



**COOPER GRACE WARD**  
LAWYERS

## **LEGAL ADVICE**

*The Wishart Family Super Fund*  
Prepared for **Grants Law Firm**

**Confidential and subject to legal professional privilege**

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## TABLE OF CONTENTS

1.	INTRODUCTION .....	1
2.	BACKGROUND.....	1
3.	SUMMARY OF ADVICE AND RECOMMENDATIONS .....	2
4.	ESTABLISHMENT .....	ERROR! BOOKMARK NOT DEFINED.
	Ratification deed .....	2
	General requirements to establish a trust.....	2
5.	COMPLIANCE ISSUES.....	3
6.	LEGAL PROFESSIONAL PRIVILEGE .....	4
7.	SCOPE OF OUR ADVICE.....	4



## 1. INTRODUCTION

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- 1.1 You have asked us to advise whether The Wishart Family Super Fund (**Fund**) has been validly established and whether there are any compliance issues arising from the error in the signing of the original trust deed for the Fund.
- 1.2 This document sets out:
- (a) the background upon which we have based our advice;
  - (b) a summary of our advice and recommendations; and
  - (c) our legal analysis of the relevant issues.

## 2. BACKGROUND

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- 2.1 The Fund was established by deed dated 9 December 2014 (**Trust Deed**) between Simmons Livingstone & Associates Pty Ltd (**Principal**) and Wishart Family SMSF Pty. Ltd. (**Trustee**).
- 2.2 Simon Leigh Wishart is and at all times has been the sole member of the Fund.
- 2.3 The directors and secretaries of the Principal and the Trustee were as follows (as at 7 July 2015):

	Director	Secretary
Simmons Livingstone & Associates Pty Ltd	Simon Livingstone Kristopher Simmons	-
Wishart Family SMSF Pty. Ltd.	Simon Leigh Wishart	Simon Leigh Wishart

- 2.4 The Principal purported to sign the Trust Deed to establish the Fund, however Simon Leigh Wishart signed on behalf of the Principal, instead of the directors of the Principal. There is no evidence he was authorised to sign the Trust Deed on behalf of the Principal.
- 2.5 The Member has not started a pension from the Fund.
- 2.6 The Fund received a rollover from Hostplus for the Member on 23 March 2015. This was the first deposit to the Fund's bank account.
- 2.7 The Trustee signed a deed to establish a bare trust (**Bare Trust**) as part of a limited recourse borrowing arrangement on 14 April 2015.
- 2.8 The trustee of the Bare Trust entered into contract to purchase a property using the limited recourse borrowing arrangement on 21 April 2015.
- 2.9 Two ratification deeds have been signed in relation to the signing and effectiveness of the Trust Deed:
- (a) one prepared by Grants Law Firm signed on 11 January 2016; and
  - (b) one prepared by Kemp Strang (we have not been provided with a signed copy) (**Ratification Deeds**).

### 3. SUMMARY OF ADVICE AND RECOMMENDATIONS

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- 3.1 The Ratification Deeds are effective in ratifying the execution of the Trust Deed, and confirming the establishment of the Fund.
- 3.2 The Trust Deed and the Ratification Deeds clearly demonstrate the parties' intention to establish the Fund on 9 December 2014. The Fund was established from this 23 March 2016 (if not earlier), as it held property first on this date.
- 3.3 From a superannuation compliance perspective, there are no further issues created by the error in signing the Trust Deed. There is no requirement for a self-managed superannuation fund (SMSF) to have a written trust deed, and as such, even if the terms of the Trust Deed are found to not be binding, this will not by itself prevent the Fund from being compliant.

### 4. RATIFICATION DEEDS

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- 4.1 The Ratification Deeds are effective in:
- (a) ratifying:
    - (i) the establishment of the Fund and terms of the Trust Deed;
    - (ii) the signing of the Trust Deed by the Principal; and
  - (b) confirming that the Trustee and Principal:
    - (i) intended to establish the Fund on 9 December 2014;
    - (ii) agree that the Principal is the principal of the Fund;
    - (iii) were bound by the terms of the Trust Deed from 9 December 2014; and
    - (iv) agree to continue to be bound by the terms of the Trust Deed from the date of the Ratification Deeds.
- 4.2 The Ratification Deed prepared by Grants Law Firm has been correctly signed by the relevant parties and is binding.

### 5. GENERAL REQUIREMENTS TO ESTABLISH A TRUST

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- 5.1 It has long been established that to establish a trust there must be:
- (a) a trustee;
  - (b) who holds the legal title to trust property;
  - (c) for a beneficiary.
- 5.2 For a trust to be created, it is not essential there is written trust deed. A written trust deed is useful in that it outlines the terms of the trust.
- 5.3 The Fund was established with a trustee and beneficiaries, which are outlined in the Trust Deed, and confirmed by the Ratification Deeds. It is clear from the documents the parties intend the Fund to be governed by the rules in the Trust Deed from the time it was established.

- 5.4 The statements for the bank account for the Fund (Macquarie Cash Management Account 963292206) indicate that the first deposit into that account was on 23 March 2015 for the sum of \$251,740.36. Assuming this deposit was the first asset of the Fund, the Fund was established at this point if not before. This means the Fund was established from 23 March 2015 at the latest.
- 5.5 In addition to this, fundamental to the creation of an express trust is that the settlor or principal have an intention to create a trust. The High Court in *Byrnes v Kendle* [2011] HCA 26 indicated that in determining whether a trust has been created, the objective intention rather than the subjective intention of the settlor/principal should be considered.
- 5.6 Based on the following information, on an objective view it appears that the parties had an intention to establish the Fund on the terms in the Trust Deed:
- (a) the existence of the Trust Deed demonstrates that the parties were actively engaging in the establishment of the Fund, rather than unintentionally creating a trust by their actions;
  - (b) the wording of the Trust Deed is clear as to the purpose of the trust, its terms and identities of the trustee and beneficiaries;
  - (c) the Ratification Deeds ratify the intentions of the parties in relation to the establishment of the Fund;
  - (d) the parties have established a bank account for the Fund, and also requested a rollover of a member's account from a retail fund to the Fund, which indicates that they believed the Fund to be in existence; and
  - (e) the role of the Principal is to establish the Fund (see clause 1 of the Trust Deed) and although the Principal did not correctly sign the Trust Deed, the Ratification Deeds confirm the Principal's intention to establish the Fund.

## 6. COMPLIANCE ISSUES

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- 6.1 In addition to the trust law requirements, there are number of requirements in the *Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act)* to establish an SMSF.
- 6.2 An SMSF must be a 'regulated superannuation fund' and receive concessional taxation treatment as a complying superannuation fund.
- 6.3 Section 19 of the SIS Act outlines the requirements to qualify as a regulated superannuation fund:
- (2) The superannuation fund must have a trustee.
  - (3) Either of the following must apply:
    - (a) the trustee of the fund must be a constitutional corporation pursuant to a requirement contained in the governing rules;
    - (b) the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions.
  - (4) The trustee or trustees must have given to APRA, or such other body or person as is specified in the regulations, a written notice that is:
    - (a) in the approved form; and
    - (b) signed by the trustee or each trustee;

electing that this Act is to apply in relation to the fund.

- 6.4 Clause 3 of the Trust Deed identifies the Trustee as the initial trustee of the Fund in accordance with section 19(2) of the SIS Act. We have assumed that the director of the Trustee has specifically consented to act in the role of director, and signed the declaration in the form required by the ATO. Please let us know if this is not the case.
- 6.5 Under section 19(4) of the SIS Act, the trustee of an SMSF must lodge an election with the Australian Tax Office (ATO) to become a regulated superannuation fund and be entitled to concessional tax status. This must occur within 60 days of the SMSF's establishment.

We have assumed that the Trustee has lodged the election with the ATO in accordance with section 19(4) of the SIS Act. Please let us know if this is not the case.

- 6.6 Clause 2 of the Trust Deed indicates that the purpose of the Fund is to provide old age pensions and benefits to members upon their retirement, which is consistent with the requirements of section 19(3)(b) of the SIS Act.

However, given that the Trust Deed was not correctly signed, it is not completely clear whether the rules outlined in the Trust Deed are binding before the Ratification Deeds. However, section 10 of the SIS Act defines 'governing rules' as follows:

"governing rules", in relation to a fund, scheme or trust, means:

- (a) any rules contained in a trust instrument, other document or legislation, or combination of them; or
- (b) any unwritten rules;

governing the establishment or operation of the fund, scheme or trust.

- 6.7 The reference to 'unwritten rules' indicates that it is not necessary to have a written trust deed or governing rules in order to establish an SMSF. Given the Trustee properly signed the Trust Deed and the terms of the Ratification Deeds, the terms of the Trust Deed are the governing rules for the Fund from 9 December 2014.

## **7. LEGAL PROFESSIONAL PRIVILEGE**

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- 7.1 This advice and any communications between us in relation to this matter are for the purposes of giving you advice or contemplated litigation. This means that you are able to preserve the confidentiality of our advice and communications with you under the rules of legal professional privilege. To preserve this privilege in your favour, you should keep the contents of this advice and our communications confidential.
- 7.2 This also means that in the course of any negotiations you may have with external parties you should not make reference to the fact you have received legal advice from us or the substance of our advice. Otherwise, you may need to disclose our advice and communications with us to your opponents.

## **8. SCOPE OF OUR ADVICE**

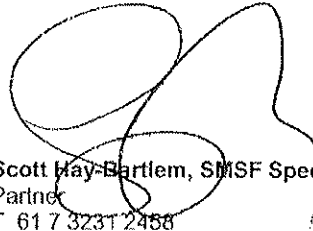
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- 8.1 You have not asked us to:
- (a) provide advice on whether there are any tax or duty issues in relation to the Ratification Deed;
- (b) provide general compliance advice for the Fund beyond considering the error made in the signing of the Trust Deed; or

- (c) provide any advice, including superannuation compliance advice in relation to any aspect of the borrowing arrangement the Fund is currently involved in.
- 8.2 Our advice is based on legislation and case law current at the date of this report. It is always possible there will be changes in the legislation or new court decisions at some future date. We are not in a position to comment on the likelihood of or the possible scope of those changes.
- 8.3 The advice is also provided on the assumption that the background section of this report is correct. If you are uncertain as to whether any of the information in those paragraphs is correct, you should contact us as this may affect the advice.



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