



## Substituting an SMSF Trustee using Enduring Power of Attorney

A question that SMSF trustees may have to answer is, 'what if I am unable to fulfil my duties as trustee for a certain amount of time, or ever again?'

The answer will be specific to the circumstances of the trustee(s) and their needs, but one possible solution is to appoint a person to hold an enduring power of attorney (EPA) and step in for the member as trustee.

The ATO recently released a draft ruling which gives greater clarity on how they interpret the legislation surrounding the appointment of a person holding enduring power of attorney as a trustee of a SMSF.

This article does not cover all aspects of the current legislation. Relevant state based legislation will impact on how the enduring power of attorney may be able to be used inside the SMSF and we recommend legal advice before acting on any matters contained within.

## When might I consider appointing an enduring power of attorney?

At times it is difficult or impossible for the member to perform the trustee functions such as:

- Member is going overseas for an indefinite amount of time
- Member no longer wishes to execute individual authority
- Member is temporarily ill
- Member has become incapacitated
- Member is unable to control spending habits (protection of pension members)

Substituting the Trustee using an enduring power of attorney may be a viable option for those who do not want to:

- Wind-up the SMSF
- Roll the money into another complying fund

- Appoint an APRA (Australian Prudential Regulation Authority) approved trustee and convert the SMSF into a Small APRA Fund (SAF)
- Trigger a Capital Gains Tax event relating to wind-up/rollout of a member's balance

A member may consider drafting the enduring power of attorney to come into effect upon a specified event (illness or incapacity). Alternatively, the member may wish that the EPA is broad enough for action at all times.

By appointing an EPA the member may be able to avoid converting to a SAF or winding up the fund. Thus the SMSF is able to continue as a complying fund in its own right.

As the EPA has the authority to act on behalf of the member, it is important that the member selects this individual with extreme care and understands the impact that this person can have in relation to the member's affairs.

## Essential Legislative Considerations

One key legislated definition of a SMSF that must be satisfied is that each member must be a trustee, or the fund can have a company trustee and each member must be a director. There are several exclusions to this, one which will be discussed below; however, this aspect of the fund is central to the ability for the SMSF to continue to be a complying fund.

Under the residency rules for SMSFs, it is imperative that the fund maintains central management and control in Australia. Trustees who reside overseas for extended periods of time are at risk of their fund being made non-complying. Appointing an Australian resident with enduring power of attorney to take over their role as trustee may be one way of ensuring that the fund continues to meet this criterion.

Superannuation Industry Supervision (SIS) legislation allows a legal personal representative who holds an enduring power of attorney to be appointed as a trustee or a director of the trustee company in place of the member.

**It is not simply a matter of 'acting on behalf of the member,' there is an actual requirement for the trustee to resign and the LPR to be appointed.**

## The Enduring Power of Attorney

An enduring power of attorney is a document that allows another individual the ability to conduct business and financial affairs for the person.

The document must be valid for the time that the EPA is appointed for and on behalf of the member in their capacity as trustee, or director of the corporate trustee. A person who accepts to be the EPA must understand the legal position that they are putting themselves in and the member must understand that the EPA has complete control in their capacity of trustee to execute the decision making process as they see fit.

Each state has different legislation to deal with the appointment of powers of attorney and this must be followed. Certain states will require registration of enduring powers of attorney.

The authority should include the ability for financial, business and property affairs of the individual to be conducted by the EPA. It may be that the power is drafted with express authority to act on behalf of the member's superannuation affairs. The EPA document cannot have an exclusion clause related to superannuation and or financial affairs; this will not constitute valid authority for the SMSF if such a clause exists.

## Administrative Steps Involved

### Step 1 – Appointing an Enduring Power of Attorney

The appointment and exercising of an enduring power of attorney should be done according to the relevant standards. It is important to choose a person who can be fully trusted. We strongly recommend advice from a suitably qualified legal practitioner.

### Step 2 – Appointing the person holding the EPA as trustee of the SMSF

Preparation for the appointment of the EPA as a trustee is multifaceted and will be different for each fund, but commonalities that exist are:

- The enduring power of attorney documentation will need to be forwarded to the fund's administrator/tax agent;
- The deed should be reviewed to ensure that appointment as a trustee of the person holding enduring power of attorney is done in accordance with the terms of the relevant clauses;
- The existing trustee must retire as a trustee and the person holding EPA is appointed as trustee. This process must follow the deed, SIS Act and SIS Regulations;

- If the trustee is a company the fund will need to comply with the company's constitution and Corporations Act with respect to the retirement and appointment of the director;
- The fund must lodge change of details documents with ATO and/or ASIC to update its registrations and ensure regulatory compliance;
- Permanent documentation to support the retirement and appointment will need to be maintained with the records of the fund and sighted by the fund's auditor at the point of the annual audit;
- Assets need to be held in the name of the trustees as trustee for the super fund.

The member needs to resign as trustee or director of the corporate trustee and the EPA needs to be formally appointed. In certain states the appointment of the EPA may not be able to exist in perpetuity and legal advice will need to be sought.

The EPA must consent in writing to the appointment of trustee, or director of the trustee. The individual cannot be a disqualified person and must sign the declaration stating that they understand their duties as trustee within 21 days of the appointment.

If a super fund has individual trustees, there may be additional administration fees as the assets need to be held in the name of the trustee for the superannuation fund. That means that the name in which the assets are held will need to be updated across all investments. This is not an issue for a corporate trustee.

## Conclusion

It is important for trustees to remember that they cannot forgo any of their individual responsibility in relation to the running of the fund. It is the trustee's responsibility to ensure that operations are within the confines of legislation and that due care is taken with the decisions that are enacted.

SMSFs need to consider that there will be costs associated with the documentation preparation, retirement and appointment of the trustee. There will be a number of parties involved, the: member, new trustee (or director), super fund's accountant, member's financial planner and respective lawyers. Each member's circumstances will be specific to their financial affairs and structure, thus consultation will be necessary.

To discuss any aspect of this newsletter in further detail, please call **Monte Engler** or **Brendan Daw** of our office on **8221 6540** or **1300 787 576**.