

## When a member of an SMSF dies

When a member of an SMSF dies, there will be many issues to deal with in relation to their funeral arrangement and their estate. There will also be a need to deal with their member account in the SMSF.

Apart from sole member SMSFs, the trustee/member rules that apply to SMSFs generally require that each member of the SMSF must also be a trustee (or director of the corporate trustee) of the SMSF, and vice versa.

However, S.17A(3)(a) of the Superannuation Industry (Supervision) Act 1993 (SIS Act) provides as follows:

*“A superannuation fund does not fail to satisfy [the SMSF trustee/member rules] by reason only that.....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 o*
- (ii) *f the fund died; and*
- (ii) *ending when death benefits commence to be payable in respect of the member of the fund.”*

While the legal personal representative (LPR) would represent the deceased member, it is also important to note the following:

- (a) the LPR of the deceased member does not automatically become trustee/director of the SMSF, and their appointment as trustee/director must be properly documented;
- (b) the above section of the SIS Act only allows the LPR to be trustee/director from the death of the member until when the deceased member's benefits “commence to be payable”;
- (c) Depending on the circumstances of the SMSF it may not be necessary (or appropriate) to appoint the LPR as a trustee/director, as benefits must be paid from the fund “as soon as practicable”;
- (d) Where a member has died, there is a six-month period under which the trustee/member rules may be satisfied under S.17A(4); and

(e) The benefits in an SMSF of a deceased member generally do not form part of the deceased member's estate (to be disposed of by their Will), unless the surviving trustee(s) determine that those benefits are to be paid to the deceased member's estate.

Dealing with such issues is a matter for professional guidance, and is where you, at this time, can be of greatest value as the trusted adviser.

## A bankrupt person must not be a trustee of an SMSF!

Superannuation legislation is clear that a “disqualified person” is prohibited from being a trustee (or director of a corporate trustee) of an SMSF.

A bankrupt person is a “disqualified person”, and therefore may not be a trustee. A trustee of an SMSF who is or becomes bankrupt is required to inform the ATO in writing of this immediately.

Serious penalties may apply for a person or persons who are trustees/directors of an SMSF while they are bankrupt. These penalties include imprisonment for two years and a fine of up to \$10,200.

For SMSFs that have a corporate trustee, it should also be noted that the corporate trustee itself may be a “disqualified person”. This would be the case if any of its “responsible officers” are or become bankrupt.

*Ed note: A “responsible officer” is defined in the superannuation legislation to include secretaries and executive officers, as well as directors. While the term “Executive officer” is not defined, it may include a public officer.*

If a director or other executive became bankrupt while serving as an officer of the corporate trustee they would be required to remove themselves from that role. It may also be appropriate to remove the corporate entity from being the SMSF Corporate Trustee, depending on the timing of that officer becoming bankrupt.

Further to this, superannuation legislation specifically provides that the legal personal representative of a bankrupt person (or other disqualified person) **cannot** be a trustee (or director of a corporate trustee) of the SMSF in that person’s place.

This prohibition on a bankrupt person in effect means that they cannot be a member of the SMSF (having regard to the trustee/member rules for SMSFs), and would therefore have to cease being a member of the SMSF as soon as possible.

Once a bankrupt person officially ceases to be bankrupt, they may once more be eligible to be a trustee/director of an SMSF. However, before taking this step, detailed advice should be sought to clarify the position.

Also, in practice, consideration of these issues should be given to trustees/directors of SMSFs who are experiencing financial difficulties, and indications are that they may become bankrupt in the near future. Detailed advice and a plan of action to address this should be sought as soon as any concerns in this area may arise.

### **Can an SMSF pension commence before it is documented in writing?**

The ATO has indicated in Taxation Ruling TR 2013/5 when the commencement date of a pension can be.

Ultimately, this is to be determined by;

- ◆ the terms and conditions agreed between the member and trustee;
- ◆ the SMSF’s deed; and
- ◆ the relevant superannuation legislation.

This is an important issue, as the assets supporting an SMSF pension are generally exempt from tax.

TR 2013/5 also provides that the commencement date of a superannuation pension may occur before the due date of the first payment (subject to the SMSF’s deed), although it cannot precede the date of the member’s application. However, this ruling does not say whether the member’s application to pay the pension needs to be in writing.

Arguably, there may be a verbal agreement to pay a pension that is documented afterwards, (unless the deed for the SMSF does not allow this). However, the onus would be on the taxpayer to demonstrate the existence of a verbal agreement; if so required by the ATO.

Effectively TR 2013/5 provides that an SMSF pension cannot commence retrospectively, and there is also the question of when the assets supporting the pension are exempt from tax.

Where an SMSF uses the segregated current pension assets method, it must segregate its assets between those assets that are supporting the pension, and other “non-pension” assets. On this basis it would seem that an SMSFs assets cannot be retrospectively segregated.

However, under the unsegregated method, no action is required in the relevant income year, although the trustee must obtain an actuarial certificate before the date of lodgement of the SMSF’s income tax return for that income year.

Therefore, if it is possible to commence an SMSF pension before it is documented (or even retrospectively), this “unsegregated” method should be available.

Care should be taken to ensure that any action taken is in accordance with the tax ruling in question - professional advice should be obtained and documented.

## **ASIC issuing fines for SMSF ‘free’ services**

In their surveillance of the marketplace, ASIC have recently issued fines for statements made about the costs of setting up and running an SMSF that they believe were “potentially misleading”.

The statements were made in online advertising for two groups, and fines were issued for over \$32,000.

The statements that drew ASIC’s attention and ultimately incurred these penalties were:

- ◆ One group’s claim that there would be no established or ongoing costs (further ASIC investigation found that there would be charges);
- ◆ One group’s published comparison that misrepresented the ongoing cost of administration of an SMSF when compared to an industry superannuation fund; and
  - ◆ That another group’s operations were reviewed annually by ASIC (this was not the case).

Concerns were also issued by ASIC about representations that fund set-up was free and had no qualifying conditions. When further investigated, it appeared that there were conditions for such an offer that equated to (what was in effect) an establishment fee being charged.

### **Who’s Responsible?**

These fines signal the extent to which ASIC is surveilling the marketing in the SMSF space.

One aspect that must be clear when operating as an Authorised Representative of an Australian Financial Services Licence (AFSL) is “who is the licensee”. Notwithstanding that the authorised representative of the licensee has a liability for advice given, the licensee is ultimately responsible.

This concept is quite different to how an accounting practice operates, where the advice given on taxation matters and any other representations are the responsibility of the practice providing such advice.

Under an AFSL, both the provision of advice as well as any marketing targeted at prospective clients must clearly state who the licensee is – not just the practice name that the clients will be dealing directly with.

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AFSL 444196  
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