SMSF Success-ion

Presented by Tim Howard

BT Tech Services

16th March 2021

Agenda

Estate & Succession Planning
01

Complying with SISA
02

Control & Conflict
03

EPoA
04

Administration
05

Is it time to Wind up my SMSF?

1. Uneconomic, 575
2. Too hard/expensive
3. Dead
4. Dementia
5. Divorced
6. Disinterested
7. Disqualified
8. Departure (CM&C)

Governing Thought

SMSF SUCCESS-ion

Agenda

Estate & Succession Planning
01

Complying with SISA
02

Control & Conflict
03

EPoA
04

Administration
05

Considerations

Complying with SIS S17A

Each member must be a trustee or a director of the corporate trustee company.

- When a member/trustee dies they cease to be a trustee or director of the trustee company.
- If your SMSF has two individual trustees and one member dies the surviving trustee has complete control of the SMSF and can decide how and to whom your death benefits are paid.
- The SIS Act does not dictate that when a member dies (or loses capacity), that the LPR automatically becomes trustee/director.
- S17A(3)(b)(ii) allows for the deceased's LPR to act as trustee/director in place of the member without causing the fund to fail the definition of an SMSF, but it's not an automatic appointment unless the trust deed directs it.
- The SMSF Trust Deed will provide direction as to what happens after the member's death.
- In situations where the LPR is becoming a trustee to comply with S17A(3)(b)(ii), the legal personal representative (LPR) must be appointed as a trustee, or director of the corporate trustee of the SMSF. The deceased member must cease to be a trustee or director of the corporate trustee except where the LPR is appointed as an alternate director.

Complying with SIS S17A

The LPR steps in until the death benefits start to be paid, which must be done as soon as practicable, but generally within six months of death.

After death benefits start to be paid,

- S17A(4) provides a "grace period" up to six months to restructure trusteeship of the SMSF.
- The LPR must resign as trustee/director.
- The trustee structure must meet the legal definition of an SMSF (s17A) **or** voluntarily wind up your SMSF and roll the benefits into an APRA (Australian Prudential Regulation Authority) regulated fund.

Correctly timing changes of trustee and admission of members

s17A(5) provides that the six-month grace period does not apply in respect of a failure of the basic conditions.

- The 'grace period' does not apply where a member joins the fund before they are appointed as a trustee or director of a corporate trustee, or.
- If the SMSF fails to appoint a member who was previously under a legal disability because of their age as a director of a corporate trustee within six months of their attaining age 18.

Disqualified Persons

SISA S126K prohibits disqualified persons from being appointed as trustees or directors of corporate trustees of SMSF's.

A disqualified person includes anyone convicted of an offence of dishonesty, and undischarged bankrupts.

The six month grace period does not apply to disqualified persons.

Trustees or directors of corporate trustees facing bankruptcy should be removed in advance to ensure they do not contravene the SISA.

A disqualified person cannot appoint a replacement trustee under an EPOA, the LPR of the member is not permitted to be a trustee or a director of a corporate trustee of an SMSF.

options are;

1. appoint an APRA approved Trustee (Small APRA Fund)
2. rollover the members balance to another APRA fund

SMSF Residency

There a number of requirements for an SMSF to be an Australian superannuation fund and maintain its complying status.

Central management and control (CM&C) of the SMSF must ordinarily be located in Australia, if the SMSF fails this test it lose its complying status.

Before SMSF members go overseas they should seek advice about maintaining SMSF residency,

Section 17A (3)(b)(ii) details how to manage CM&C.

- A member may appoint a locally-based attorney under an enduring power of attorney to act in place of them as the trustee/director so that the CM&C of the fund remains in Australia while the member is overseas.
- the member would need to resign as a trustee/director and appoint their locally-based attorney in their place as a full director.

Temporary absence rules and Active member tests still need to be considered

Agenda

Estate & Succession Planning
01

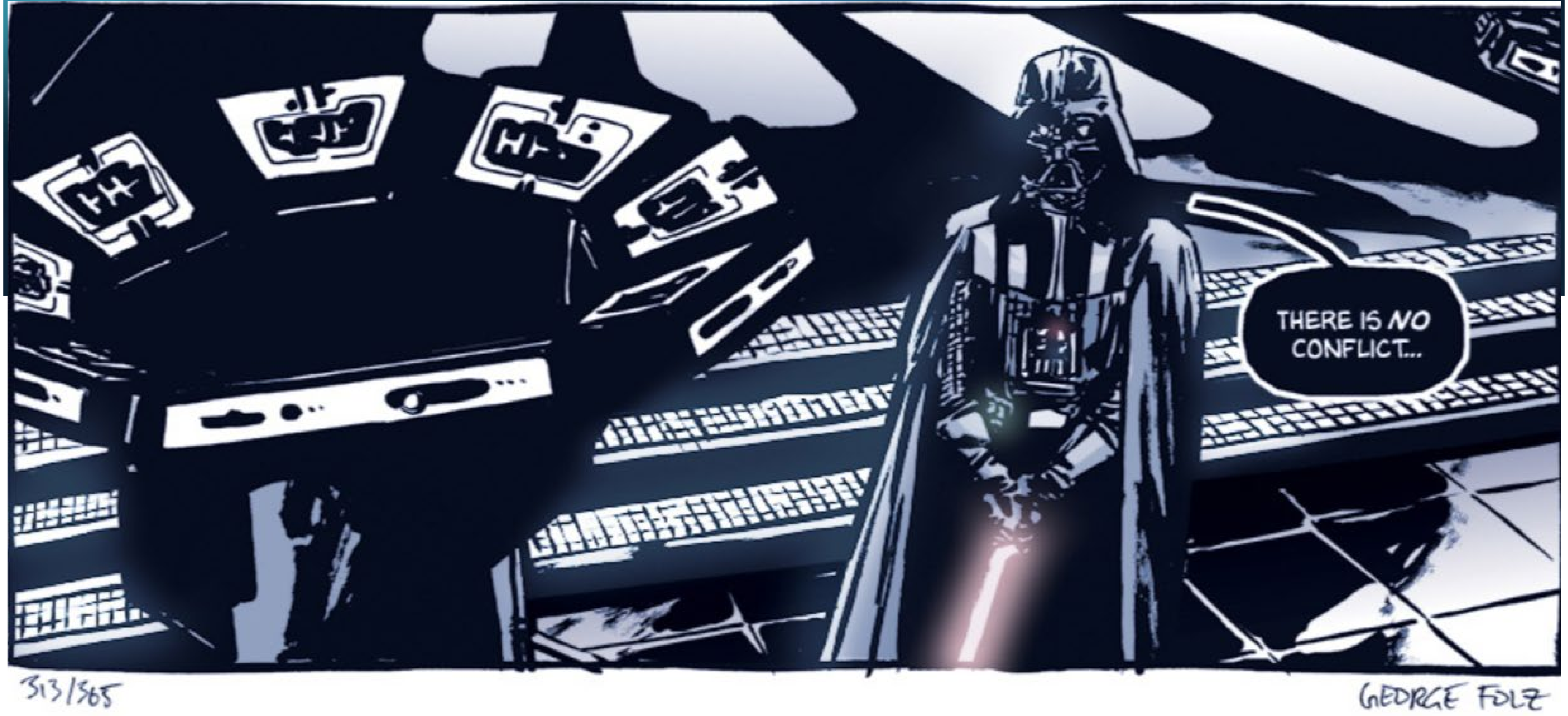
Complying with SISA
02

Control & Conflict
03

EPoA
04

Administration
05

Passing CONTROL of your SMSF



Legal Personal Representative (LPR)

S10 defines "legal personal representative" for the purposes of s17A(3), as
"the executor of the Will or administrator of the estate, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person"

When the deceased's Executor is multiple individuals the ATO confirms in SMSF 2010/2 that all, or one, or some combination of these individuals could be appointed as trustee(s)/director(s).

Once appointed, the Executor is a trustee and they will be involved in all aspects of running the SMSF not just dealing with the death benefit and be equally responsible for the compliance of the SMSF.

Important to ensure that the deceased understands that control of the SMSF is now with their LPR.

Highlights the importance of the Will as it determines who becomes the Executor of the deceased estate and therefore the LPR that may replace the deceased member as trustee of the SMSF.

Removal and Appointment Powers

The process for removing and appointing a new trustee/director must be followed to ensure that the control of the SMSF transfers to the right people.

The trust deed will determine the method for the removal and replacement of an individual trustee. Trust Deeds that follow the requirements within section 17A(3)(a) can risk giving control over death benefit payment decisions to the surviving trustee, especially where there is no valid binding death benefit nomination (BDBN) in place.

For example, in a two member SMSF the surviving member/trustee would need to consent to have the LPR appointed as a trustee. This may be an issue where the interests of the surviving member and the LPR are not aligned.

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

(keep all original copies of prior deeds to ensure there is a complete document trail.)

Constitution & Shareholding

Who can act when a director loses capacity or dies.

- Under company constitutions, a director automatically loses their office when they die or lose mental capacity. Following loss of mental capacity, a director's enduring attorney does not automatically become a director, or "stand in as the director" and exercise director rights. the constitution must give specific power to allow the enduring attorney to vote in place of a shareholder, allowing new directors to be appointed.
- Appointment and removal of a director is critical to the decision making powers of a corporate trustee and therefore control of the SMSF.
- To appoint or remove a director requires a majority of voting shares, the SIS Act does not prescribe who must own the shares in a corporate trustee.
- The distribution of voting rights amongst the shareholders needs to be carefully considered as part of a member's overall estate plans where there is a corporate trustee.

Constitution & Shareholding Continued…

Successor Directors

A constitution can allow for successor directors to take over from deceased or incapacitated directors making it possible to plan for succession of a director in advance.

Making a successor director nomination allows a director to nominate a person to automatically step into the directors role immediately upon loss of capacity or death.

Successor director strategy will work in conjunction with the member's overall estate and succession plan to enable an attorney appointed under an EPoA or an executor (LPR) of a deceased member's will to be automatically appointed as a director without any further steps involved.

Agenda

Estate & Succession Planning

01

Complying with SISA

02

Control & Conflict

03

EPoA

04

Administration

05

Incapacitated

Enduring Power of Attorney (EPOA)

Appointing the person holding the EPOA as trustee of the SMSF

- The existing trustee must retire as a trustee and the attorney is appointed as trustee.
- This process must follow the deed, SIS Act and SIS Regulations;
- If the trustee is a company the fund will need to comply with the company's constitution and Corporations Act with respect to the retirement and appointment of the director;

When an attorney becomes a director or trustee in relation to an SMSF, they do so in their personal capacity and not in their capacity as attorney… In that role they are bound by the general law of fiduciary duties of trustees or the Corporations Act.

The ATO has indicated that it has increased its focus on SMSFs that may have compliance and lodgement issues due to the incapacity of trustees.

- This is a reminder to advisers that it is important for SMSF members to have an enduring power of attorney.

Is It?


Everything is proceeding as I have foreseen it
306/365
GEORGE FOLZ

Dawson v Dawson [2019] NSWSC 826

Background:

- (2005) Peter Dawson and his wife Estelle set up an SMSF. (2014) Peter lost capacity while divorcing Estelle.
- (2013) Tony (Peter's son and enduring power of attorney) became the trustee of the SMSF with Estelle.
- (2015) Peter died (DB circa $1.4m), (2018) George (LPR) signed a deed of confirmation to replace Tony as Trustee of the SMSF with effect from the date of Peters Death (2015)

Q: Does the trustee of the SMSF change because of Peter's death, and if so who is the replacement trustee Tony or George?

The decision:

- At Peter's death Tony and Estelle were the trustees of the SMSF and the fund remained a two member fund.
- Tony was not automatically removed as a trustee of the SMSF due to Peter's death and replaced by George.
- The plaintiff's appointment as trustee was a personal role which did not cease on the death of the member, even though the EPA ceased on death.
- Peter remains a member of the SMSF until his death benefit is paid.
- There was no express power in the trust deed that ended this role on the death of a member, nor was there any other power in the deed that would operate to terminate the plaintiff's role as trustee.
- The *Superannuation Industry (Supervision) Act 1993* does not remove an existing trustee when a member dies and replace them with the deceased member's executor – the provisions just 'stipulate the circumstances and structure in which a fund will remain compliant.

These rules are subject to the terms of the trust deed, a differently worded trust deed may give a different result.

The case confirms the importance of:

- Following the trust deed when changing trustees.
- Properly considering who will become the trustee of an SMSF and how to pass control to avoid legal disputes

Moss v Hayne (2008) VSC 158

Background

Mr Hayne and Ms Moss were the sole members of an SMSF. Following Hayne's death the corporate trustee of the SMSF (PMSPL) had two directors (Moss and Hayne's lawyer) and a single member (Moss).

Documents were then executed to change the trustee of the SMSF to Moss Super Pty Ltd (Moss as sole director).

The change of trustee consisted of documentation executed by:

- The 'old' trustee, resigning as trustee of the SMSF; and
- Moss as sole member appointing Moss Super Pty Ltd as the 'new' trustee.

Mr Hayne’s children from previous relationship challenged the change of trustee to Moss Super Pty Ltd.

Decision

Determining whether or not the change of trustee was valid the judge considered the terms of the SMSF’s trust deed.

The trust deed referred to the 'founder' and required the founder to appoint any new trustees, Moss was a director of the founder.

Moss successfully resigned the company (PMSPL) as trustee and signed the change of trustee documentation as the sole remaining “*member”* and as director of Moss Super Pty Ltd.

This resignation and appointment did not comply with the trust deed as the change of trustee documentation was not executed by Moss as the “founder” (Moss signed the documentation, but not in her capacity as director of the founder). In other words the right signature was there but the wrong title appeared above it. (that of the member)

The judge ruled that:

If parties have established a complicated legal structure such as this and where they have multiple roles to play they must respect the conflicts which may arise.

As a result the change of trustee was not valid and Moss Super Pty Ltd was not the trustee of the SMSF 'the office of Trustee is vacant'.

Classic SMSF Disputes

Classic SMSF Disputes

Katz v Grossman [2005] NSWSC 934
Ioppolo v Conti [2013] WASC 389
Wooster v Morris [2013] VSC 594
Munro v Munro [2015] QSC 61
CMS v Booth [2017] SASCFC 122
McIntosh v Mcintosh (2014) QSC 99
Donovan v Donovan [2009] QSC 26
Karger v Paul (1984) VR 161, 163 11
Marsella v Wareham (No 2) [2019] VSC 65
Perry V Nicholson (2017) QSC 163
Narumon Pty Ltd (2018) QSC 185
Moss Super Pty Ltd v Hayne [2008] VSC 158
Dawson v Dawson [2019] NSWSC 826

Agenda

Estate & Succession Planning
01

Complying with SISA
02

Control & Conflict
03

EPoA
04

Administration
05

Administration

Change of Trustee

Checklist to ensure variations and changes are correctly documented.

1. The variation or change of trustee must be strictly in accordance with the trust deed

2. The documentation prepared must leave no room for error.
   - There is a risk when using document templates where they do not operate effectively with other fund documents or the requirements of the trust deed.

3. Ensure that the documents have been properly signed (and witnessed) by all necessary parties and dated the date they were signed.

4. If there are issues with the history of the trust (such as lost trust deeds or incorrect changes of trustee) seek advice about the implications and what action to take.
   - (*Sutton v NRS(J) Pty Ltd* [2020] NSWSC 826)

5. Records relating to any changes to an SMSF trustee be retained for at least 10 years with an administrative penalty of 10 penalty units on each trustee applicable.(S104)

Trustee Consent and Declarations

ALL TRUSTEES AND DIRECTORS MUST:

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

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

- The ATO 'Trustee Declaration' (NAT 71089) must be signed within 21 days of the appointment.
- Trustees are required to retain the declaration for at least 10 years and, if requested, be able to provide the declaration for inspection by the ATO.

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

Notify ASIC & the ATO

The fund must lodge change of details documents with ATO and/or ASIC to update its registrations and ensure regulatory compliance, you need to notify the ATO within 28 days if there is a change in:

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

Adding a new member or trustee, or changing from individual to corporate trustee may trigger the ATO 'secure front door' process.

- the ATO may review the new trustee, member or structure if they do the SMSF is taken offline while the review is conducted. The process may take up to 56 days to complete.

This is one of the many steps the ATO are taking to safeguard the retirement of Australians.

Audit Standards

Section or regulation	Minimum expectation of audit check
S17A	To check if the fund meets the definition of an SMSF, the auditor should collect evidence by checking the: › trust deed › current number and names of members › type of trustee › relationship between members (for example, no member of the fund is an employee of another member, unless they are relatives) › names of individual trustees or directors of corporate trustees › details of legal personal representatives where relevant. **See also:** › SMSFR 2010/2 - *Self Managed Superannuation Funds: the scope and operation of subparagraph 17A(3)(b)(ii) of the Superannuation Industry (Supervision) Act 1993.*

Change the Legal Title of Fund Investments

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

For example:

- Don Jay & Mel Jay as trustees for (ATF) the Jay Family Super Fund would need to change to Trump Pty Ltd ATF the Jay Family Super Fund

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

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

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

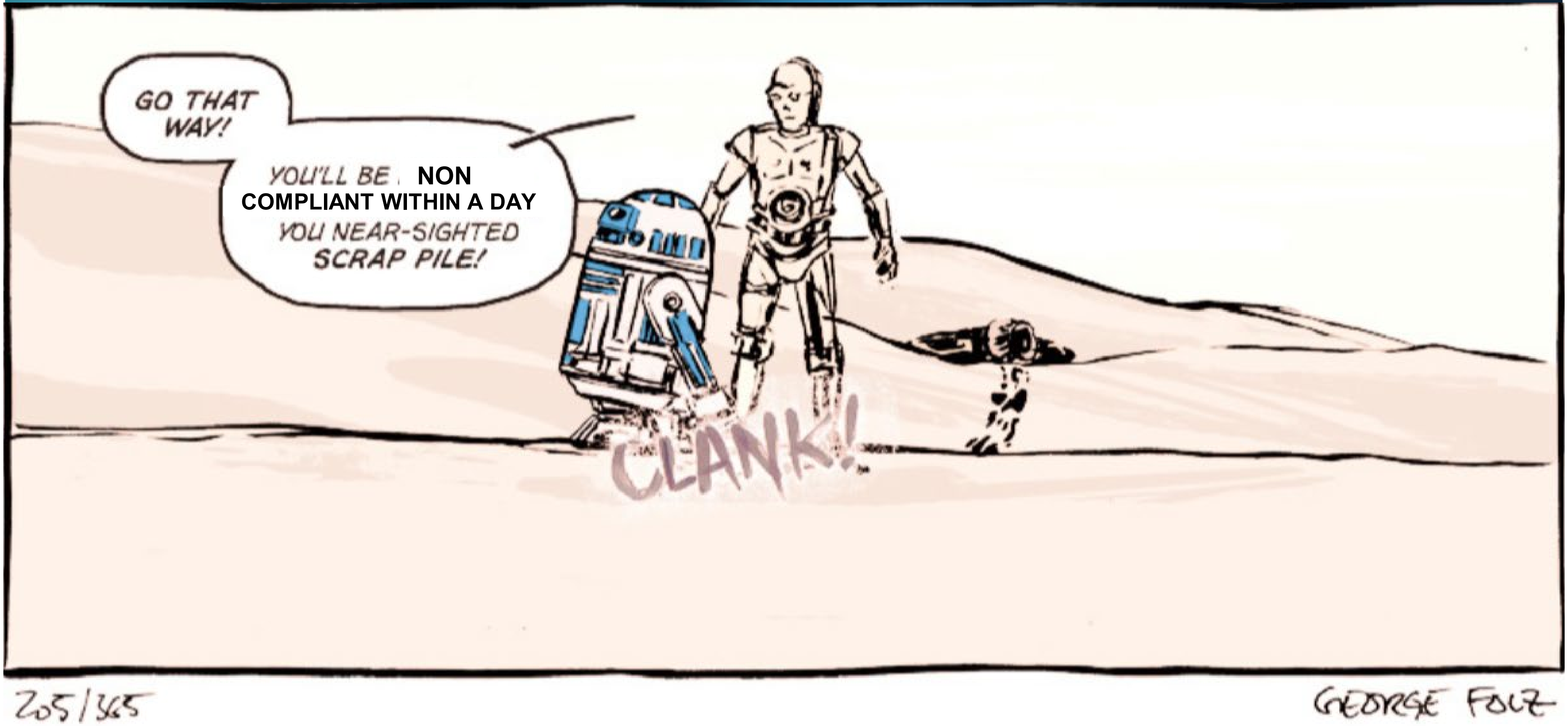
Administration Checklist

1. Review the trust deed of the fund and the constitution of the company (if there is a corporate trustee)
2. All legal documents must be prepared in line with requirements of the SMSF deed in order to be valid.
   - A resolution of Trustees and/or Retirement or Appointment of Trustee Deed
   - A resolution confirming consent by the Members
   - Consent to act as Trustee for each new trustee/director
   - Trustee Declaration for each new trustee/director (NAT71089)

   – https://www.ato.gov.au/Forms/Trustee-declaration/ (Must be signed within 21 days of becoming a trustee/director)
3. SIS Reg 11.07AA Trustees must notify the ATO in writing within 28 days of changes to trustees or members.
   - ATO Change of Details for Superannuation Entities (NAT 3036).

   – https://www.ato.gov.au/super/self-managed-super-funds/administering-and-reporting/notify-us-of-changes/
4. Inform ASIC where a change is made to a corporate trustee
   - Company detail changes must be made online.
   - Notify ASIC within 28 days of the change
   - Notify ASIC of changes to shareholding in corporate trustee
5. Update the legal title of fund investments once change of individual trustee is finalised

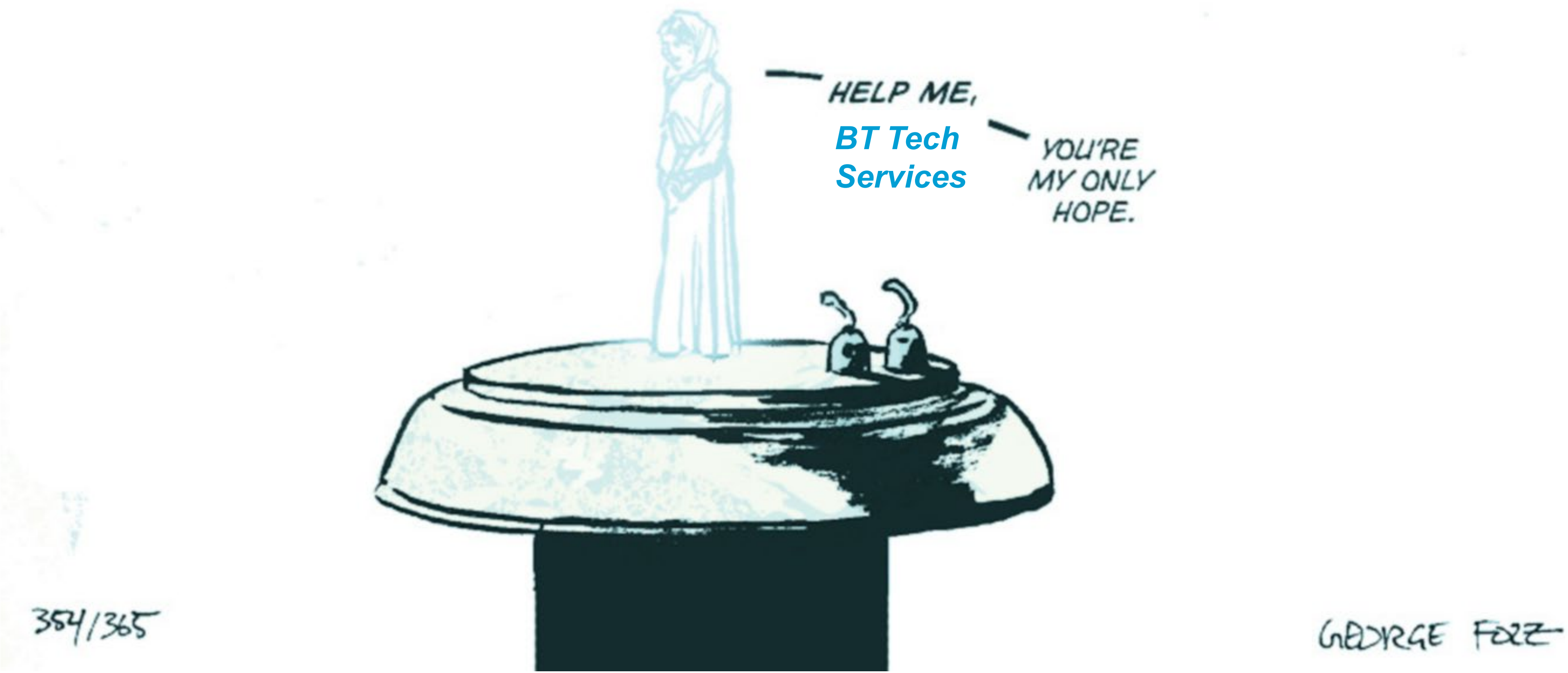
Conclusion


GO THAT WAY!
YOU'LL BE NON COMPLIANT WITHIN A DAY YOU NEAR-SIGHTED SCRAP PILE!
CLANK!
205/365
GEORGE FOLZ

Conclusion

- The importance of comprehensive estate planning and correct documentation.
- Estate planning should be regularly reviewed to incorporate changing circumstances in a person’s life.
- Make sure the SMSF’s trust deed is up to date and contains the relevant clauses and powers regarding replacing trustees, payment of death benefits to beneficiaries etc.
- Remember that the deceased member’s will does not take precedence over the discretionary powers of a superannuation fund trustee in making death benefit payments in accordance with the trust deed and the SIS Act.
- Remove conflicts of interest, Have the appropriate structure in place to ensure the surviving spouse does not control the distribution of death benefits if they are not the beneficiary .
- Trustees should seek specialist advice before exercising their discretion in the payment of superannuation death benefits.
- Inform trustees that SMSF disputes cannot be taken to AFCA, but instead will wind up in the courts.
- ASIC want Advisers to do this as part of the Advice process when recommending the set up of an SMSF (refer to ASIC info sheets 205 & 206)

Where to Go for Help?



BT Technical Services Team

For more information or for technical assistance, please contact the team on:

Phone:
1800 655 901
(8:30am – 6:00pm AEST Mon – Fri)

Email:
technical@btfinancialgroup.com

Questions?

Disclaimer

This presentation has been prepared by [insert relevant entity here] 'BT' and is for general information only. Every effort has been made to ensure that it is accurate, however it is not intended to be a complete description of the matters described. The presentation has been prepared without taking into account any personal objectives, financial situation or needs. It does not contain and is not to be taken as containing any securities advice or securities recommendation. Furthermore, it is not intended that it be relied on by recipients for the purpose of making investment decisions and is not a replacement of the requirement for individual research or professional tax advice. BT does not give any warranty as to the accuracy, reliability or completeness of information which is contained in this presentation. Except insofar as liability under any statute cannot be excluded, BT and its directors, employees and consultants do not accept any liability for any error or omission in this presentation or for any resulting loss or damage suffered by the recipient or any other person. Unless otherwise noted, BT is the source of all charts; and all performance figures are calculated using exit to exit prices and assume reinvestment of income, take into account all fees and charges but exclude the entry fee. It is important to note that past performance is not a reliable indicator of future performance.

This document was accompanied by an oral presentation, and is not a complete record of the discussion held.

No part of this presentation should be used elsewhere without prior consent from the author.

For more information, please call BT Customer Relations on 132 135 8:00am to 6:30pm (Sydney time)