



Powers of attorney for SMSF members and trustees

This Solution Brief discusses what you can do to safeguard your super benefits if you lose capacity as a member and trustee of an SMSF

Planning for the unexpected is never pleasant. However, when your hard-earned super benefits are at stake, our view that it's better to be safe rather than sorry.

Care needs to be taken as to who acts as the trustee. You also need to plan for what happens if a member loses capacity and is unable to make decisions as to the fund and their benefits.

Losing legal capacity

If a member loses legal capacity, then their appointed **legal personal representative** may act as a trustee of the fund (or as a director of a company trustee) in their place.

For an adult, their legal personal representative will be a person (or persons) who holds an **enduring power of attorney** for the member.

It is important to note that no matter what the Fund Deed says, if the member loses legal capacity **before** making a valid enduring power of attorney, there will be no person able to step into the member's shoes. In these circumstances the member's benefits will need to be paid to a public offer fund or paid out (if possible).

It may also be possible to apply to the state guardianship board or tribunal to have a person appointed as the incapacitated member's legal personal representative. However, this can be a protracted exercise, and the Fund Deed must provide for a person appointed under these rules to become the replacement trustee.

What happens if a member loses legal capacity?

If there are 2 individual trustees, and the sole member loses capacity, then **the other individual trustee will be left to administer the fund**. The member needs to be confident that the remaining individual trustee will exercise any discretion available to them (e.g., investing and paying benefits) in accordance with their wishes.

If the member was the sole director of the trustee company, then there will be no one to run the company. Under this scenario, the super benefits will be effectively locked-up until the shareholder of the company can appoint a replacement director. If the member was the only shareholder, then appointing a new shareholder will not be possible.

Accordingly, we recommend that either another director be appointed from the outset to act alongside the sole member, or the company trustee appoints someone as the company's attorney, so that this person can act on behalf of the company if the member dies.

Appointing a legal personal representative

In order to meet the requirements in the Superannuation Industry (Supervision) Act and Self-Managed Superannuation Funds Ruling SMSFR 2010/2, as to the appointment of a legal personal representative for a member, the following conditions must be satisfied:

- The legal personal representative must be appointed as a trustee of the fund, or as a director of the company trustee of the fund. The appointment of the legal personal representative



must also be in accordance with the Fund Deed, the Constitution of the trustee company (if any), the Superannuation Industry (Supervision) Act, and any other relevant legislation (such as the Powers of Attorney Act in the relevant state, and the *Corporations Act 2001*);

- A member who has lost capacity must cease to be a trustee of the fund, or a director of the company trustee, on the appointment of their legal personal representative;
- Where the enduring power of attorney appoints multiple attorneys, one or more of those attorneys can be appointed as trustee (or as director of the company trustee) in place of the member;
- Similarly, multiple members are able to execute an enduring power of attorney for the same legal personal representative, who can be appointed as a trustee or a director of the company trustee in place of each of those members;
- A member is also able to execute an enduring power of attorney in favour of an existing member who is a trustee or director of the company trustee. In this case, the donor member can cease to be a trustee, or director of a company trustee, and the legal personal representative is considered to be appointed in their place; and
- The legal personal representative will perform their duties as a trustee of the fund (or a director of the company trustee) under the appointment to that position, rather than as 'agent' for the member.

What do we recommend?

First, each member should make a **valid enduring power of attorney**. This will enable the appointed enduring attorney to act for them as a replacement individual trustee or director if they lose capacity.

Secondly, we recommend that a company trustee has **2 directors**, even if the company trustee is acting as trustee for a single member fund. This will enable the company to continue to operate if the member loses capacity. The alternative (and we recommend to do this in any event) is to have the company appoint someone as the company's attorney, so that person can act for the company if the sole director loses capacity.

Thirdly, we recommend that the Fund Deed provides for the legal personal representative, or a person appointed by the state guardianship board, to **act as an individual trustee and company director**.

Finally, we recommend that the member make a **valid investment strategy and binding death benefit nomination** to ensure that the fund is administered, and their benefits are paid, in accordance with their wishes. To whom the binding nomination should be made is a subject to another brief.

What next?

If you would like to speak to someone about getting your super nomination sorted, call us on **1300 654 590** or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.