

April 2018

AVOIDING SUPERANNUATION CLAIMS

AN LPLC PRACTICE RISK GUIDE



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Introduction

Every year LPLC sees claims involving superannuation funds. Claims sometimes arise because the practitioner does not have sufficient knowledge or experience with superannuation matters.

Practitioners who regularly act in this area will agree that extensive expertise and understanding is required to properly advise clients and to have the best chance to avoid a claim.

The failure to properly advise clients:

- > may expose a practitioner to civil penalties. For more information about this issue see the LPLC blog [Risk management and advising SMSFs](#)
- > can have serious tax consequences where the advice results in the fund being non-compliant. Non-complying funds can be taxed at 47 per cent compared to the post 1 July 1988 amount of 15 per cent. The amount may be higher than 15 per cent depending on Government policy at the time.

Claims also arise where practitioners overlook some crucial detail. For example, failing to establish the correct name of the trustee of an SMSF and/or whether duty is payable on a transfer of land to an SMSF.

This guide focuses on claims which have arisen in family law, wills and estates and property matters. In all areas simple oversight is the most common cause of claims involving superannuation matters.

Common themes

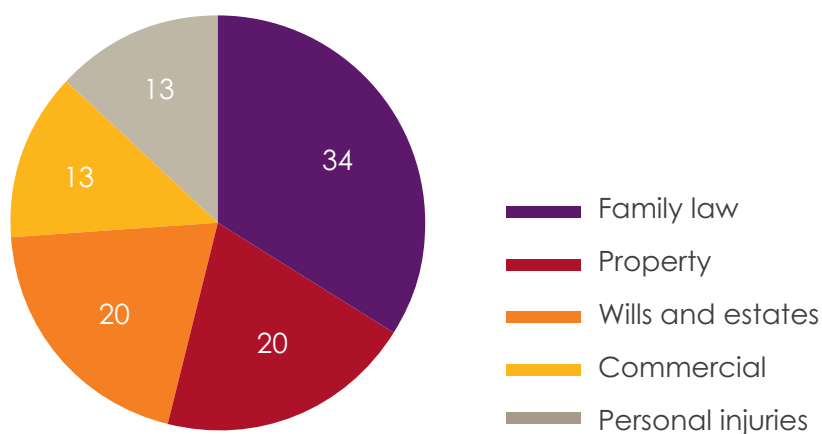
Some common themes based on LPLC's claims data are:

- > failure to properly advise on permitted use of assets of a self-managed superannuation fund.
- > unclear settlement terms about how superannuation is to be divided in family law matters.
- > when moving money or land in or out of a superannuation fund, failing to advise on:
 - » tax consequences
 - » effect on pension
 - » whether duty is payable or an exemption applies.
- > delay when:
 - » telling the trustee of a superannuation fund of the death of a member
 - » obtaining money from the trustee of a superannuation fund
 - » appealing a decision of the trustee of a superannuation fund to the Superannuation Complaints Tribunal. This tribunal will be replaced by the Australian Financial Complaints Authority. The expected start date is November 2018. You can find the relevant legislation [here](#).

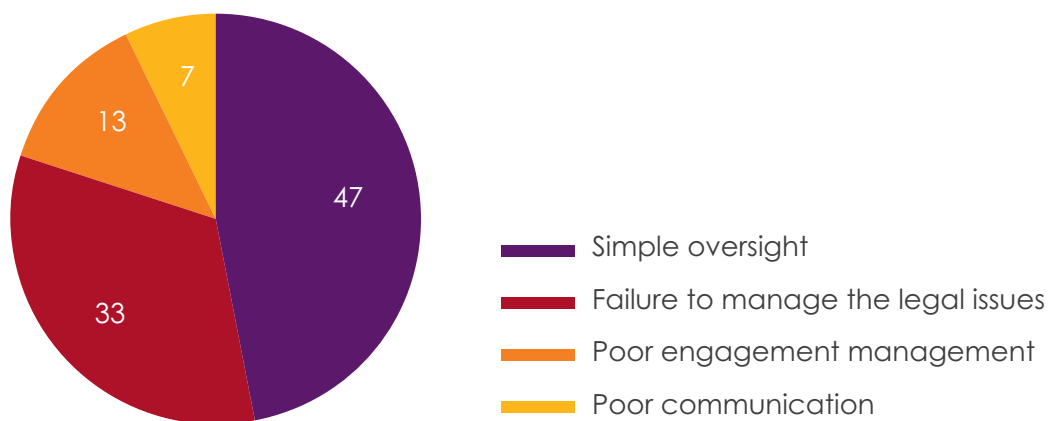
Practitioners should contact LPLC to discuss any concerns they have about advising on superannuation related matters. While LPLC is unable to provide legal advice, it can discuss danger areas, how claims may arise and refer to resources that may be of assistance.

Superannuation related claims from 1 July 2015 to 30 June 2017

Number of claims by practice area by percentage



The main causes of superannuation claims



Areas of law

Family law

Most family law claims involving superannuation funds arise when:

- > the superannuation fund has been mistakenly left out of the asset pool
- > the fund has not been properly dealt with
- > the client fails to understand what will happen to the fund
- > sealed orders are not served on the superannuation fund
- > there has been delay in contacting a trustee
- > an error is made about the amount in the fund.

Claims involve both financial agreements and property orders.

EXAMPLES

Delay in providing certified orders

A practitioner acted for the wife in a family law property settlement. Consent orders were made late 2009 requiring the trustee of the husband's superannuation fund to transfer a sum to the wife's superannuation fund.

The practitioner acting for the wife failed to serve a certified copy of the sealed orders on the trustee until two years later. Just prior to the fund receiving the certified orders the husband withdrew all funds from the superannuation fund so the trustee was unable to comply with the orders.

The practitioner for the wife then made a demand on the husband to comply with the orders failing which application would be made to the court seeking enforcement of the orders.

12 months later the husband made payment to the wife's superannuation fund in accordance with the orders.

Can't access the superannuation yet

In a divorce proceeding judgment was given in the Federal Magistrates' Court apportioning 60/40 in the husband's favour for the sale of the matrimonial home while other assets were apportioned 50/50. The final orders were drafted by the parties' lawyers and filed with the court. The orders were made before changes to the *Family Law Act* in 2002 allowing superannuation to be split.

About four years later the husband complained that:

- > the split relating to the superannuation fund was incorrectly shown as 50/50 and should have been 60/40 in his favour
- > he was not told that payment of the amount held in the wife's superannuation fund could not be made to him until she was 65 and by that stage the husband would be 86.

The husband's practitioner believed there had been a misunderstanding by their client that the 60/40 split applied to all assets. The practitioner said that it was an agreed term of settlement that there was a 50/50 split of the wife's superannuation.

The practitioner also stated that the court was made aware of the delay in the husband receiving the superannuation and there seemed to be no other way of dealing with this issue.

Ultimately the husband did not pursue the claim against the practitioner but it is a good example of how practitioners need to be very clear in their communication with their clients about what is finally agreed.

Orders not served on fund

A practitioner acted for the wife in a matrimonial property dispute which resolved with the issuing of final consent orders in the Federal Magistrates' Court in September 2004.

Pursuant to those orders, superannuation was to be split with \$88,000 to be held on behalf of the wife.

The orders were not sealed and were not served on the fund. Following the death of the husband some eight years later, the fund refused to pay funds to the wife on the basis they had not been ordered to do so.

The practitioner had by this stage destroyed their file, had no recollection of the matter and could not explain why the orders were not sealed and not sent to the trustee.

The claim settled with a payout to the client.

No funds as order not served

A practitioner was instructed by a wife to assist her in obtaining various orders. After a drawn out process orders were eventually made by consent and included an order that when payment was due to the husband under his superannuation fund an amount would be paid from his fund to the non-member wife. The orders also provided that the practitioner for the wife was to serve a sealed copy on the trustee.

Five years later the wife's new practitioner made enquiries with the husband's superannuation trustee and was informed that the funds had already been released to the husband as the trustee had never received a copy of the sealed orders.

A demand was made on the husband to comply with the orders and make payment to the wife. This demand was eventually abandoned as the husband was impecunious.

Wrongly described superannuation as minimal

A practitioner prepared a financial agreement pursuant to section 90B of the *Family Law Act 1975* (Cwlth). The agreement was signed by the parties about 10 days prior to their marriage.

The practitioner said he did not receive any documents from the client about his superannuation. He was told that the client's superannuation was minimal and this was noted in the financial agreement.

About four years after the agreement was entered into the parties separated. At this point the wife discovered that the husband's superannuation was substantial.

The problem for the husband was that the agreement could be declared invalid by the court as a result of his failure to disclose his superannuation.

The husband blamed his lawyer saying he gave the lawyer all of the information but the lawyer failed to include it in the agreement. The practitioner denied he was given full disclosure about the superannuation fund.

The file notes were poor and it was not clear from the file what information had actually been provided to the practitioner.

The claim against the practitioner was settled with a payment to the husband for the loss he suffered due to the agreement being invalid and his partner claiming a greater portion of the assets.

Recommendations

- ☑ Refer to the information provided by the Attorney-General's Department about family law matters and superannuation splitting which can be found [here](#).
- ☑ Ask the client and the other side to provide:
 - » a copy of the most current superannuation statement(s) for any industry funds
 - » latest audit report and financial statement for any self-managed superannuation fund (SMSF).
- ☑ Ensure any terms of settlement, agreement or orders deal with all superannuation funds of both parties.
- ☑ Give the client the opportunity to:
 - » seek advice from a financial advisor, accountant and/or an SMSF auditor
 - » review any terms of settlement, agreement or orders at the time of drafting and take time to explain their effects. Some clients benefit from a diagram showing how assets are split while others may benefit from seeing a list of assets they are receiving and the ones the other party is receiving. Clients also need to know timing on the receipt of any assets.
- ☑ Ask the client to explain to you, or draw a diagram of, their understanding of what will happen in relation to their superannuation fund(s) and those of their spouse / de facto.
- ☑ Provide the trustee of the superannuation fund with a copy of any draft orders with at least 28 days' notice for comment. This is to prevent the situation arising where orders are made but a trustee has no power to undertake the action contemplated by the orders.
- ☑ Have an office procedure that ensures either original sealed orders or a certified copy of the sealed orders are served on the relevant superannuation fund promptly after orders are made. A file closing procedure should also include checking this is done.

Wills and estates

The mistakes involving superannuation occur both in the preparation of wills and the administration of estates. The most common mistakes occur when preparing wills where practitioners do not determine whether the superannuation forms part of the estate. They often incorrectly assume it does when in fact it doesn't. During the administration errors include failing to:

- > determine whether any death benefits from a superannuation fund forms part of the estate
- > invest superannuation funds when paid into the estate
- > inform the deceased's superannuation fund of the death
- > make application to the Superannuation Complaints Tribunal. This tribunal will be replaced by the Australian Financial Complaints Authority. The expected start date is November 2018. You can find the relevant legislation [here](#).

EXAMPLES

Superannuation advice when preparing a will – superannuation does not form part of the Estate unless specifically stated

A practitioner prepared a will which provided that the testator's mother and step father were to receive the testator's superannuation funds.

After the death of the testator it was discovered that:

- > the superannuation funds did not form part of the estate; and
- > no beneficiary had been nominated in relation to the superannuation fund.

At the trustee's discretion the superannuation funds were paid to the testator's son and former wife.

The mother and step father brought a claim against the practitioner alleging that he had failed to advise the testator that the superannuation funds did not form part of the estate.

In his defence the practitioner said that it was his usual practice to tell the testator to make arrangements with the trustee of the superannuation fund to ensure the estate was named as the beneficiary.

The claim was eventually abandoned.

Tell fund when member dies – to avoid obligations to repay in certain circumstances

A practitioner acted for an executor of a deceased estate. The practitioner was informed by the executor that the deceased was a member of the New South Wales Government defined benefit superannuation scheme. The deceased was entitled to payment of a monthly amount from the superannuation fund during his life.

As the trustee of the superannuation fund was not informed about the death, the trustee continued to pay the life benefit after the death until the deceased's bank account was closed. The funds from the account were transferred to the practitioner's trust account and distributed to six beneficiaries.

After the account was closed the trustee of the superannuation fund discovered that there had been an overpayment to the deceased and a demand was made for repayment.

As the overpaid amount had already been distributed to the six beneficiaries the practitioner wrote to the beneficiaries seeking a refund. They declined as they had already spent the money.

The lesson from this claim is that the practitioner should have raised the issue of giving notice to the trustee of the superannuation fund of the death of the member and decided with the client whether the practitioner or the executor client would give notice.

Who are you acting for?

A practitioner acted for the executor of a deceased estate. The executor was the second wife of the deceased and they had been married for approximately three years at the date of his death.

The deceased had a daughter from a previous marriage and the daughter resided outside Australia at the time of her father's death.

The wife was named as the sole beneficiary under his will and preferred beneficiary under the deceased's industry superannuation fund. The wife was concerned that the daughter would bring a claim in relation to the superannuation fund.

Two days after the funeral the wife arranged for her step-daughter to see the practitioner.

At this meeting the step-daughter signed a statutory declaration which was witnessed by another lawyer in the practitioner's office. Pursuant to the declaration the step-daughter disclaimed any interest in the superannuation fund.

Four years later the step-daughter commenced proceedings against the wife and the practitioner who acted for the wife alleging unconscionable conduct and that the practitioner was in fact acting for the step-daughter but failed to properly advise her.

The matter settled with a payment to the step-daughter representing approximately 25 per cent of the value of the superannuation fund held by the deceased.

Time expired before superannuation appeal lodged – the 28-day limitation period

In this claim the practitioner acted for the adult non-dependent children of the deceased. The deceased had nominated the children as beneficiaries under his superannuation fund but the nomination had lapsed at the time of death. As is usual in such circumstances, the trustee paid the funds to the deceased's spouse.

The practitioner informed the children that they could seek a review by the Superannuation Complaints Tribunal. This tribunal will be replaced by the Australian Financial Complaints Authority. The expected start date is November 2018. You can find the relevant legislation [here](#).

The application was posted just prior to the end of the 28-day limitation period but was not received until after the 28 days had expired. The clients were referred for independent advice but ultimately did not pursue a claim against the practitioner.

In some situations the Superannuation Complaints Tribunal may be able to assist with matters involving deceased estates. See for example, D15-16\020 [2015] SCTA 130 where the tribunal ordered an industry fund to honour payment of a life insurance policy which the fund alleged had lapsed.

Practitioners should check the current requirements for making a complaint as this process is likely to change.

The relevant legislation is the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017.

Recommendations

When acting for a testator

- ☑ Have a good working knowledge of how superannuation funds work.
- ☑ Advise the client that they should keep up-to-date records about their superannuation, including the name of any SMSF financial adviser and auditor, and details of any loan obtained to fund the purchase of real estate by the SMSF. The location of this information can be disclosed in a letter kept with the will as the information will be required by the executor.
- ☑ Obtain details of the client's superannuation fund and policy.
- ☑ Ask the client if they:
 - » would like their superannuation to form part of the assets of their estate
 - » have in place a current nomination of beneficiary.
- ☑ Determine whether the fund has binding, non-binding or no nominations and review the superannuation fund trust deed if necessary. Alternatively, advise the client orally and in writing to contact the superannuation fund and obtain details of the nomination arrangements. The client should provide this information in writing to the firm before the will is drawn and finalised.
- ☑ Determine what nomination, if any, the client has made.
- ☑ Give the client an oral and written explanation of what the form of nomination governing the fund means and whether they must renew any binding nomination and how regularly.
- ☑ Where the client has or wishes to make a binding nomination advise them whether this can be done by an attorney in the event of incapacity of the testator. Explain the consequences if the fund does not permit attorneys to renew binding nominations and make allowance for this when drafting the will.
- ☑ When the will is finalised confirm in writing whether or not the superannuation forms part of the estate and what steps the client needs to undertake with the superannuation fund in order to achieve his or her desired outcome.

Recommendations

When acting for an estate

- ☑ For any SMSF check the terms of the trust deed for the replacement of the deceased as a trustee / director of any corporate trustee. This is also necessary to ensure the fund remains compliant under the SIS Act and the Superannuation Industry (Supervision) Regulations 1994. In some circumstances it may be necessary to make application to court. See for example *The Estate of Edith Macdougall* [2013] NSWSC 990.
- ☑ Consider the need to check the Australian Taxation Office (ATO) website for membership details of any superannuation fund or any lost superannuation for:
 - » current superannuation you need the testator's myGov username and password
 - » lost super – access 'Superseeker' on the ATO website and you need the testator's first name, surname, tax file number and date of birth.
- ☑ Notify the superannuation fund promptly that the deceased has passed away or advise the legal personal representative to do so.
- ☑ When superannuation funds form part of the deceased's estate obtain them from the trustee of the superannuation fund without delay.
- ☑ If the superannuation funds are not being distributed promptly discuss with the executor the importance of investing the money until distribution. Consider a solicitor's controlled money account.
- ☑ Check the tax liabilities of the estate in relation to any superannuation payments. Information about the tax payable is available on the ATO website [here](#).
- ☑ Consider whether application should be made to the Superannuation Complaints Tribunal to resolve any outstanding issues. Note the 28-day time limit to make an application. This tribunal will be replaced by the Australian Financial Complaints Authority. The expected start date is November 2018. You can find the relevant legislation [here](#).
- ☑ Consider whether any executor and/or administrator may have a conflict of interest in the event that they wish to make a personal claim on any superannuation fund of the deceased especially where the superannuation fund is or may be included as an asset of the estate. One case to note is *McIntosh v McIntosh* [2014] QSC 99. In this case the administrator of the deceased's estate argued that the superannuation funds of the deceased should be paid to her and not to the estate.

Recommendations

When acting for a beneficiary

- ☑ Request that the legal personal representative provide:
 - » a copy of the will as this may refer to superannuation funds of the testator. **Section 50** of the *Wills Act 1997* (Vic) lists those persons entitled to see the will
 - » details of superannuation funds of the testator.
- ☑ Consider how the superannuation funds of the testator may be taken into account where the beneficiary is able to bring a family provision claim pursuant to **Part IV** of the *Administration and Probate Act 1958* (Vic).
- ☑ Consider the need to make application to the Superannuation Complaints Tribunal where the beneficiary wishes to challenge a decision of the trustee about payment of the deceased's superannuation, for example a dependent child may wish to challenge payment to a step-parent.

A client wishing to lodge a complaint to the tribunal must:

- » within 28 days of being given notice by the trustee of how the superannuation funds are to be distributed give notice of objection to the trustee
- » within 28 days of the trustee giving its response (known as a final notice of its decision) lodge a complaint with the tribunal. This tribunal will be replaced by the Australian Financial Complaints Authority. The expected start date is November 2018. You can find the relevant legislation [here](#).

Conveyancing and mortgages

LPLC has received many conveyancing claims where a practitioner is acting for a self-managed superannuation fund.

The underlying cause of most claims was a lack of knowledge of the law relating to ownership of land by an SMSF.

Some examples include:

- > stamp duty is payable when transferring a property owned by the superannuation fund to a member. For example, the exemption in [s.41A](#) of the *Duties Act 2000 (Vic)* only applies where the property transferred does not exceed the value of the members interest in the fund.
- > the single acquirable asset test.

This test provides that any property acquired by the SMSF must be a 'single acquirable asset'. For example, a townhouse with a car space on the same title is a single acquirable asset. A unit with a car space on a separate title will not pass the 'single acquirable asset' test unless there is a restriction preventing the lots from being sold separately.

- > where a member of the superannuation fund has signed the contract a trustee of a superannuation fund or a trustee of a bare trust cannot be nominated as purchaser.

Where the intention was for the asset to be held by a superannuation fund one solution seems to be to cancel the contract and have a new contract entered into with the trustee of the superannuation fund as the purchaser.

- > where funds are being borrowed by the SMSF to fund a purchase of land the trustee of the superannuation fund and/or the trustee of the bare trust can be named as the purchaser in the contract of sale but only the bare trustee registered on the title. That is, there needs to be a nomination in favour of the bare trustee where the trustee of the superannuation fund signs the contract.
- > that the superannuation fund cannot buy property for a members' private use.
- > no stamp duty is payable if a member gifts property to a SMSF but stamp duty is payable if a member sells property to a SMSF. See [s.41](#) of the *Duties Act 2000 (Vic)*.

Practitioners who do not usually act for SMSFs in conveyancing transactions should refer the client to someone who does.

EXAMPLES

Transfer into superannuation fund triggers costs

A practitioner acted for a client for many years. On her death, the practitioner was engaged to act for the deceased's daughter in her capacity as executor of the estate. The daughter also sought advice from the practitioner about her entitlement as a beneficiary including whether any duty was payable.

Land was transferred for consideration from the mother's estate to the daughter's SMSF in reliance on advice from the practitioner that no duty was payable.

Duty was subsequently assessed as payable at the time the documents were lodged with the State Revenue Office (SRO) and the transfer also triggered a CGT event and payment of additional land tax.

The client was informed that she should seek advice from another practitioner and this practitioner wrote to the practitioner who originally acted demanding compensation for failing to properly advise the daughter.

Had she been fully informed she said she would have held the land in her own name and may have subsequently sold the land without incurring any duty or additional land tax.

The panel firm described the practitioner's position as 'hopeless' even though there was some confusion based on the content of the practitioner's file as to whether the practitioner was told the transfer would be for consideration. Nil consideration meant no duty was payable. Capital gains tax would still have been payable.

The matter settled with a substantial payment to the client.

What is the consideration?

A practitioner was instructed to transfer some farm land owned by the client to the client's SMSF. The practitioner informed the client that a gift of the land by a member to their SMSF would not incur any duty.

The client subsequently decided, on advice from their accountant, that the SMSF would pay \$300,000 for the land.

The accountant notified the practitioner that consideration of \$300,000 was to be shown in the transfer of land. The issue of duty liability was not revisited.

After the transfer was assessed for duty the client complained to the practitioner that they would not have transferred the land to the superannuation fund if the practitioner had told them duty would be payable. Unfortunately, as the client had already obtained the funds from the SMSF the transaction could not be undone. The client brought a claim against the practitioner and the matter was settled with a payment of a small amount to the client.

Recommendations

- ✓ Obtain as much detail as possible from the client about the transaction including asking in what capacity the client is acting.
- ✓ Provide a detailed letter of advice to the client about the various issues that need to be addressed when transferring land to or from an SMSF including duty implications both on the purchase and any subsequent sale / transfer by the SMSF.
- ✓ Revisit advice where circumstances change such as when a gift becomes a sale.
- ✓ Become familiar with the resources referred to in [Appendix one](#) if acting for trustees of superannuation funds.
- ✓ Ensure the trustee of the SMSF or trustee of the bare trust is named as the purchaser under the contract of sale. All funds including the deposit must come from the account of the SMSF and/or a lender where funds are being borrowed.
- ✓ Where all funds are provided for the purchase from the superannuation fund only the trustee of the superannuation fund can be registered on any unencumbered title.
- ✓ Where any of the funds for the purchase are borrowed only a bare trustee can be registered on title. Once any loan is repaid the trustee of the superannuation fund should be registered on title.
- ✓ Lodge the land tax form 8 with the SRO when a SMSF buys property. Land tax for a superannuation trust is charged at the general rate. See s. 46E of the *Land Tax Act 2005* (Vic).
- ✓ The SRO also needs to be notified when the SMSF ceases to be the registered proprietor. There is no prescribed form so a letter notifying the SRO would be sufficient.

List of other issues practitioners need to consider when acting for an SMSF borrowing funds

- ☑ The SMSF trust deed must contain the appropriate powers to borrow where a loan is being obtained to finance a purchase of land. LPLC considers it necessary to refer the review of any SMSF trust deed to a specialist, especially where amendments may be required.
- ☑ Are the assets a 'single acquirable asset'? See ATO SMSF Ruling 2012/1.
- ☑ Some lenders take 90 days from loan approval to settle a loan for an SMSF. LPLC recommends practitioners tell their clients to seek a timeline and list of requirements from their lender.
- ☑ Most lenders require a number of certificates to be provided including one by the practitioner acting for the SMSF, the SMSF auditor and accredited financial adviser and/or an accountant. Recommend to the client that they consult others who are required to provide a certificate first so they can identify any issues which may need to be addressed by the client and/or practitioner.
- ☑ From 1 July 2016 accountants must hold at least a limited Australian Financial Services licence if advising on SMSFs. Regulation 7.1.29A set out the circumstances in which a person is taken not to provide a financial service and until 30 June 2016 included SMSFs.
- ☑ A bare trust must be established and the bare trustee registered on the title where the SMSF is borrowing money to fund the purchase of land. LPLC recommends specialist advice be sought to prepare any bare trust deed.
- ☑ Ensure the bare trustee deed is lodged with the SRO and an assessment obtained. Even though no duty should be payable on the bare trust deed this is a requirement of the SRO.

Opinion letters and certificates for SMSFs

LPLC regularly receives calls from practitioners who are concerned about the content of a borrower's SMSF certificate requested by a lender as they often go beyond mere certification of advice given and become opinion letters.

Some practitioners conclude that they will not provide this sort of certificate. This is the **best risk management approach**.

The certificate usually provides that the practitioner has reviewed certain documents including the loan documents, deed constituting the superannuation fund and bare trust deed. The practitioner is often required to certify that the superannuation fund has been validly constituted and complies with the SIS Act among other things.

A practitioner is usually not in a position to comment on whether the fund has been validly constituted and complies with the SIS Act. It is more appropriate that compliance matters be referred to the client's auditor.

A practitioner is also unable to advise on matters beyond their control. For example, a certificate may require the practitioner to certify that on completion the bare trustee will be the registered proprietor of the real estate. The lender will have the control of the transfer of land following settlement and so should not require the practitioner to certify such a matter.

Other matters may be known only to the borrower, and the borrower should provide any necessary certification relating to these matters. One example is the requirement to certify that the loan funds will be used to acquire the real estate.

The opinion required in many of these certificates should more properly be given by the financiers' legal advisors.

It is arguable that the effect of the wording of these opinion certificates is that a practitioner is advising the lender, who is not their client. This may give rise to a conflict with the duties owed to their client, the borrower.

Superannuation checklist

Family law

- > Refer to the information provided by the Attorney-General's Department about family law matters and superannuation splitting which can be found [here](#).
- > Ask the client and the other side to provide:
 - » a copy of the most current superannuation statement(s) for any industry funds
 - » latest audit report and financial statement for any self-managed superannuation fund (SMSF).
- > Ensure any terms of settlement, agreement or orders deal with all superannuation funds of both parties.
- > Give the client the opportunity to:
 - » seek advice from a financial advisor, accountant and/or an SMSF auditor
 - » review any terms of settlement, agreement or orders at the time of drafting and take time to explain their effects. Some clients benefit from a diagram showing how assets are split while others may benefit from seeing a list of assets they are receiving and the ones the other party is receiving. Clients also need to know timing on the receipt of any assets.
- > Ask the client to explain to you, or draw a diagram of, their understanding of what will happen in relation to their superannuation fund(s) and those of their spouse / de facto.
- > Provide the trustee of the superannuation fund with a copy of any draft orders with at least 28 days' notice for comment. This is to prevent the situation arising where orders are made but a trustee has no power to undertake the action contemplated by the orders.
- > Have an office procedure that ensures either original sealed orders or a certified copy of the sealed orders are served on the relevant superannuation fund promptly after orders are made. A file closing procedure should also include checking this is done.

Wills and estates

When acting for a testator

- > Have a good working knowledge of how superannuation funds work
- > Advise the client that they should keep up-to-date records about their superannuation, including the name of any SMSF financial adviser and auditor, and details of any loan obtained to fund the purchase of real estate by the SMSF. The location of this information can be disclosed in a letter kept with the will as the information will be required by the executor.
- > Obtain details of the client's superannuation fund and policy.

- > Ask the client if they:
 - » would like their superannuation to form part of the assets of their estate
 - » have in place a current nomination of beneficiary.
- > Determine whether the fund has binding, non-binding or no nominations and review the superannuation fund trust deed if necessary. Alternatively, advise the client orally and in writing to contact the superannuation fund and obtain details of the nomination arrangements. The client should provide this information in writing to the firm before the will is drawn and finalised.
- > Determine what nomination, if any, the client has made.
- > Give the client an oral and written explanation of what the form of nomination governing the fund means and whether they must renew any binding nomination regularly.
- > Where the client has or wishes to make a binding nomination advise them whether this can be done by an attorney in the event of incapacity of the testator. Explain the consequences if the fund does not permit attorneys to renew binding nominations and make allowance for this when drafting the will.
- > When the will is finalised confirm in writing whether or not the superannuation forms part of the estate and what steps the client needs to undertake with the superannuation fund in order to achieve his or her desired outcome.

When acting for an estate

- > For any SMSF check the terms of the trust deed for the replacement of the deceased as a trustee / director of any corporate trustee. This is also necessary to ensure the fund remains compliant under the SIS Act and the Superannuation Industry (Supervision) Regulations 1994. In some circumstances it may be necessary to make application to court. See for example *The Estate of Edith Macdougall* [2013] NSWSC 990.
- > Check the Australian Taxation Office (ATO) website for membership details of any superannuation fund or any lost superannuation for:
 - » current superannuation you need the testator's myGov username and password
 - » lost super – access 'Superseeker' on the ATO website and you need the testator's first name, surname, tax file number and date of birth.
- > Notify the superannuation fund promptly that the deceased has passed away or advise the legal personal representative to do so.
- > When superannuation funds form part of the deceased's estate obtain them from the trustee of the superannuation fund without delay.
- > If the superannuation funds are not being distributed promptly discuss with the executor the importance of investing the money until distribution. Consider a solicitor's controlled money account.
- > Check the tax liabilities of the estate in relation to any superannuation payments. Information about the tax payable is available on the ATO website [here](#).

- > Consider whether application should be made to the Superannuation Complaints Tribunal to resolve any outstanding issues. Note the 28 day time limit to make an application. This tribunal will be replaced by the Australian Financial Complaints Authority. The expected start date is November 2018. You can find the relevant legislation [here](#).
- > Consider whether any executor and/or administrator may have a conflict of interest in the event that they wish to make a personal claim on any superannuation fund of the deceased especially where the superannuation fund is or may be included as an asset of the estate. One case to note is *McIntosh v McIntosh* [2014] QSC 99. In this case the administrator of the deceased's estate argued that the superannuation funds of the deceased should be paid to her and not to the estate.

When acting for a beneficiary

- > Request that the legal personal representative provide:
 - » a copy of the will as this may refer to superannuation funds of the testator. **Section 50** of the *Wills Act 1997* (Vic) lists those persons entitled to see the will
 - » details of superannuation funds of the testator.
- > Consider how the superannuation funds of the testator may be taken into account where the beneficiary is able to bring a family provision claim pursuant to **Part IV** of the *Administration and Probate Act 1958* (Vic).
- > Consider the need to make application to the Superannuation Complaints Tribunal where the beneficiary wishes to challenge a decision of the trustee about payment of the deceased's superannuation, for example a dependent child may wish to challenge payment to a step-parent.

A client wishing to lodge a complaint to the tribunal must:

- » within 28 days of being given notice by the trustee of how the superannuation funds are to be distributed give notice of objection to the trustee
- » within 28 days of the trustee giving its response (known as a final notice of its decision) lodge a complaint with the tribunal.

Conveyancing

- > Obtain as much detail as possible from the client about the transaction including asking in what capacity the client is acting.
- > Provide a detailed letter of advice to the client about the various issues that need to be addressed when transferring land to or from an SMSF including duty implications both on the purchase and any subsequent sale / transfer by the SMSF.
- > Revisit advice where circumstances change such as when a gift becomes a sale.

- > Become familiar with the resources referred to in [Appendix one](#) if acting for trustees of superannuation funds.
- > Ensure the trustee of the SMSF or trustee of the bare trust is named as the purchaser under the contract of sale. All funds including the deposit must come from the account of the SMSF and/or a lender where funds are being borrowed.
- > Where all funds are provided for the purchase from the superannuation fund only the trustee of the superannuation fund can be registered on any unencumbered title.
- > Where any of the funds for the purchase are borrowed only a bare trustee can be registered on title. Once any loan is repaid the trustee of the superannuation fund should be registered on title.
- > Lodge the land tax form 8 with the SRO when a SMSF buys property. Land tax for a superannuation trust is charged at the general rate. See s. 46E of the *Land Tax Act 2005* (Vic).
- > The SRO also needs to be notified when the SMSF ceases to be the registered proprietor. There is no prescribed form so a letter notifying the SRO would be sufficient.

When acting for an SMSF borrowing funds

- > The SMSF trust deed must contain the appropriate powers to borrow where a loan is being obtained to finance a purchase of land. LPLC considers it necessary to refer the review of any SMSF trust deed to a specialist, especially where amendments may be required.
- > Are the assets a “single acquirable asset”? See ATO SMSF Ruling 2012/1.
- > Some lenders take 90 days from loan approval to settle a loan for an SMSF. LPLC recommends practitioners tell their clients to seek a timeline and list of requirements from their lender.
- > Most lenders require a number of certificates to be provided including one by the practitioner acting for the SMSF, the SMSF auditor and accredited financial adviser and/or an accountant. Recommend to the client that they consult others who are required to provide a certificate first so they can identify any issues which may need to be addressed by the client and/or practitioner.
- > From 1 July 2016 accountants must hold at least a limited Australian Financial Services licence if advising on SMSFs. Regulation 7.1.29A set out the circumstances in which a person is taken not to provide a financial service and until 30 June 2016 included SMSFs.
- > A bare trust must be established and the bare trustee registered on the title where the SMSF is borrowing money to fund the purchase of land. LPLC recommends specialist advice be sought to prepare any bare trust deed.
- > Ensure the bare trustee deed is lodged with the SRO and an assessment obtained. Even though no duty should be payable on the bare trust deed this is a requirement of the SRO.

Opinion letters

- > Avoid providing trust opinion letters where possible.

Appendix one

LEGISLATION

Main Acts:

- > *Superannuation Industry (Supervision) Act 1993* (Cwlth) (SIS Act)
- > *Income Tax Assessment Act 1997* (Cwlth)

Main regulations:

- > *Superannuation Industry (Supervision) Regulations 1994* (Cwlth)

You can access the Federal Government Superannuation Policy and Legislation website [here](#).

You can find information [here](#) about the Victorian State Government superannuation schemes.

ATO

Website – <https://www.ato.gov.au/Super/Self-managed-super-funds/>

Some relevant ATO rulings:

- > SMSFR 2009/1 – meaning of 'business real property' relating to an SMSF
- > SMSFR20094 – meaning of 'asset', 'loan', 'investment in' 'lease', and 'lease arrangement'
- > SMSFR 2010/2 – explains how a trustee can appoint an attorney pursuant to an enduring power of attorney without causing the fund to cease to be an SMSF
- > SMSFR 2012/1 – 'single acquirable asset' test explained
- > TR 93/17 – type of deductible expenses that can be claimed by a superannuation fund
- > TR2012/6 – allowable insurance premiums payable by superannuation funds for members

OTHER WEBSITES

- > Superannuation Complaints Tribunal – <http://www.sct.gov.au/>
- > Lost super search – <https://www.ato.gov.au/Forms/Searching-for-lost-super/>
- > Attorney-General's Department – [superannuation splitting](#)
- > ASIC money smart – <https://www.moneysmart.gov.au/superannuation-and-retirement>
- > APRA
- > Wikipedia

See also the information available from Business Victoria [here](#).

FURTHER READING

- > *Australian Taxation Law* – Woellner, Barkoczy, Murphy, Evans and Pinto 2015 CCH chapter 23 Superannuation
- > *Financial planning in Australia: advice and wealth management* – Sharon Taylor and Roger Juchau LexisNexis Butterworths



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