YOU'RE WINDING ME UP

COLIN LEWIS
Senior Manager, Strategic Advice
13/09/2015

If a self-managed super fund (SMSF) no longer meets your needs it may be time to wind it up. To get that right you need a methodical approach says Perpetual's Head of Strategic Advice, Colin Lewis.

If you no longer want the responsibility of running your own SMSF, or you're no longer able to (for example, you're bankrupt and thus cannot be a trustee/member) then you need to consider your options.

An alternative to winding-up your fund may be to appoint a legal personal representative (LPR) under an enduring power of attorney to act in your place.

Pick the right person for your LPR
As your LPR replaces you as a trustee/director of corporate trustee, it's vital you choose the right person as they may have total control of your fund. They're not merely your agent and while they have a duty to act in your best interest as a member, your LPR does not have to follow your instructions.

If you want to maintain the asset allocation of your SMSF but wish to relinquish the trustee responsibilities, you could convert it into a small APRA fund (SAF) and appoint an approved trustee. SAFs are regulated by the Australian Prudential Regulation Authority (APRA), not the Tax Office. This move may allow you to keep the same investments, without the trustee responsibility. Your approved trustee will, however, charge a fee and may limit the investment flexibility otherwise available to you.

How to wind-up right
So if you choose to wind-up your SMSF, you have two options.

1. Transfer to another complying super fund – for example, a retail fund or SAF
2. Take your money, provided you've met a condition of release (COR), and invest outside super

However, as with many super-related decisions, these decisions may have some significant implications:

- capital gains tax (CGT) and stamp duty liabilities may arise from the disposal of certain assets
- winding up means any insurance policies held by the fund cease
- if you move outside the SMSF structure you will be unable to transfer some assets - for example, 'frozen assets', real property or collectables. These need to be sold or taken as a benefit payment – and that means a COR must be met
- any fund reserves allocated to members on winding up may impact their super contribution caps.
- Centrelink will reassess account-based pensions rolled over which may result in a reduction in benefits.

Revisit your plan?
As we saw in my previous SMSF article, winding up can make long-term sense. The list above highlights that there are important issues to consider before you look to wind up a fund and generally, it will need you to revisit your overall strategy.

The change in control following a wind-up may mean you need to review your estate planning – requiring, for example, new death benefit nominations and wills. It could possibly lead to a reassessment by Centrelink – and that is something it is very important to look at.

Your best chance of making the wind-up work for you is to go through a methodical process that makes sure you don't miss any issues and take advantage of any opportunities.

The following process may help.

Check the deed and convene trustee meeting
Consult the fund's trust deed to determine if there's any specific wind-up procedure that must be followed and hold a trustee meeting to discuss, approve and minute the winding-up.

Calculate outstanding expenses, tax and refunds

As the costs of administration and winding-up are the first priority, you must provide for:

- the accounting, audit, actuarial, legal, and administration fees for work done and to be done
- current and estimated future tax liabilities, including CGT on disposal of assets if relevant.

You should ensure receipt of, and record any outstanding income, including the refund of excess franking credits.

Dispose of assets and calculate member entitlements
You may need to sell assets. In this situation, super law requires all transactions be done on an arm's-length basis – on commercial terms at market values. The proceeds (after fees and taxes) will determine your entitlements. A reconciliation of member balances to net fund assets should be made.

Remember, selling assets or paying another fund or yourself via an in-specie payment is a CGT event. This must be accounted for in the final return.

If a defined benefit pension is being run, an actuary must calculate the commutation value.

Transfer entitlements to another fund / pay-out benefits
Benefits may be paid as cash or as an in-specie transfer where allowed and possible. You should provide - in writing - details of the fund to which you want your benefits transferred. Alternatively, if you've met a COR, you may cash-out your benefits.

If you're running a pension, ensure that the pro-rated minimum pension amount is paid before rolling over or cashing out. You must ensure tax is withheld from payments and reported to the ATO, if relevant.

You're still entitled to any amounts received by the fund after a benefit payment and they must be accounted for.

Pay outstanding expenses and tax
For simplicity, amounts for outstanding expenses and tax could be held in a non-interest bearing account to avoid the need to distribute income, account for tax and to do an annual return. A second benefit payment may be required to clear any remaining funds if expenses have been over-provided for, or if there's further amounts received such as excess franking credits.

Complete final accounts and annual return
You must ensure all tax and reporting obligations have been met at the time your SMSF is wound-up, including:

- lodging the fund's final annual return once the final audit is completed
- completing PAYG summaries for members under age 60 receiving a pension
- issuing benefit payment summaries where benefits have been paid to members
- meeting any outstanding tax obligations and the ATO supervisory levy.

You should wait until your SMSF has no assets and liabilities before lodging the final returns.

Notify the regulator and members
The ATO must be notified within 28 days of the fund winding-up. Also, the members must be notified, but it's likely this requirement will have been met at the trustee meeting.

Following the wind-up of your SMSF, bank accounts can be closed and, if there's a corporate trustee, it may have to be deregistered.

Finally, wait for the ATO to confirm that it has cancelled the fund's ABN. And remember - while you may no longer have a SMSF, you'll still need to keep the fund records for a minimum of 10 years!

The bottom line – look at the big picture
This list of requirements may seem onerous, but this methodical approach means you can wind-up an SMSF, do it right, do it once and get on with your life. As with any major change to a super strategy, getting expert advice can make something that looks very complicated a lot easier.

This is an edited version of an article that first appeared in The Australian Financial Review on 12-13 September.
Part one of Colin's latest SMSF analysis is here