

SMSF TRUSTEESHIP AND 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.

On 21 April 2010, the Australian Taxation Office published Self Managed Superannuation Funds Ruling 2010/2 (SMSFR 2010/2), representing the Commissioner's 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.

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 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 2010/2, para 40)

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 2010/2, paras 42-43)

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 2010/2, para 56)

Power conferred on more than one person – one for one substitution not necessary

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 and one or more of those people can be appointed as trustee or director in place of the member. Further despite the purpose of section 17A as a whole to ensure equality of influence in the

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administration of SMSFs, an existing member and trustee or director can also be a trustee or director in the place of another member where they hold an EPOA for that member and an LPR who holds an EPOA for more than one member can be a trustee or director in the place of one or more of those members. (SMSFR 2010/2, paras 65)

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 2010/2, para 44)

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 2010/2, para 48)

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 2010/2, paras 10 & 53-54)

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 2010/2, para 11 & 55)

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 2010/2, para 12)

Examples

Appendix 1 to the 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 are 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 member of a single member SMSF. The trustees of the SMSF are Clare and her daughter, Jan. Clare 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 Jan, giving her authority to manage Clare's superannuation affairs. Clare resigns as trustee leaving Jan as the sole trustee.

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Example 4

Chris and Marie are members and directors of a corporate trustee 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 resign as directors and Rick, Cassandra and Caroline are appointed as directors of the corporate trustee in their place. Once appointed as directors, Rick, Cassandra and Caroline will act in their capacity as directors and will not be bound by the requirements attaching to the EPOA (i.e. to act jointly) which mean that they may act separately and severally in relation to their activities as directors. (SMSFR 2010/2, paras 25-28)

Example 5

Ewan is a member of a two member fund with his sister. The SMSF has a corporate trustee of which the pair are directors. Ewan has recently retired and plans to travel extensively. Ewan executes an EPOA in favour of his father, Andrew, who he also nominates as an alternate director of the corporate trustee. Ewan does not step down as a director himself and fulfills the responsibilities of that role while he is not traveling. Andrew is a LPR of Ewan by virtue of the EPOA and as an alternate director, Andrew is only a director of the corporate trustee whilst he is performing the duties of that role in place of Ewan.

Food for thought

Super fund residency rules

Whilst 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 if they are still 'contributors'.

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.

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 may include an authority to act in relation to the

member's financial, business and property affairs or the member's superannuation affairs.

- Where a member executes an EPOA in favour of more than one person (whether joint and/or several), one or more 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.

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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