

SMSF BY THE DEED

There were 566,735 self-managed super funds (**SMSF**) and 1,075,267 SMSF members as at December 2015 according to the Australian Taxation Office. A great example of the importance of the SMSF deed can be found in the case of *Moss Super Pty Ltd & Anor v Hayne & Anor* [2008] VSC 158.

The Key Facts

1. The Photography Management Services Pty Ltd Superannuation Fund (**Fund**) was created by a deed dated 31 May 1985 (**Deed**) by Photography Management Services Pty Ltd (**Founder**).
2. The Founder was also the trustee of the Fund.
3. Hayne and Moss were the directors of the Founder.
4. Hayne and Moss were the only members of the Fund.
5. Hayne and Moss were domestic partners.
6. Under the terms of the Deed, the Founder was obliged to appoint a new trustee if the office of trustee became vacant.
7. On 25 July 2005, Hayne died with a credit balance of \$710,820.85 in the Fund.
8. Hayne's executors were Moss and Sundberg (**Executor**).
9. On Hayne's death:
 - (a) the Executor replaced Hayne as a director of the Founder; and
 - (b) Moss became the sole member of the Fund.
10. Hayne's will left one fifth of the residue of his estate to each of:
 - (a) his two children from an earlier marriage (**Hayne's Children**);
 - (b) two children of Moss's earlier marriage; and
 - (c) Moss.
11. On 30 May 2006, the Founder was purportedly replaced as trustee of the Fund by Moss Super Pty Ltd (**MSPL**). MSPL's sole director was Moss. The documents prepared to effect this were:
 - (a) (**Resignation Letter**) a letter on the Founder's letterhead addressed to the Fund, signed by Moss and the Executor as directors stating:

I hereby tender the resignation as trustee of Photography Management Service Pty Ltd Superannuation Fund effective 30th May 2006.

- (b) **(Member's Minute)** a signed minute of a meeting of the members of the Fund on 30 May 2006 in which Moss as the sole member was present stating:

Change of Trustee

IT WAS RESOLVED to remove Photography Management Services Pty Ltd as trustee of the Photography Management Service Pty Ltd Superannuation Fund.

IT WAS RESOLVED to appointment Moss Super Pty Ltd as trustee of the Photography Management Service Pty Ltd Superannuation Fund.

- (c) **(MSPL Consent)** a letter from MSPL to the Fund, signed by Moss as sole director stating:

I consent to the appointment of trustee of Photography Management Service Pty Ltd Superannuation Fund effective 30th May 2006.

The Issues

12. After reviewing the terms of the Deed, the Court found that Hayne's interest in the Fund was to be dealt with under the Deed, rather than passing through to the residue of his estate.
13. The remaining issue was whether the trustee of the Fund was effectively changed to MSPL.
14. If MSPL was validly appointed trustee of the Fund:
 - (a) the Fund would be effectively controlled by Moss as sole director of MSPL;
 - (b) MSPL would be empowered to determine which beneficiary under the Deed would receive Hayne's interest in the Fund; and
 - (c) MSPL could make dispositions that were detrimental to Hayne's Children.
15. If the change in the Fund trustee was invalid:
 - (a) the Founder would remain the trustee of the Fund;
 - (b) the Fund would be effectively controlled by the directors of the Founder, being Moss and the Executor;
 - (c) Hayne's Children could benefit from the Executor, an independent party, being involved in dealing with Hayne's interest in the Fund rather than the affairs being solely controlled by Moss.

The Findings

16. The Court found that:
- (a) the Resignation Letter effectively caused the Founder to resign as trustee of the Fund;
 - (b) the resolutions in the Member's Minute were ineffective because:
 - (i) the Founder could not be removed as a trustee, as it had already resigned under the Resignation Letter; and
 - (ii) in any case, the members of the Fund did not have the power to remove or appoint trustees under the Deed; and
 - (c) the MSPL Consent was irrelevant because MSPL could not be appointed trustee by the members of the Fund.
17. The net result was the Fund had no trustee until such time that the Founder appointed another Trustee under its power under the Deed, or otherwise by law or court order.

Conclusion

It is critical that the terms a SMSF trust deed be reviewed carefully for estate planning, and before any act is done concerning the fund. SMSF trust deeds can vary considerably in vesting the power to remove and appoint trustees on different parties, and the mechanism to effect that power.

If an individual serves in several different capacities (here, Moss was a member of the Fund, a director of the trustee of the Fund, a potential beneficiary of Hayne's interest in the Fund, an executor of Hayne's estate, a beneficiary of Hayne's estate, and the sole director of the potential incoming trustee of the Fund) it is important to clearly set out in what capacity that individual is purporting to act.



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