

SMSFR 2010/2 - Self Managed Superannuation Funds: the scope and operation of subparagraph 17A(3)(b)(ii) of the Superannuation Industry (Supervision) Act 1993

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Self Managed Superannuation Funds Ruling

Self Managed Superannuation Funds: the scope and operation of subparagraph 17A(3)(b)(ii) of the *Superannuation Industry (Supervision) Act 1993*

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Preamble

This publication represents the Commissioner's view about the way in which provisions of the *Superannuation Industry (Supervision) Act 1993*, or regulations under that Act, apply to superannuation funds that the Commissioner regulates: principally self managed superannuation funds.

Self Managed Superannuation Funds Rulings (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than this ruling indicates, the fact that you acted in accordance with this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion as to what action to take in response to a breach of that law. The Commissioner may, having regard to all the circumstances, decide that it is appropriate to take no action in response to the breach.

What this Ruling is about

1. This Ruling explains how subparagraph 17A(3)(b)(ii) of the *Superannuation Industry (Supervision) Act 1993* (SISA)¹ applies to self managed superannuation funds (SMSFs).
2. Subparagraph 17A(3)(b)(ii) allows a person who holds an enduring power of attorney in respect of a member to be 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.
3. This Ruling does not provide the Commissioner's views on how other SISA and Superannuation Industry (Supervision) Regulations 1994 (SISR) provisions apply to any of the arrangements discussed in this Ruling.

¹ All legislative references in this Ruling are to the SISA unless otherwise indicated.

Ruling

4. Section 17A sets out certain conditions that a superannuation fund must satisfy in order to be an SMSF. The primary requirements are set out in subsection 17A(1) for funds with more than one member and in subsection 17A(2) for single member funds. One particular requirement is that each member of an SMSF is also a trustee, or a director of the corporate trustee, of the SMSF. Except in the case of single member funds, each trustee, or director of the corporate trustee, is also a member of the SMSF. Subsection 17A(3) then provides a number of exceptions to the conditions imposed under subsections 17A(1) and (2).

5. Under subparagraph 17A(3)(b)(ii) a legal personal representative who holds an enduring power of attorney granted by a member may be a trustee of the SMSF, or a director of the corporate trustee of the SMSF, in place of the member without causing the fund to fail to satisfy the definition of an SMSF.

6. A person who holds an enduring power of attorney for a member qualifies as a legal personal representative.

7. In order to comply with subparagraph 17A(3)(b)(ii), the legal personal representative must be appointed as a trustee of the SMSF, or a director of the corporate trustee of the SMSF. The member must cease to be a trustee of the SMSF or a director of the corporate trustee except where the legal personal representative is appointed as an alternate director.

8. The appointment of the legal personal representative as a trustee and the removal of the member must be in accordance with the trust deed, the SISA and any other relevant legislation.

9. The appointment of the legal personal representative as a director of the corporate trustee and the removal of the member from this position, must be in accordance with the constitution (if any) of the corporate trustee, the SISA and the relevant provisions of the *Corporations Act 2001* (Corporations Act).

10. A member who is a director of the corporate trustee may also appoint their legal personal representative holding an enduring power of attorney as an alternate director in their place in accordance with the corporate trustee's constitution or section 201K of the Corporations Act. If the legal personal representative is appointed as an alternate director, he or she must be so appointed in their own right and not as the member's agent. In addition, the terms of the appointment must only empower the legal personal representative to act as a director when the member is not performing those duties themselves. The member is not removed from the position of director in these circumstances.

11. The legal personal representative performs their duties as a trustee of the SMSF, or a director of the corporate trustee of the SMSF, pursuant to their appointment to that position rather than as an attorney or agent 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 are not relevant to the application of the exception contained in subparagraph 17A(3)(b)(ii).

12. Further, as the legal personal representative is acting in a personal capacity as a trustee of the SMSF, the legal personal representative is subject to civil and criminal penalties for any breaches of their duties under the SISA or other legislation. Likewise, a legal personal representative who is a director of the corporate trustee is also subject to civil and criminal penalties for breaches of the SISA and the Corporations Act.

13. The enduring power of attorney must be current and accord with the relevant State or Territory legislation relating to enduring powers of attorney at all times during which the legal personal representative is a trustee, or a director of the corporate trustee, of the SMSF in place of the member.

14. Where a member is disqualified from being a trustee, or a director of the corporate trustee, of an SMSF under section 120, subsection 17A(10) prevents the exceptions in subsection 17A(3) from applying in respect of that member. Consequently, the exception in subsection 17A(3)(b)(ii) will not apply and the superannuation fund will cease to satisfy the definition of an SMSF under subsections 17A(1) or 17A(2).

15. Where an enduring power of attorney is executed in favour of multiple attorneys, one or more of those attorneys can be appointed as a trustee, or a director of the corporate trustee, in place of the member.

16. Similarly, multiple members can execute an enduring power of attorney in respect of the same legal personal representative who can be appointed as a trustee, or a director of the corporate trustee, in place of each of those members.

17. Finally, a member can execute an enduring power of attorney in favour of an existing member who is a trustee, or director of the corporate trustee, in their own right. In that case, the donor member can cease to be a trustee, or a director of the corporate trustee, and the legal personal representative will be considered to be appointed in their place for the purposes of subparagraph 17A(3)(b)(ii).

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Funds to which the Ruling applies

18. This Ruling applies to Self Managed Superannuation Funds² (SMSFs) and former SMSFs.³ References in the Ruling to SMSFs include former SMSFs unless otherwise indicated.

Date of effect

19. This Ruling applies to years of income commencing both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling.

Commissioner of Taxation

21 April 2010

² As defined in section 17A of the SISA.

³ A former SMSF is a fund that has ceased being a SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee – see subsection 10(4) of the SISA.

Appendix 1 – Examples

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached.*

Example 1

20. Andrew works for a large international group of companies. He and his wife, Jane, are trustees and members of their SMSF. From 1 February 2009 Andrew is transferred to an overseas company for an indefinite period of time. In accordance with the relevant State legislation, Andrew and his wife each execute an enduring power of attorney in favour of their friend and retired accountant, Trevor. In addition, Andrew and Jane both resign as trustees of their SMSF and appoint Trevor as the trustee. The appointment of Trevor as trustee is in accordance with the terms of the trust deed. Other than the fact that Andrew and Jane are not trustees of the SMSF, the superannuation fund satisfies the other requirements of the definition of an SMSF in subsection 17A(1).

21. Trevor is a legal personal representative of both of the members, Andrew and Jane, by virtue of holding an enduring power of attorney in respect of each of them. In addition, Trevor is now the trustee of the SMSF in place of both Andrew and Jane. Once appointed as trustee, Trevor is subject to civil and criminal penalties in the event that he breaches his duties. Provided that the enduring power of attorney remains valid during the period Trevor is the trustee and given that the other requirements of subparagraph 17A(3)(b)(ii) are satisfied, the superannuation fund continues to satisfy the definition of an SMSF in subsection 17A(1), notwithstanding that Andrew and Jane are no longer trustees.⁴

Example 2

22. Taking the situation in Example 1, if Andrew were to travel overseas by himself and execute an enduring power of attorney in favour of his wife, Jane, Andrew would still be required to resign as trustee of the SMSF. However, as Jane is already a trustee of the SMSF, she does not need to be re-appointed in her capacity as legal personal representative for Andrew.⁵

⁴ The appointment of Trevor as trustee will not necessarily result in the SMSF continuing to be an 'Australian superannuation fund' while Andrew and Jane are residing overseas. Please refer to Taxation Ruling TR 2008/9 Income tax: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the *Income Tax Assessment Act 1997* for more information.

⁵ The resignation of Andrew as trustee will not necessarily result in the SMSF continuing to be an 'Australian superannuation fund' while he is residing overseas. Please refer to TR 2008/9 which considers the meaning of 'Australian superannuation fund' for more information.

Example 3

23. 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 a trustee of the SMSF have become too difficult and time consuming for her. She executes an enduring power of attorney for Jan in accordance with State legislation. Clare resigns as trustee, leaving Jan as the sole trustee. Other than the fact that Clare is not a trustee of the SMSF, the fund satisfies the other requirements of the definition of an SMSF in subsection 17A(1).

24. Jan is a legal personal representative for Clare by virtue of holding an enduring power of attorney in respect of Clare. In addition, Jan is trustee of the SMSF in place of Clare. Provided that the enduring power of attorney remains valid during the period whilst Jan is the only trustee and given that the other requirements of subparagraph 17A(3)(b)(ii) are satisfied, Clare's superannuation fund continues to satisfy the definition of an SMSF in subsection 17A(2), notwithstanding that Clare is no longer a trustee of her fund.

Example 4

25. Chris and Marie are members of an SMSF, the trustee of which is Clear Pty Ltd. Chris and Marie are the directors of Clear Pty Ltd.

26. Chris and Marie own their own yacht and decide to go on a cruise around the world for an indefinite period of time. Chris and Marie have three children (Rick, Cassandra and Caroline) and they have each granted an enduring power of attorney to all three of their children to be exercised jointly in accordance with State legislation. Under each joint enduring power of attorney, the children are required to act together, and never separately or severally, in relation to any activity undertaken as attorneys.

27. Chris and Marie resign as directors of Clear Pty Ltd and Rick, Cassandra and Caroline are appointed as directors in their place. Other than the fact that Chris and Marie are not directors of Clear Pty Ltd, the fund satisfies the other requirements of the definition of an SMSF in subsection 17A(1).

28. Rick, Cassandra and Caroline are all legal personal representatives of both Chris and Marie by virtue of each of the enduring powers of attorney executed by Chris and Marie. In addition, Rick, Cassandra and Caroline are now directors of the corporate trustee in place of Chris and Marie. Once appointed as directors, Rick, Cassandra and Caroline will act in their capacity as director and will not be bound by the requirements attaching to the enduring powers of attorney. This means that they may act separately or severally in relation to their activities as directors, and are subject to civil or criminal penalties in the event of a breach of duties. Further, provided that the enduring powers of attorney remain valid during the period whilst Rick, Cassandra and Caroline are directors, and given that the other requirements of subparagraph 17A(3)(b)(ii) are satisfied, Chris and Marie's superannuation fund continues to satisfy the definition of an SMSF in subsection 17A(1), notwithstanding that Chris and Marie are no longer directors of the corporate trustee of the fund.⁶

Example 5

29. Ewan is a member of a two member SMSF with his sister. The SMSF has a corporate trustee, Transitional Pty Ltd, of which the pair are directors.

30. Ewan has recently retired and plans to travel extensively. Consequently, he wants to put arrangements in place for the management of his affairs in his absence. Ewan executes an enduring power of attorney in favour of his father, Andrew, who he also nominates as an alternate director of Transitional Pty Ltd. Ewan does not step down as a director himself and fulfils the responsibilities of that role while he is not travelling.

31. Andrew is a legal personal representative of Ewan by virtue of holding an enduring power of attorney. In addition, as an alternate director, Andrew is only a director of Transitional Pty Ltd while he is performing the duties of that role in place of Ewan. Provided that the enduring power of attorney remains valid during any period when Andrew is performing these duties, and given that the other requirements of subparagraph 17A(3)(b)(ii) are satisfied, Ewan's superannuation fund continues to satisfy the definition of an SMSF in subsection 17A(1), notwithstanding that Andrew is a director of the corporate trustee of the fund.

⁶ The appointment of Rick, Cassandra and Caroline as directors will not necessarily result in the SMSF continuing to be an 'Australian superannuation fund' while Chris and Marie are overseas. Please refer to Taxation Ruling TR 2008/9 which considers the meaning of 'Australian superannuation fund' for more information.

Appendix 2 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner’s view has been reached.***

Background information

32. The definition of a ‘self managed superannuation fund’ was inserted into the SISA in 1999.⁷ SMSFs were formerly known as ‘excluded superannuation funds’. The policy reason for the conditions that essentially prohibit persons other than members from being a trustee of the fund (or a director of the corporate trustee of the fund) was explained as follows:

B. All members are trustees and there are no other trustees

Under the existing definition an excluded superannuation fund may contain members that are at arms length from the trustees, for example, non-related employees of the funds employer-sponsor. These members often lack a clear commonality of interest and equality of influence over the management of the fund in comparison to other members of the fund.

The requirement that all members be trustees will ensure that each member is fully involved and has the opportunity to participate equally in the decision making processes of the fund (*that is, that the fund is truly self managed*). (emphasis added)⁸

33. Another policy reason provided for this strict requirement was that SMSFs are exempt from many of the prudential requirements under SISA that have the effect of protecting members’ interests.⁹

Explanation

34. Section 17A sets out the conditions that a fund must satisfy in order to be an SMSF. One particular requirement is that each member of an SMSF is also a trustee of the SMSF, or a director of the corporate trustee of the SMSF.¹⁰ Further, other than in the case of single member funds,¹¹ each trustee of the SMSF (or director of the corporate trustee) is also a member of the SMSF.¹²

35. Subsection 17A(3) prescribes certain limited situations in which a person other than a member may be a trustee of an SMSF, or a director of the corporate trustee of the SMSF.

⁷ *Superannuation Legislation Amendment Act (No. 3) 1999.*

⁸ Explanatory Memorandum (EM) to the Superannuation Legislation Amendment Bill (No. 3) 1999, item 22.

⁹ EM to the Superannuation Legislation Amendment Bill (No. 3) 1999.

¹⁰ Paragraph 17A(1)(d).

¹¹ Single member funds may have one or two directors or two individual trustees (paragraphs 17A(2)(a) and (b)).

¹² Paragraphs 17A(1)(b) and (c).

36. Subsection 17A(3) states:

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 has 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 – the parent or guardian of the member is a trustee of the fund in place of the member; or
- (d) an appointment under section 134 of an acting trustee of the fund is in force.

37. In both paragraphs 17A(3)(a) and (b) the person that may be a trustee of the SMSF, or a director of the corporate trustee, in place of the member is the legal personal representative of the member.

38. Consistent with the modern approach to statutory interpretation¹³ the operation of subparagraph 17A(3)(b)(ii) should be determined by having regard to the context in which the provision appears. The relevant context includes the policy underpinning the provisions,¹⁴ the scheme of the SISA as a whole and the powers of attorney and trustee legislation of each State and Territory of Australia.¹⁵

¹³ *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384.

¹⁴ Refer to paragraphs 32 and 33 of this Ruling.

¹⁵ The courts have expressed the view that unless the trustee legislation or the rules governing the trust provide to the contrary, the principles of the general law of trusts applies to superannuation funds. See, for example, *Cowan v. Scargill* [1985] Ch 270 at 292; [1984] 2 All ER 750 at 764 and *Lock v. Westpac Banking Corporation* (1991) 25 NSWLR 593 at 609-610.

Legal personal representative of a member of the fund

39. Subsection 10(1) defines a 'legal personal representative' as:

... the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person.

40. Where a person has been granted an enduring power of attorney by a member of an SMSF the person will qualify as a legal personal representative under the third limb of the definition. That person will also be a legal personal representative for the purposes of subparagraph 17A(3)(b)(ii).

Enduring power of attorney

41. A power of attorney that is not an 'enduring power of attorney' will not be sufficient to satisfy the requirements of either subsection 10(1) or subparagraph 17A(3)(b)(ii).¹⁶ If the attorney in these circumstances becomes a trustee of the fund, or a director of the corporate trustee, the status of the fund as an SMSF will not be maintained.

42. The concept of an 'enduring power of attorney' is not defined in the SISA. This concept has a specific legal meaning. An enduring power of attorney is a power authorised by statute which survives the legal incapacity of the donor.¹⁷ Each State and Territory in Australia has enacted legislation that deals specifically with enduring powers of attorney.¹⁸ Regard must be had to these specific provisions to ensure that an enduring power of attorney is valid.

43. While an enduring power of attorney is intended to survive the legal incapacity of the donor, the legislation of each jurisdiction enables the donor to authorise the donee to exercise those powers while the donor is legally capable. An enduring power of attorney that is invoked while the donor is legally capable is one which satisfies the requirements of both paragraph 10(1) and subparagraph 17A(3)(b)(ii).

¹⁶ For more information on delegation of trustee's duties see paragraphs 123 to 127 of TR 2008/9.

¹⁷ Collier B and Lindsay S 1992, *Powers of Attorney in Australia and New Zealand*, The Federation Press, Australia, p. 131.

¹⁸ *Powers of Attorney Act 2003* (NSW) Part 4, Division 2; *Powers of Attorney Act 2006* (ACT) Chapter 5; *Powers of Attorney Act 1980* (NT) section 13; *Powers of Attorney Act 1998* (Qld) Chapter 3; *Powers of Attorney and Agency Act 1984* (SA) section 6; *Powers of Attorney Act 2000* (Tas) Part 4; *Instruments Act 1958* (Vic) Part XIA; *Guardianship and Administration Act 1990* (WA) Part 9.

Requirement that legal personal representative be appointed as trustee of the SMSF or a director of the corporate trustee

44. The exceptions in paragraph 17A(3)(b) apply only where the legal personal representative 'is a trustee of the fund or a director of a body corporate that is the trustee ... in place of the member'. In addition, there are proscriptions in some State or Territory legislation against transferring trustee duties under a power of attorney.¹⁹ Further, under the common law, a power of attorney does not itself give a person authority to act in place of the director of a company.²⁰ Therefore, it is considered that paragraph 17A(3)(b) requires that:

- the legal personal representative be appointed as a trustee of the SMSF, or a director of the corporate trustee. This is because the legal personal representative does not become a trustee of the fund, or a director of the corporate trustee, merely by virtue of holding an enduring power of attorney; and
- the member cease to be a trustee of the SMSF, or as a director of the corporate trustee of the SMSF, except where the legal personal representative is appointed as an alternate director.

45. Further, in order to be appointed as a trustee or a director of the corporate trustee, the legal personal representative:

- must consent in writing to the appointment as a trustee or as a director of the corporate trustee;²¹ and
- cannot be a disqualified person as defined under section 120;²² and
- must sign a declaration stating that they understand their duties as a trustee no later than 21 days after their appointment as trustee, or as a director of the corporate trustee.²³

¹⁹ See for example *Powers of Attorney Act 2003* (NSW) section 10; *Powers of Attorney and Agency Act 1984* (SA) subsection 5(4); *Instruments Act 1958* (Vic) subsection 107(2).

²⁰ *Mancini v. Mancini* (1999) 17 ACLC 1570 at 1577-1578 where it was held that the office of a director is a personal responsibility and it is not a property right capable of being exercised by an attorney or other substitute or delegate of the person holding the office; see also *Cheerine Group (International) Pty Ltd v. Yeung* [2006] NSWSC 1047.

²¹ Section 118.

²² Under subsection 126K(1), it is an offence for a disqualified person to act as trustee of a superannuation entity and under subsection 126K(4) it is an offence for a disqualified person to act as a responsible officer of a corporate trustee.

²³ Section 104A. Note that this requirement only applies to appointments after 30 June 2007.

46. It should also be noted that no trustee, or director of a corporate trustee, can receive remuneration from the fund or any person for any duties or services performed by the trustee or director in relation to the fund.²⁴

47. Further issues specific to individual trustees and directors of a corporate trustee are outlined in paragraphs 48 to 55 of this Ruling.

Individual trustee

48. The legal personal representative will need to be appointed as a trustee, and the member removed as a trustee, in accordance with the relevant provisions of SISA, the SMSF's trust deed and State or Territory trustee legislation. In particular, the SMSF's trust deed will have to allow for the appointment of a person who is not a member of the fund as a trustee in place of the member.

49. In *Re Smith; Eastick v. Smith* Farwell J stated that:²⁵

Every power given to trustees which enables them to deal with, or affect, the trust property, is prima facie given to them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being. Whether a power is so given *ex officio* or not, depends in each case on the construction of the document giving it; but the mere fact that the power is one requiring the exercise of a very wide personal discretion, is not enough to exclude the prima facie presumption.

50. Therefore, after appointment as a trustee of the SMSF, the legal personal representative derives his or her authority to administer the fund from their position as a trustee of the fund, and not as an agent for the member under the enduring power of attorney. Consequently, any proscriptions contained in State or Territory legislation against conferring trustee duties and powers via a power of attorney are not relevant to the operation of subparagraph 17A(3)(b)(ii).²⁶

Director of corporate trustee

51. In the case of an SMSF that has a corporate trustee, the legal personal representative must be appointed as a director of the corporate trustee, and the member must cease to be a director (except in the case of alternate directors), in accordance with the company's constitution (if any) and the relevant rules for the appointment of directors contained in the Corporations Act.

²⁴ Paragraphs 17A(1)(f) & (g) or paragraphs 17A(2)(c) & (d).

²⁵ *Re Smith; Eastick v. Smith* [1904] 1 Ch 139 at 144.

²⁶ See paragraph 44 of this Ruling for examples of such proscriptions.

52. A member may also appoint their legal personal representative who holds an enduring power of attorney as an alternate director in accordance with the corporate trustee's constitution (if any) or section 201K of the Corporations Act (replaceable rule).²⁷

53. An alternate director is appointed by a director of a company to exercise some or all of the director's powers for a specified period.²⁸ An alternate director has no legal standing as director unless they are entitled or empowered to act in that role.²⁹ In addition, an alternate director is only a director while they are acting in that position.³⁰ While they are in the role they are subject to the normal duties which a director owes to the company.³¹ The appointing director remains in the position of director (together with all the responsibilities that attend that position) even while the alternate director is exercising those powers.³²

54. As subparagraph 17A(3)(b)(ii) requires the legal personal representative to exercise those duties 'in place of' the member, the legal personal representative, as alternate director, must exercise those duties in their own right and not as an agent for the member. In addition, the terms of the appointment must only empower the legal personal representative to act as a director when the member is not performing those duties themselves. The alternate director will be personally liable for decisions that he or she makes in their capacity as alternate director.

55. Whether the legal personal representative is appointed as a director in their own right or is acting as an alternate director, they administer the fund in their capacity as a director of the corporate trustee, not as an agent for the member under the enduring power of attorney. Therefore, the legal personal representative's authority to perform the duties of a director of the corporate trustee is derived from his or her position as a director of the corporate trustee and not from the enduring power of attorney.

²⁷ Refer to section 201K of the Corporations Act for the specific requirements for appointing alternate directors.

²⁸ Subsection 201K(1) of the Corporations Act

²⁹ *Playcorp Pty Ltd v. Shaw* (1993) 10 ACSR 212

³⁰ See the definition of 'Director' in section 9 of the Corporations Act.

³¹ *Markwell Bros Pty Ltd v. CPN Diesels (Qld) Pty Ltd* [1983] 2 Qd R 508; (1982) 7 ACLR 425 at 433; *Playcorp Pty Ltd v. Shaw* (1993) 10 ACSR 212

³² *Androvin v. Figliomeni* (1996) 14 ACLC 1461 at 1470. In this case, Owen J stated that the mere appointment of an alternate director did not of itself entitle the respondent to claim that he did not consent to the incurring of debts by the other director while the company was insolvent.

Validity of enduring power of attorney

56. The exception in subparagraph 17A(3)(b)(ii) applies during any period when the legal personal representative has an enduring power of attorney in respect of the member. It is implicit in this requirement that the enduring power of attorney is current and accords with the relevant State or Territory powers of attorney legislation at all times during which the legal personal representative is a trustee, or a director of a corporate trustee, in place of the member. Thus, if the enduring power of attorney has been, for any reason, terminated, one of the conditions in the exception contained in subparagraph 17A(3)(b)(ii) is not satisfied. In such situations, the former legal personal representative must resign and the member must be re-appointed as a trustee, or a director of the corporate trustee, in order for the fund to continue to meet the definition of an SMSF in subsections 17A(1) or 17A(2).³³

Obligations imposed on trustees of SMSFs

57. Before accepting an appointment as a trustee, or a director of a corporate trustee, of an SMSF the legal personal representative must ensure that they are aware of the duties, responsibilities and obligations of being a trustee or a director of a corporate trustee. The duties, responsibilities and obligations are imposed by the SISA and other legislation (such as the *Taxation Administration Act 1953* or, in the case of a director of a corporate trustee, the Corporations Act).³⁴

58. As a trustee of the SMSF, or a director of the corporate trustee, the legal personal representative is subject to civil and criminal penalties for any breaches of their duties under the SISA or other legislation. A legal personal representative who is a director of the corporate trustee is also subject to civil and criminal penalties for breaches of the Corporations Act.

59. If a legal personal representative, as a trustee of an SMSF, is in breach of the trust deed, or fails to exercise their powers reasonably, in good faith and for the purposes for which they were conferred, civil action may be brought against the legal personal representative by members of the SMSF (as beneficiaries of the trust).³⁵

³³ Where a superannuation fund ceases to meet the definition of an SMSF in subsections 17A(1) or 17A(2) due to the change in trustees or directors, subsection 17A(4) would cease to be an SMSF from the earlier of an RSE licensee trustee being appointed or 6 months after the definition ceased to be satisfied.

³⁴ For further detailed information on the duties, responsibilities and obligations imposed on SMSF trustees refer to the publication *Running a self managed super fund* (NAT 11032) available on www.ato.gov.au.

³⁵ Dal Pont, GE and Chalmers, DRC 2004, *Equity and Trusts in Australia*, 3rd edn, Lawbook Co, Australia, p 745.

Members disqualified from being trustees

60. Where a member is disqualified from being a trustee, or a director of the corporate trustee, of an SMSF under section 120, subsection 17A(10) prevents the exceptions in subsection 17A(3) from applying in respect of that member. Consequently, if a legal personal representative of that member is appointed as a trustee, or a director of a corporate trustee, in place of that member, the superannuation fund will cease to satisfy the definition of an SMSF under subsections 17A(1) and 17A(2).

One for one substitution is not necessary

61. The question arises as to whether satisfaction of the conditions in subparagraph 17A(3)(b)(ii) requires a preservation of the number of trustees, or directors of the corporate trustee, dictated by subsections 17A(1) or (2). If that were the case, then in order to satisfy the exception in subparagraph 17A(3)(b)(ii) each member could only be replaced by one legal personal representative who is appointed as a trustee, or director of the corporate trustee, of the fund.

62. Considering the exceptions contained in subsection 17A(3) as a whole, it is apparent that in practice the majority of those exceptions may operate to allow some members of an SMSF to be trustees or directors in the place of other members, despite the overall aim of section 17A to provide for equality of influence.

63. Further, although the terms 'legal personal representative', 'parent', guardian', 'member', 'trustee', and 'director' in paragraphs 17A(3)(a) to (c) are all expressed in the singular form, section 23 of the *Acts Interpretation Act 1901* provides as follows:

SECTION 23 RULES AS TO GENDER AND NUMBER

23 In any Act, unless the contrary intention appears:

- (a) words importing a gender include every other gender; and
- (b) words in the singular number include the plural and words in the plural number include the singular.

64. Therefore, taking into account the structure and effect of the exceptions contained in subsection 17A(3) as a whole, it is implicit that the words of paragraphs 17A(3)(a) to (c) should not be read as being restricted to only a one for one substitution of the legal personal representative (or parent or guardian) for the member as trustee of the superannuation fund (or director of the corporate trustee).

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65. To read subparagraph 17A(3)(b)(ii) as only allowing a one for one substitution of a legal personal representative in place of a member, would be inconsistent with the other parts of the subsection. Read in this context, subparagraph 17A(3)(b)(ii) allows for the following:

- an existing member and trustee or director can also be a trustee or director in the place of another member where they hold an enduring power of attorney for that member;
- a legal personal representative who holds an enduring power of attorney for more than one member can be a trustee or director in the place of one or more of those members; and
- where one member has granted an enduring power of attorney to more than one person, one or more of those people can be appointed as trustee or director in place of the member.

The fund ceases to satisfy the definition of an SMSF

66. If a fund ceases to satisfy the definition of an SMSF in section 17A, the Commissioner of Taxation will retain powers of administration as regulator of the fund until a registrable superannuation entity (RSE) licensee is appointed as trustee.³⁶ The trustee must notify the Commissioner within 21 days of the fund ceasing to be an SMSF.³⁷

67. Funds that no longer meet the definition of an SMSF need to:

- restructure the fund to again meet the SMSF conditions;
- appoint an RSE licensee as trustee and become regulated under APRA; or
- wind up the fund.

68. If the trustees of the fund do not rectify the situation, the fund's complying status may be removed. A non-complying fund is taxed at the highest marginal tax rate (currently 45%) on its income and the market value of assets just before the start of the year in which it is made non-complying rather than only on the income of the fund at the concessional rate of 15%.

³⁶ Subsection 10(4).

³⁷ Section 106A.

Appendix 3 – Detailed contents list

69. The following is a detailed contents list for this Ruling:

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- powers of attorney
- retirement income entities
- self managed superannuation funds
- SMSF structure
- SMSF trustee
- superannuation

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