

# SMSF CORPORATE TRUSTEES AND UNDERAGE MEMBERS

Arising from what was an apparent SIS Act drafting oversight, this technical articles reviews the corrections and implications.

Arising from what was an apparent drafting oversight back in 1999, the rules which require that members of a SMSF also be the trustees of the fund (member/trustee rules) under the SIS Act would not be met when:

- the trustee of a SMSF is a company (i.e. a corporate trustee); and
- a member of the SMSF is under age 18; and
- a parent of the minor steps in as a director of the corporate trustee until the child turns 18.

The SIS Act was retrospectively amended to remove both the oversight and those instances of inadvertent breaches of the member/trustee rules under the SIS Act caused by parents standing in as directors for their minor children.

This article details the corrections made and how SMSFs with minors as members are impacted.

## The detail

Rules regarding the trustee structure of a self managed superannuation fund (SMSF) are well known, having now been in place since 1999. The definition of a SMSF contains a general rule (the member/trustee rule) that:

- all members of a SMSF must be a trustee of the SMSF or director of the corporate trustee of the fund; and
- all trustees of the SMSF, or directors of the corporate

trustee, must be members of the fund.

The main exception to that rule is in the instance of a single member fund, whereby:

- for individual trustees, the member and one other person must be the trustees; or
- for a corporate trustee, the member can either act alone or with a second director.

However, further exceptions apply to that member/trustee rule, one being in regards to a child under 18 years of age who is a member of a SMSF. That child is not able to act as trustee of the SMSF because of their age - that is referred to as being 'under a legal disability'.

## How is that overcome?

It had been assumed that the SIS Act provided the means to overcome that, by permitting a parent or guardian to act in place of the child under the legal disability. The assumption was based on a reading of section 17A(3)(c) of the SIS Act, which stated that the member/trustee rules would be met:

*if a member of the fund is under a legal disability because of age and does not have a legal personal representative—the parent or guardian of the member is a trustee of the fund in place of the member;*

Note that the exception only relates to the parent or guardian being a trustee of the fund - there is no

mention of the parent or guardian being a director of the corporate trustee, if that was the way the SMSF was structured.

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Technically, therefore:

- when a parent or guardian stepped in to act as trustee of the SMSF in place of an underage child, the SMSF met the trustee component of the definition of an SMSF under section 17A of the SIS Act; but
- when the parent or guardian stepped in to act as a director of the corporate trustee of the SMSF in place of an underage child, the SMSF did not meet the trustee component of the definition of an SMSF, as there was no provision in the SIS Act for such an occurrence.

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

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It should be noted that any formal appointment as legal personal representative (LPR) of a minor, such as by a court, would not cause a breach, as SIS Act section 17A(3)(b) allows the LPR to act in place of the 'member ... under a legal disability'.

Such a formal LPR scenario would be more of an exception, than a regular occurrence. Most likely, many SMSFs (with corporate trustees and underage members) will have inadvertently operated in breach of the member/trustee rules, because of the exclusion of corporate trustees from the exemption.

When the issue was raised, it became apparent that not only were some of the directors of corporate trustees of SMSFs, and their advisers, under a misapprehension regarding the rules, but so were the regulators and, in fact, the drafters of the legislation in the first place.

A review of the drafting notes from when the legislation was initially prepared indicated there was no reason for not permitting the same to apply in a corporate trustee structure, as was available for individual trustees.

## Is it fixed?

Yes, the issue has been rectified by a change in the legislation. In the 2011 Federal Budget, the Government announced that it would amend the SIS Act so that where the SMSF has a corporate trustee, a parent or guardian may be director of the trustee company in place of the underage member. The amending legislation, the Tax Laws Amendment (2011 Measures No. 9) Act 2012, received Royal Assent in March 2012.

Included as part of that Act were changes to section 17A(3)(c) of the SIS Act, which now states the member/trustee rules will be met:

*if a member of the fund is under a legal disability because of age and does not have a legal personal representative:*

- i. *the parent or guardian of the member is a trustee of the fund in place of the member; or*
- ii. *if the trustee of the fund is a body corporate—the parent or guardian of the member is a director of the body corporate in place of the member.*

## What about all those SMSFs in breach because of previous actions?

Potentially, breaches could have occurred back to 1999, at the time the SIS Act was changed to incorporate the member/trustee rules referred to above.

To ensure that any of the inadvertent breaches were cleared, the amending legislation also directed that the changes to section 17A(3)(c) of the SIS Act take effect from 8 October, 1999 (i.e. the date of introduction of the member/trustee rules).

## Any action required to Trust Deeds?

It would be worthwhile to check the trust deed for the SMSF to ensure that the provisions contained in the old section 17A(3)(c) of the SIS Act were not replicated in the deed, so as to exclude parents from acting in the event of the SMSF having both:

- a corporate trustee; and
- an underage beneficiary.

## A good story ending!

Pleasingly, common sense prevailed once the issue came to light, and the Government and various departments worked to ensure both the problem was removed and that no penalties would apply for those who inadvertently breached the applicable rules.

## More information

Should you have any queries, or require more information, please contact the team at Topdocs on 1300 659 242.

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