



# Why you need an enduring attorney for your SMSF

The trustee of your SMSF is all-powerful.

The trustee decides how much money you can put in the fund, who else can join, how your money is invested, how much gets paid out to you and when, and finally who gets what's left over when you die. This is why you are required by law to be a trustee or director of your fund, other than in very limited circumstances. In short, you need to be involved in how your money is managed.

However, in some circumstances it's not practical or even possible for you to be a trustee or director. If you become legally incapacitated, then you aren't able to act. If you die, obviously you can't be involved! But you also can't act if you are bankrupt or resident outside Australia.

So how do you ensure the trustee of your fund continues to do the right thing when you can no longer be involved? There are a number of strategies you need to have in place.

First, you need to appoint a **general and enduring power of attorney**. The person you appoint is then able to step into your shoes when you can't act. For example, if you are overseas or if you become mentally incapacitated. In fact, you can appoint an enduring attorney to act on your behalf with respect to your fund at any time. To make this work you need an SMSF Deed that recognises the authority of your attorney, and their right to act on your behalf, as well as a power of attorney document that ties in with your SMSF.

Secondly, you need a legally valid Will that clearly appoints your **legal personal representative** (or 'executor'). This person can ensure the trustee of your fund carries out your wishes for your super after you have died. As you may know, your super will not necessarily form a part of your 'estate', and if you don't make appropriate arrangements then the trustee of your fund can pay your super as they see fit, i.e., to themselves or another beneficiary of their choosing (rather than yours). But to make this work you will need an SMSF Deed that immediately recognises the authority of your legal personal representative on your death, rather than having to wait for probate of your Will. This is an important issue that is often overlooked in other deeds.

Finally, you should have in place a **death benefit nomination**, that tells the trustee of your fund how and to whom you want your fund balance paid. For example, to your spouse in the form of a pension, to your children in a lump sum, or to your estate. This nomination can be binding or non-binding. The best type to choose depends on many factors and will be considered as part of your estate planning.

If you do not have these three critical strategies in place, then chances are you will lose control of your super at a critical time, i.e., when you and your family need it most.

## **It's important to appoint an enduring attorney as soon as possible.**

If you lose capacity before appointing an enduring power of attorney then, no matter what the SMSF Deed says, there will be no person able to step into your shoes to manage and protect your super. In these circumstances your benefits will need to be paid to a public offer fund or paid out (if possible). This can seriously upset your investment strategy (triggering unnecessary CGT and stamp duty), as well as derail your retirement planning at a critical time.<sup>1</sup>

---

<sup>1</sup> It's possible for someone to apply to the state guardianship board to be given the power to act on your behalf. But this is a slow process, which can be easily derailed by an argument among your family as to who should be involved.



### **What happens if you have a company trustee?**

If there are other members in your fund, and you haven't appointed an enduring attorney, then they will continue on in control of the company trustee, and in complete control of your investments and benefits. As noted above, they will have no choice but to move your benefits or pay them out.

If you are the sole member of the fund, then things get very tricky. If you are also the sole shareholder, and have not appointed an enduring attorney, there will be no one able to appoint a replacement director – and the fund will freeze-up until an application to the guardianship board is successful. But if you have prepared properly, and appointed an enduring attorney, they will be able to appoint themselves as a director and then manage the fund on your behalf as you have directed.

Put simply, if you have a company trustee for your fund, you must appoint an enduring attorney under an appropriate document and ensure that the SMSF Deed recognises how they will act.

### **How do you appoint an enduring attorney?**

There are a number of formalities that must be met to effectively appoint an enduring attorney to look after your super interests. You also need to ensure that your SMSF Deed (and constitution for a company trustee) properly recognises the role and rights of your enduring attorney.

### **What next?**

If you would like to speak to someone about getting things started, call us on **1300 654 590** 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).