

ADVISERS COMPLETING BDBNs CAN BE A RISKY BUSINESS

Should non-legal advisers complete or give advice relating to binding death benefit nominations (BDBNs) on behalf of their clients? How much risk is there in doing so?

The principal risk of advisers completing or giving advice relating to BDBNs is death benefits not going where they were intended to go. This can occur in a number of circumstances such as:

- The advice given by the adviser was not effective
- The documentation was not correctly executed
- The BDBN did not cater for situations where a beneficiary pre-deceased a member
- The remaining Trustee(s) lost the BDBN
- The BDBN subsequently lapsed and the client was not advised (such as 3 year lapsing BDBNs)

An example of how it can go wrong

The case of [Donovan v Donovan \[2009\] QSC 26](#) provides an example of how a problem can arise when all factors are not considered.

In this particular case, a BDBN was prepared, apparently with the expectation that it would be non-lapsing. However, the trust deed of the fund linked the BDBN to the provisions of the SIS Act and Regulations, resulting in the BDBN becoming a non-binding nomination after 3 years, unless renewed. Had the SMSF trust deed been updated at the time the BDBN was prepared to provide for non-lapsing BDBNs, the problems would not have arisen.

This example illustrates how the knowledge of what instructions are permitted in a BDBN, and what would cause the BDBN to be deemed invalid, is crucial. In addition, just as the wording used in a BDBN is very important, errors or omissions can also significantly affect the outcome - usually to be discovered at a time when it is too late to rectify the position. Importantly, these events may leave an adviser open to a law suit by disgruntled beneficiaries – with the dollar value of these claims being substantial.

But aren't advisers covered for these events by their professional indemnity (PI) insurance?

A close review of PI policies indicates that PI cover for accounting and financial advisory services is unlikely to cover the insured for claims in respect of 'legal services'.

In the event of a claim in regards to the eventual invalidity of a BDBN, some insurers will likely determine that the claim arose as a result of the provision of legal services and therefore, deny liability under the policy.

“

A close review of PI policies indicates that PI cover for accounting and financial advisory services is unlikely to cover the insured for claims in respect of 'legal services'

“

Current as at 1 August 2017.

Please note this article is for information purposes only and does not constitute legal advice.

1300 659 242 | info@topdocs.com.au | topdocs.com.au

Page 1 of 2

ADVISERS COMPLETING BDBNs CAN BE A RISKY BUSINESS

Is preparing a BDBN the provision of legal services?

Although there is no clear guidance on whether or not the preparation of a BDBN constitutes 'legal practice' (which may only be conducted by a lawyer), some schools of thought suggest that a BDBN is a legal document.

Other views suggest the BDBN is merely an instruction from the member, suggesting the completion of a form by the adviser, whether on paper or online, is not necessarily providing a legal service, so the document could not be equated to a legal document to the same extent as a SMSF trust deed referred to in the case above. Progressing that further, if there is a component of advice or recommendation included, a legal service may be seen to have been provided. The fact that there are differing legal views, and the dollar values involved, should be sufficient incentive to take the conservative approach.

Is there an issue under the relevant licence/practising certificate?

The major accounting bodies and the FPA do not permit their members to engage in legal practice unless they are licenced under the relevant state based Legal Practice Board (or similar) to do so.

That brings us back to the question of whether the preparation of a BDBN is the provision of a legal service. If yes, it may jeopardise the licence or practising certificate under which the financial adviser or accountant operates as well as their PI cover.

What is the best approach to preparing a BDBN?

Generally there are three approaches that could be taken:

1. The most appropriate approach is for the client to receive estate planning advice from lawyers qualified in this area. This should include the suitability of the BDBN in relation to the client's total position. This advice should be provided by the client's lawyer or by a specialist in the area such as Topdocs Legal
2. The next most appropriate approach is for the prepared BDBN to be reviewed by estate planning lawyers. Topdocs Legal Pty Ltd can provide services to review and signoff BDBN documentation.
3. The third approach is for the client to complete the BDBN themselves without any adviser input. This is the cheapest but riskiest option.

Engaging a qualified specialist

Topdocs Legal are specialists in the area of estate planning. We can provide advice and draft documentation to implement binding death benefit nominations along with other estate planning documentation.

Our services also includes individual letters of legal assurance for complex documents such as BDBNs, SMSF Deed updates, changes of trustee and SMSF bare trust arrangements.

Eliminate your risk

In conclusion, due to the inherent complexity in superannuation and tax laws and the possible traps along the way, we strongly recommend you limit any potential risks by leaving the preparation of estate planning documentation to the experts.

More information

For more information or to discuss your individual estate planning requirements, please [visit the Topdocs website](#) or contact the team at Topdocs on 1300 659 242.