

Should an SMSF have a unitholders' agreement?

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Introduction

Unit trusts are a common investment structure in Australia and can provide a simple way for parties to invest in an investment or business together. In particular, investing via a unit trust is a popular way for SMSFs to gain real estate exposure and is often used where real estate is being developed.



While the terms of a unit trust deed alone may be sufficient for many circumstances throughout the life of a unit trust, there are situations where a unitholders' agreement would assist the parties in avoiding costly disputes or simply by removing uncertainty.

This article explains where things can go wrong in a unit trust and what a unitholders' agreement might contain.

What can go wrong?

There are many things that can happen to a unitholder (or the person controlling a unitholder entity) that can cause problems for other unitholders. These include such things as unitholders or their controllers:

- dying or losing capacity;
- becoming bankrupt or being placed under administration;
- being sued or otherwise caught up in litigation;
- getting divorced or experiencing other familial or personal issues; or
- simply wanting to divest their unitholding.

While an investor may initially know and get along with all of their fellow unitholders, these events can result in another person becoming a unitholder (or controlling a unitholder entity) which may not be a desirable outcome for the remaining unitholders.

Further, unitholders may simply be experiencing an irresolvable dispute and require some mechanism for one or more unitholders to divest their unitholding.

Types of provisions to consider

There are various types of provisions and issues that should be considered in preparing a unitholders' agreement such as:

- how units can be offered by sale and to who;
- what will constitute a default by a party;
- when will a unitholder be forced to sell their units;
- methods of valuing units and disputing valuations;
- what decisions will require a special resolution (75%) or greater majority;
- invoking and holding unitholders' meetings;
- control restrictions in respect of superannuation law issues; and
- dispute resolution procedures.

Conclusion

A unitholders' agreement is a prudent way to ensure parties' rights and obligations in respect of various events are considered and known from the commencement of a unit trust. Such an agreement can ensure any default events or disputes are dealt with more effectively.

Prudent advisers should discuss the option of a unitholders' agreement with any client investing in a unit trust.

DBA Lawyers are often engaged to prepare or review unitholders' agreements where SMSFs are involved. Please contact us if you would like to discuss these agreements and how we might assist you.

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This article is for general information only and should not be relied upon without first seeking advice from an appropriately qualified professional.

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