

Self managed superannuation funds – Importance of Enduring Powers of Attorney

Members losing their capacity

Section 17A of the *Superannuation Industry (Supervision) Act 1993 (SIS)* requires all members of a SMSF to be either a trustee or a director of the trustee company.

If a member loses capacity, they cannot be either a trustee or a director, and this has the potential for some serious issues for an SMSF confronted with an incapacitated member.

Where a member has granted an Enduring Power of Attorney, then the SMSF can comply with section 17A of SIS by the attorney or attorneys becoming the trustee or director in the place of the member. In the absence of an Enduring Power of Attorney, the member's benefit must leave the fund, either as a roll out or a benefit payment.

Where a person does not have an Enduring Power of Attorney and loses capacity, then there is legislative provision for another to be appointed as guardian over the person's affairs.

Can a Guardian become the trustee or director in the member's place?

It has been unclear whether the guardian becoming the trustee or director of the corporate trustee in the place of the incapacitated member complied with section 17A(3) of SIS .

The ATO has clarified in ATO ID 2010/139 that a person appointed as guardian for a member with a mental disability can act as trustee of a self managed superannuation fund.

Before this ATO ID, our view was that a guardian cannot be the trustee or director of the trustee company in the place of the incapacitated member and comply with section 17A, because section 17A(3) provides that a legal personal representative can act as a trustee of a self managed superannuation fund in place of the member.

The definition of legal personal representative includes an attorney appointed under an enduring power of attorney and the trustee of the estate of a person under a legal disability. This does not include a guardian appointed by a State or Territory tribunal did not appear to satisfy the definition of legal personal representative.

In this ID, the ATO are relying on the fact that it was intended to cover this situation, even though the wording of the legislation does not clearly allow this.

It is still of the greatest importance that all members of self managed superannuation funds have a valid and current enduring power of attorney in place to cover this issue.