



## Single Member SMSFs

This solution brief discusses your options for appointing a trustee for your self-managed super fund, and what happens if you lose mental capacity, die, or leave the country.

### **Single member funds**

A self-managed super fund can have 1 member, but care needs to be taken as to who acts as the trustee. You also need to plan for what happens if the sole member loses capacity, leaves the country, or dies.

### **Company trustee**

If a single member fund has a company trustee, then:

- The member must be the sole director; or
- The company can have 2 directors, and the other non-member director must either be:
  - Related to the member; or
  - Another person who is not an employer of the member.

### **Individual trustees**

If the single member fund has individual trustees, then there must be 2 individual trustees, and the other non-member trustee must be either:

- Related to the member, or
- Another person who is not an employer of the member.

The fund's assets must be held in the name of all of the trustees. So, if there is a change of trustee, legal title to the fund's assets must be transferred from the old trustee to the replacement trustee.

### **Disqualified people**

In addition, each individual trustee (and company director) must:

- Not be under a legal disability;
- Not have been convicted of an offence involving dishonesty;
- Not have been subject to a civil penalty order under the SIS Act;
- Not be an un-discharged bankrupt; and
- Not have otherwise been disqualified by the regulator.

### **Becoming a single member fund**

If your fund currently has more than 1 member, but a member dies or leaves the fund, then either a replacement individual trustee or company must be appointed (in accordance with the above rules), and the Tax Office must be notified within 28 days.



## **What do we recommend?**

On balance, we generally recommend that a member set up their fund with a company trustee. There is a little additional expense, but this is offset with not having to transfer ownership of assets when trustees come and go, and a company is easier to administer if something untoward happens to the member, as discussed in more detail below.

### **Losing Legal Capacity**

**Legal Personal Representative** 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 doing 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 or tribunal, 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.

### **Death of a sole member**

When a member dies, they will of course cease to be an individual trustee, or a director of the company trustee.

#### **Individual trustees**

If there are 2 individual trustees, and the sole member dies, 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., paying out their death benefits) in accordance with their wishes. Under this scenario we recommend that a binding death benefit rule be in place.

#### **Company trustee**

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. This can take some time.

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. Under this scenario we also recommend that a binding death benefit rule be in place.



## **What do we recommend?**

First, 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 dies. 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 dies.

Then 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.

## **Can a child under 18 be a member of a self-managed fund?**

The short answer is yes. The difficulty arises from the fact that a minor is not able to be a trustee of the fund, because they lack legal capacity. For a child, their legal personal representative will automatically be their parent or legally appointed guardian. Therefore, if the child is a member of the fund, then their parent or guardian must be a trustee (or a director of the company trustee).

## **Residency requirement**

A self-managed fund must remain an **Australian superannuation fund** in order to retain its complying status. In order to do this the fund must satisfy the following 3 tests each year:

### **1. Be established in Australia**

This test is relatively easy to satisfy, because it is a once-off test as to whether the fund was set up in Australia.

### **2. Have its central management and control ordinarily in Australia**

This test requires that the strategic, investment related and main decisions concerning the fund are ordinarily made in Australia.

The concept of **ordinarily in Australia** means that a trustee temporarily outside Australia is likely to be OK, but a trustee temporarily in Australia just to make decisions is not likely to satisfy this requirement. The trustees can engage external advice, but they cannot delegate their function to make the strategic and high-level decisions for the fund. They must physically make the decisions themselves, ordinarily in Australia.

There is one exception to this requirement, being that a trustee or director can be absent from Australia for a continuous period of up to 2 years and still not jeopardise the fund's complying status. To start the 2-year period again, the person must return to Australia for a visit of more than 28 days.

### **3. Satisfy the active member requirement**

The fund must satisfy one of the two following criteria:

- At least 50% of the fund's assets must be linked to **active members**, who are **resident** in Australia; or
- Not have any **active members**.

An active member is a member who makes a contribution during the year.

This means that if a non-resident member has more than 50% of the funds assets, the fund will cease to be complying if the member makes a contribution to the fund.



### **What do we recommend?**

If a member is planning on being outside of Australia for more than 2 years then the member should get specific advice as to how to deal with their self-managed fund, to avoid it potentially becoming non-complying.

### **What next?**

If you would like to speak to someone about these matters further, call us on [1300 654 590](tel:1300654590) or email us at [wehelp@adlvlaw.com.au](mailto:wehelp@adlvlaw.com.au).

Further information can also be found on our website at [www.adlvlaw.com.au](http://www.adlvlaw.com.au).