

# SMSF Trusteeship & Enduring Powers of Attorney



Generally, all members of a self managed superannuation fund (**SMSF**) must be trustees, or directors of the corporate trustee, of the fund. However, other persons may be trustees or directors in specific circumstances.

In July last year, the Australian Taxation Office published *Draft Self Managed Superannuation Funds Ruling 2009/D1 (SMSFR 2009/D1)*, a 17 page document for public comment, representing the Commissioner's preliminary view about the way in which subparagraph 17A(3)(b)(ii) of the *Superannuation Industry (Supervision) Act 1993 (Cth) (SISA)*, which allows a person who holds an enduring power of attorney in respect of a member to be a trustee, or director of the corporate trustee, of a superannuation fund in place of the member without causing the fund to cease to be an SMSF, applies to SMSFs.

With publication of the final version of SMSFR 2009/D1 rumoured to be "just around the corner", in this article, experienced superannuation lawyer, Ian Waters examines subparagraph 17A(3)(b)(ii) and the Commissioner's preliminary view about the way in which it applies to SMSFs.

## Legislative Background

Section 17A of the SISA sets out basic conditions that a superannuation fund must satisfy in order to be an SMSF, including that all of the members must generally be trustees, or directors of the corporate trustee, of the fund. However, other persons may be trustees or directors in specific circumstances, including if a member dies, is physically or mentally incapacitated or is a minor and subparagraph 17A(3)(b)(ii) expressly allows the *legal personal representative* of a member to be a trustee or director in place of the member during any period when they hold an *enduring power of attorney* in respect of that member, without causing the fund to cease to be an SMSF.

### **Legal personal representative**

*Legal personal representative (LPR)* is defined in subsection 10(1) of the SISA to include "a person who holds an enduring power of attorney granted by a person" and the Commissioner acknowledges in the draft ruling that the holder of an enduring power of attorney granted by a person is, indeed, the LPR of that person for the purposes of subparagraph 17A(3)(b)(ii). (SMSFR 2009/D1, para 31)

## Enduring powers of attorney

The Commissioner points out that only a power of attorney that is an *enduring* power of attorney (**EPOA**) will satisfy the requirements of subparagraph 17A(3)(b)(ii). A *general* power of attorney will not.

While an EPOA is intended to survive the mental incapacity of the donor, the legislation governing EPOAs in each State and Territory enables the donor to authorise the donee to exercise those powers while the donor is mentally capable and an EPOA that is invoked while the donor is mentally capable, therefore, satisfies the requirements of subparagraph 17A(3)(b)(ii).

Note, however, that regard must still be had to the specific requirements of each jurisdiction to ensure that an EPOA is current and effective at all times during which the attorney is a trustee or director in place of a member. (SMSFR 2009/D1, paras 32-34)

### **Nature of the authority conferred**

Note also the Commissioner considers that for the purposes of subparagraph 17A(3)(b)(ii), the authority conferred by the EPOA must include an authority to act in relation to the member's financial, business and property affairs or the member's superannuation affairs and conversely, the authority cannot have an exception relating to superannuation or financial affairs. (SMSFR 2009/D1, para 37)

This is particularly noteworthy, because the Commissioner's requirements appear to go further than the legislation and may mean that some existing EPOAs are inadequate for the purposes of subparagraph 17A(3)(b)(ii), ie that they will need to be redrafted before a trustee or director appointment can be made (or continue) pursuant to them.

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### **Validity of enduring power of attorney**

The exception in subparagraph 17A(3)(b)(ii) applies *during any period when the LPR has an EPOA in respect of the member*. It is, according to the Commissioner, implicit in this requirement that the EPOA remains current and satisfies the relevant State and Territory power of attorney legislation at all times during which the attorney is a trustee, or director of a corporate trustee, in place of the member.

Therefore, if the EPOA terminates for any reason, one of the conditions in subparagraph 17A(3)(b)(ii) will no longer be satisfied, the attorney will have to step down and the member will have to be re-appointed as a trustee or director. (SMSFR 2009/D1, para 48)

### **Power conferred on more than one person**

Where a member executes an EPOA in favour of more than one person (whether joint and/or several), each of the attorneys would meet the definition of "LPR" under subsection 10(1) of the SISA. However, the Commissioner considers that in such a situation, given:

- the wording of paragraph 17A(3)(b), in particular the use of the phrase "in place of the member" and the use of the singular for "LPR" (ie, "the LPR"); and
- the purpose of section 17A as a whole to ensure equality of influence in the administration of SMSFs,

only one of the attorneys can be appointed as a trustee or director in place of the member for the purposes of subparagraph 17A(3)(b)(ii). (SMSFR 2009/D1, paras 52-53)

### **Appointment**

The Commissioner considers that in order to comply with subparagraph 17A(3)(b)(ii), an attorney must actually be appointed and a member must actually be removed as a trustee or director. In other words, a person does not automatically become a trustee or director merely because they hold an EPOA. (SMSFR 2009/D1, para 38)

**Individual trustee:** The appointment of an attorney and the resignation of a member as a trustee must be in accordance with the fund's trust deed, the SISA and relevant State or Territory trustee legislation. In particular, according to the Commissioner, the trust deed must allow the appointment of a person who is not a member of the fund as a trustee in place of the member. (SMSFR 2009/D1, para 42)

**Corporate trustee:** Similarly, the appointment of an attorney and the resignation of a member as a director must be in accordance with the constitution of the corporate trustee, the SISA and the *Corporations Act 2001* (Cth) (**Corporations Act**). If the attorney is appointed as an alternate director, the Commissioner considers that they must be so appointed *in place of* the member and not as the member's *agent*. Otherwise, the member may still retain office, in which case the requirements of subparagraph 17A(3)(b)(ii) would not be met. (SMSFR 2009/D1, paras 8 & 46)

Once appointed, an attorney performs their duties as a trustee or director pursuant to their appointment to the position rather than as an attorney for the member. Consequently, any proscriptions contained in State or Territory legislation against conferring trustee duties and powers via a power of attorney or common law restrictions on attorneys undertaking directors' duties do not affect the operation of subparagraph 17A(3)(b)(ii). (SMSFR 2009/D1, para 9)

### **Obligations imposed on trustees and directors**

People contemplating becoming a trustee, or a director of the corporate trustee, of an SMSF (whether pursuant to an EPOA or otherwise) would do well to note that once appointed *in place of the member*, they assume the duties, responsibilities and obligations of a trustee or director in their personal capacity and not as an agent for someone else. Further, they may be subject to civil and criminal penalties for any breaches of their duties under the SISA or other legislation and as a director of a corporate trustee, they may also be subject to civil and criminal penalties for breaches of the Corporations Act. (SMSFR 2009/D1, para 10)

### **Examples**

Appendix 1 to the draft ruling comprises practical examples of the sorts of scenarios in which it would appear the Commissioner will be satisfied that people holding EPOAs in respect of a member could be appointed as a trustee or director in place of the member in accordance with subparagraph 17A(3)(b)(ii), key aspects of which I have paraphrased, below.

**Example 1**

Andrew and his wife, Jane, have an SMSF into which Andrew's employer contributes. Andrew is being transferred overseas for an indefinite period of time. He and his wife execute enduring powers of attorney. The enduring powers of attorney give authority to Trevor to manage their superannuation affairs during the period of their absence. Andrew and Jane step down as trustees and appoint Trevor as the trustee in accordance with their super fund trust deed. Trevor is now, therefore, trustee of the fund in place of both Andrew and Jane.

**Example 2**

Taking the situation in Example 1, if Andrew were to travel overseas by himself and execute an EPOA in favour of his wife, he would still be required to step down as trustee of the SMSF but, as Jane is already a trustee of the fund, she would not need to be re-appointed in her capacity as her husband's LPR.

**Example 3**

Clare is the sole member and director of the corporate trustee of an SMSF. She has found that, as she nears retirement, the responsibilities of being director have become too difficult and time consuming for her. She executes an EPOA to her daughter, Jan, giving her authority to manage Clare's superannuation affairs. Clare resigns as director of the corporate trustee and Jan is appointed in her place in accordance with the Corporations Act and the company's constitution.

**Example 4**

Chris and Marie are members and individual trustees of an SMSF. They decide to travel overseas for an indefinite period of time. They have three children (Rick, Cassandra and Caroline) and have granted an EPOA to all three of them to be exercised jointly. Under the EPOA, the children are authorised to take care of Chris and Marie's financial affairs. Chris and Marie decide that Rick and Cassandra will be trustees of the SMSF while they are away. They step down as trustees and Rick and Cassandra are appointed in their place in accordance with their super fund trust deed. (SMSFR 2009/D1, paras 15-21)

**Food for thought****Super fund residency rules**

While I am not taking issue with the accuracy of Examples 1, 2 and 4, each of which involves overseas travel "for an indefinite period of time", members of SMSFs contemplating travelling overseas for an extended period of time would do well to note that appointing a new trustee or director in their place may not be enough to avoid the potentially draconian tax consequences of failing to satisfy the super fund residency rules while they are away.

It would, therefore, seem prudent for SMSF members heading overseas whether *temporarily* (for an extended period of time) or *permanently*, to seek professional advice before they go, to ensure that the *Australian superannuation fund* status of their fund will be maintained while they are away and give themselves the opportunity to restructure their superannuation arrangements before they go if need be.

**Not legally binding**

Note that SMSFR 2009/D1 is a draft for public comment only, representing the Commissioner's preliminary view about the way in which subparagraph 17A(3)(b)(ii) of the SISA applies to SMSFs and that SMSF Rulings (whether draft or final) are not legally binding on the Commissioner.

**Summary**

- Only an EPOA will satisfy the requirements of subparagraph 17A(3)(b)(ii). A *general* power of attorney will not.
- Regard must be had to the specific requirements of each jurisdiction to ensure that an EPOA is current and effective at all times during which the attorney is a trustee or director in place of a member.
- The authority conferred by the EPOA must include an authority to act in relation to the member's financial, business and property affairs or the member's superannuation affairs and cannot have an exception relating to superannuation or financial affairs.

- Where a member executes an EPOA in favour of more than one person (whether joint and/or several), only one of the attorneys can be appointed as a trustee or director in their place.
- An attorney must actually be appointed and a member must actually be removed as a trustee or director; they do not automatically become a trustee or director merely because they hold an EPOA.
- Once appointed, an attorney performs their duties as a trustee or director pursuant to their appointment to the position rather than as an attorney for the member.
- Once appointed, an attorney assumes the duties, responsibilities and obligations of a trustee or director in their personal capacity and not as an agent for someone else.

**Topdocs Legal can provide legal advice in relation to SMSF trusteeship and enduring powers of attorney. Please contact us on 1300 659 242 with any queries that you may have in this regard or in regard to super and estate planning advice and documentation more generally.**