

## SMSF MEMBER TRUSTEE RULES

Section 17A of the SIS Act sets out the basic rules for structuring an SMSF and is a section that every person who deals with SMSFs, including trustees, should be familiar with. Failing to comply with section 17A means the fund is not a complying SMSF and if appropriate action is not taken, within prescribed time limits, can result in material taxation consequences and individual penalties.

### Basic conditions--funds other than single member funds

- (1) Subject to this section, a superannuation fund, other than a fund with only one member, is a self managed superannuation fund if and only if it satisfies the following conditions:
- (a) it has fewer than 5 members;
  - (b) if the trustees of the fund are individuals--each individual trustee of the fund is a member of the fund;
  - (c) if the trustee of the fund is a body corporate--each director of the body corporate is a member of the fund;
  - (d) each member of the fund:
    - (i) is a trustee of the fund; or
    - (ii) if the trustee of the fund is a body corporate--is a director of the body corporate;
  - (e) no member of the fund is an employee of another member of the fund, unless the members concerned are relatives;
  - (f) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;
  - (g) if the trustee of the fund is a body corporate--no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

*Note: Section 17B contains exceptions to paragraphs (1)(f) and (g).*

### Basic conditions--single member funds

- (2) Subject to this section, a superannuation fund with only one member is a self managed superannuation fund if and only if:
- (a) if the trustee of the fund is a body corporate:
    - (i) the member is the sole director of the body corporate; or
    - (ii) the member is one of only 2 directors of the body corporate, and the member and the other director are relatives; or
    - (iii) the member is one of only 2 directors of the body corporate, and the member is not an employee of the other director; and
  - (b) if the trustees of the fund are individuals:
    - (i) the member is one of only 2 trustees, of whom one is the member and the other is a relative of the member; or
    - (ii) the member is one of only 2 trustees, and the member is not an employee of the other trustee; and
  - (c) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;
  - (d) if the trustee of the fund is a body corporate--no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

*Note: Section 17B contains exceptions to paragraphs (2)(c) and (d).*

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### Certain other persons may be trustees

- (3) A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:
- (a) a member of the fund has died and the legal personal representative of the member is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during the period:
    - (i) beginning when the member of the fund died; and
    - (ii) ending when death benefits commence to be payable in respect of the member of the fund; or
  - (b) the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during any period when:
    - (i) the member of the fund is under a legal disability; or
    - (ii) the legal personal representative has an enduring power of attorney in respect of the member of the fund; or
  - (c) 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; or
  - (d) an appointment under section 134 of an acting trustee of the fund is in force.

### Circumstances in which entity that does not satisfy basic conditions remains a self managed superannuation fund

- (4) Subject to subsection (5), if a superannuation fund that is a self managed superannuation fund would, apart from this subsection, cease to be a self managed superannuation fund, it does not so cease until the earlier of the following times:
- (a) the time an RSE licensee of the fund is appointed;
  - (b) 6 months after it would so cease to be a self managed superannuation fund.
- Subsection (4) does not apply if admission of new members
- (5) Subsection (4) does not, except for the purposes of section 29J, apply if the reason, or one of the reasons, why the superannuation fund would cease to be a self managed superannuation fund was the admission of one or more new members to the fund.

### Extended meaning of employee in certain circumstances

- (6) For the purposes of this section, a member of a fund, who is an employee of an employer-sponsor of the fund, is also taken to be an employee of another person (the other person ), if the employer-sponsor is:
- (a) a relative of the other person; or
  - (b) either of the following:
    - (i) a body corporate of which the other person, or a relative of the other person, is a director;
    - (ii) a body corporate related to that body corporate; or
  - (c) a trustee of a trust of which the other person, or a relative of the other person, is a beneficiary; or
  - (d) a partnership, where:
    - (i) the other person, or a relative of the other person, is a partner in the partnership; or
    - (ii) the other person, or a relative of the other person, is a director of a body corporate that is a partner in the partnership; or

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- (iii) the other person, or a relative of the other person, is a beneficiary of a trust, if a trustee of the trust is a partner in the partnership.

*Note 1: An effect of this subsection is that a fund will not be a self managed superannuation fund if a member is employed by an employer-sponsor of the fund, and another member (who is not a relative) has a specified interest in that employer-sponsor: see paragraph (1)(e). An example of this would be where the employer-sponsor is a company of which another member is a director.*

*Note 2: Another effect is that a fund will not be a self managed superannuation fund if its single member is employed by an employer-sponsor of the fund in which the other trustee of the fund (who is not a relative) has a specified interest: see subsection (2).*

- (7) Subsection (6) does not limit the meaning of the term employee.

### Regulations

- (8) For the purposes of this section:
  - (a) a member of a fund is taken to be an employee of a person belonging to a class specified in the regulations for the purposes of this paragraph; and
  - (b) despite subsections (6) and (7) and section 15A, a member of a fund is not taken to be an employee of a person belonging to a class specified in the regulations for the purposes of this paragraph.

### Meaning of relative

- (9) In this section:

**"relative"**, in relation to an individual, means:

- (a) a parent, child, grandparent, grandchild, sibling, aunt, uncle, great-aunt, great-uncle, niece, nephew, first cousin or second cousin of the individual or of his or her spouse or former spouse; or
  - (b) a spouse or former spouse of the individual, or of an individual referred to in paragraph (a).
- (9a) For the purposes of paragraph (a) of the definition of relative in subsection (9), if one individual is the child of another individual because of the definition of child in subsection 10(1), relationships traced to, from or through the individual are to be determined in the same way as if the individual were the natural child of the other individual.

### Disqualified persons

- (10) For the avoidance of doubt, subsection (3) does not permit a person, in the capacity of legal personal representative of a disqualified person (within the meaning of section 120), to be a trustee of a self managed superannuation fund or a director of a body corporate that is a trustee of a self managed superannuation fund.

### More information

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