a company – on that date four months from the time one or all of the directors of the company cease to be Members or the Legal Personal Representatives of Members;
  - (d) if the Trustee is prohibited from being a Trustee by reason of Rules 2.9, 2.10 or Rule 2.11 – on that date a Trustee is so prohibited from being a Trustee;
  - (e) if the continued appointment of the Trustee as a Trustee will cause the Fund to be a Non-Complying Self Managed Superannuation Fund – on the day before the



day the continued appointment of the Trustee as a Trustee will cause the Fund to be a Non-Complying Self Managed Superannuation Fund.

## **Rule 6. Remuneration and Indemnification of a Trustee**

### **Explanation**

*A Fund will not be a Complying Self Managed Superannuation Fund if the Trustee receives any remuneration for acting as Trustee unless the Trustee is an Approved Trustee.*

### **Rule**

- 6.1.** A Trustee shall not be entitled to be remunerated for acting as a Trustee unless the Trustee is an Approved Trustee.
- 6.2.** A Trustee may apply the assets of the Fund in indemnification of itself or a former Trustee for expenses incurred by itself or a former Trustee in managing or administering the Fund provided:
  - (a) the Trustee or the former Trustee acted honestly in the matter in respect of which the indemnification is sought;
  - (b) the Trustee or the former Trustee did not intentionally or recklessly fail to exercise, in relation to the matter in respect of which indemnification is sought, the degree of care and diligence that the Trustee or the former Trustee was required to exercise.

## **Rule 7. Meetings of the Trustees**

### **Explanation**

*If there is more than one Trustee, the Trustees should meet to decide matters such as the:*

- *appointment of various professional advisers to the Fund including the Auditor,*
- *establishment of a bank account or cash management trust for the Fund,*
- *setting of an investment objective and investment strategy for the Fund,*
- *admission of Members to the Fund,*
- *acquisition and disposal of investments pursuant to the Fund's investment strategy,*
- *approval of the payment of Benefits to a Member (including payment of a Pension),*
- *payment of a Death Benefits,*
- *acceptance of a Binding Death Benefit Nomination from a Member,*
- *review of audit reports,*
- *creation of any Reserves.*

*Normally the Manager, the person whom the Trustees have appointed to be responsible for the day-to-day administration of the Fund, will call meetings. However Members with Members' Account balances equal to 50% or more of the balances of all Members' Accounts can also call a meeting.*

*Where the Trustee is a company decisions will be made at meetings of the directors of that company rather than at meetings of the Trustees. In this case meetings of the company must be held in accordance with the constitution of that company. It is important that the constitution of any company that is a Trustee be compatible with the Rules.*

*These Rules are designed to ensure that Members would normally vote according to their interests in the Fund. The constitution of the Strategist special purpose company contains rules that are designed to only allow directors of any such company to vote at directors' meetings of that company according to the directors' interests in the Fund (or the interests of those Members who those directors represent).*