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Ruling Compendium – SMSFR 2010/2

This is a compendium of responses to the issues raised by external parties to draft Self Managed Superannuation Fund Ruling SMSFR 2009/D1 – Self Managed Superannuation Funds: the scope and operation of subparagraph 17A(3)(b)(ii) of the *Superannuation Industry (Supervision) Act 1993*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1.	<i>Member who is bankrupt</i> Can the effect of subsection 17A(10) of the <i>Superannuation Industry (Supervision) Act 1993</i> (SISA) ¹ on the ability of a legal personal representative (LPR) to be a trustee in the place of a member who is bankrupt be included in the final Ruling?	<i>New paragraphs 14 and 60 have been inserted explaining the effect of subsection 17A(10).</i>
2.	<i>Residency issues for the superannuation fund</i> In the examples at appendix 2 (specifically examples 1, 2 and 4) it would be worthwhile flagging that, as a separate issue, the trustees also need to consider whether the fund will remain an 'Australian Superannuation Fund' for the purposes of section 295-95 of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) (and therefore a complying superannuation fund) so as to retain its tax concessions.	<i>A footnote has been added to each relevant example referring the reader to Taxation Ruling TR 2008/9.</i>
3.	<i>State and Territory requirements in relation to transfers of title to property</i> If a trustee is replaced by their LPR for whatever reason,	Trustee legislation in each State and Territory provides for the vesting of title to certain trust property in newly appointed trustees and divesting it from a trustee who is being replaced. However, other steps may need to

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

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	do the share registries need to be advised and shareholders changed for example, for listed company shares. What about the title to property held within the SMSF, does the Titles Office need to be informed of the change/s?	be taken for certain forms of property, such as land and choses in action, to ensure effective assignment of the trust property to the new trustee. ² Those requirements will vary between jurisdictions. The focus of the Ruling is the exception to the requirements for a fund to be a self managed superannuation fund (SMSF) and hence a discussion of State and Territory legislation in relation to assignment of property is beyond the scope of the Ruling. <i>No action required.</i>
4.	<i>Whether appointment of legal personal representative must be on a one-for-one basis</i> The draft Ruling indicates that the Tax Office is prepared to accept a single individual trustee of an SMSF if there has been an enduring power of attorney (EPOA) granted to one individual by both fund members. We have concerns about whether or not the same person, being an LPR of more than one SMSF member could hold office 'in place of' each member. Section 17A of the SISA contemplates that each individual trustee or trustee director will be a member of the fund and vice versa while subparagraph 17A(3)(b)(ii) provides an exception to this rule that enables an LPR, holding an EPOA for a member, to be appointed trustee of the SMSF or director of the corporate trustee 'in place of' the member. If the same person is appointed for more than one member then this structure in which either each member is involved in the management of their SMSF, or has a person	Under section 17A each individual trustee or director of the corporate trustee will, in the normal course, also be a member of the fund. Those requirements were intended to provide for each member to have equality of influence over the management of the SMSF (as referred to in paragraph 32 of the final Ruling). However, some of the exceptions in subsection 17A(3) appear to contemplate a reduction in the number of trustees while still operating in an SMSF environment. This is particularly notable for the exception in paragraph 17A(3)(c), which allows the parents or guardians to be trustees of the superannuation fund in place of minor members. This view is supported by the Explanatory Memorandum to the Superannuation Legislation Bill (No. 3) 1999 which notes in relation to this paragraph that '(A) parent acting as a trustee on behalf of a minor in a self managed superannuation fund may also be a member of the same fund.' Therefore, when all of the exceptions contained in subsection 17A(3) are considered together, it is considered that the terms of paragraph 17A(3)(b)(ii) do allow for a reduction in the number of trustees specified in subsections 17A(1) and 17A(2) in the circumstances described. In light of this conclusion, it is clear that

² Principles of the Law of Trusts, Thomson Legal Online at 8400.

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	appointed in their place who is so involved, is not maintained. It is not clear whether the appointee can be said to be a trustee or a director 'in place of' a member if they already hold that position in their own right or hold the position for more than one member. Such a position may not serve the policy objective behind the changes to the regulation of small superannuation funds which was 'to ensure that all members of excluded superannuation funds are able to protect their interests' (see references in the explanatory memorandum). This position may also provide a loophole for people wishing to have a single trustee without the expense of incorporation. Could the Commissioner state his views and his reasoning in relation to this issue more explicitly? Could the Commissioner clarify the legal status of this arrangement? For example does the Attorney sign twice as two members?	subparagraph 17A(3)(b)(ii) also operates to allow reductions in the number of trustees or directors of the corporate trustee. Further, as is stated in the draft and final Rulings, an LPR must be appointed as a trustee of the SMSF or as a director of the corporate trustee and is not acting as an agent of the member who had invoked the EPOA. Rather, they are acting in their personal capacity with the powers and duties of the position to which they were appointed. This is the case irrespective of the number of members that they may be replacing. The LPR will exercise that power as a single trustee or director. In addition, the powers and duties of the LPR as trustee or director are personal in nature and are to be exercised for the benefit of all of the members of the fund, not for the benefit of any specific member. <i>New paragraphs 61 – 65 have been included in the final Ruling to clarify this view.</i>
5.	<i>Whether appointment of legal personal representative must be on a one-for-one basis</i> Where there is more than one LPR appointed by a fund member under an EPOA, it should be for the member and the attorneys to determine whether any or all of them should be appointed as a trustee or as a trustee director 'in place of' the member. We do not agree that subparagraph 17A(3)(b)(ii) allows only for the appointment of one attorney for the purposes of the subparagraph. More examples should be provided to illustrate the types of scenarios that may arise in practice including where	<i>Paragraphs 16 and 61 – 65 have been revised to reflect the view that more than one LPR can be appointed as a trustee, or a director of the corporate trustee, in place of a member.</i> <i>Example 4 has been amended to demonstrate the revised view.</i>

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	members appoint LPRs under a power of attorney which requires the attorneys to act jointly or allows the attorneys to act severally.	
6.	<i>Issues arising in relation to the other exceptions in subsection 17A(3)</i> The draft Ruling (or another Ruling) should deal with issues arising in respect of paragraphs 17A(3)(a) and (c), as well as those relevant to subparagraph 17A(3)(b)(ii). Those issues include: • In relation to 17A(3)(a), it is not clear whether a person who is name executor of a Will of a deceased member can be appointed and act as a trustee or as a director of the corporate trustee prior to the grant of probate. • The Tax Office has stated in the draft Ruling that, where a member has granted an EPOA to multiple donees, only one of those donees can be appointed trustee, or director of the corporate trustee in place of the member. How does this view apply to paragraph 17A(3)(a) where a member has appointed two or more executors? • In relation to 17A(3)(c), there is confusion regarding the application of this paragraph. While paragraphs 17A(3)(a) and (b) both provide for an LPR to be a trustee or a director of a corporate trustee in place of the relevant member, paragraph 17A(c) refers only to the parent or guardian being a trustee.	The Tax Office will consider these issues and determine whether an ATO publication is required to provide guidance on these areas. <i>No action required with regard to this Ruling.</i>

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7.	<i>Scope of the EPOA</i> We disagree with the Commissioner's views in relation to the scope of the EPOA given there are no requirements included in the legislation as to the scope of an EPOA that is to be relied upon.	<i>Part of paragraph 11 and the whole of paragraphs 35 – 37 of SMSFR 2009/D1 have been deleted in the final Ruling to remove this requirement.</i>
8.	Is it possible for the Commissioner to include a standard clause for an EPOA that would be accepted as satisfying the requirements of subparagraph 17A(3)(b)(ii)?	In light of the revised view for Issue 7 above, no action is required. <i>No action required.</i>
9.	In numerous States and Territories, an EPOA can have limitations and conditions imposed in it. The ATO acknowledged indirectly that such an EPOA should be recognised. It would be good for the ATO to state that the ATO expressly recognises such EPOAs provided the powers conferred are sufficient. Can an EPOA include an exception that enables the donor to revoke the power where, for example, the trustees are not following an investment strategy in an appropriate manner and can this issue be covered in the Ruling?	In light of the revised view for Issue 7 above, no action is required. <i>No action required.</i>
10.	<i>Use of alternate directors</i> We disagree with the views expressed in the draft Ruling in relation to alternate directors. An alternate director will cease to hold office upon the director in respect of whom they are appointed ceasing to hold office. Therefore, an alternate director appointed by a member of an SMSF who subsequently ceases to be a director of the corporate trustee (as required in	The ATO has revised its view on the effect of the appointment of an alternate director for subparagraph 17A(3)(b)(ii). The final Ruling now reflects the view that an alternate director will be a director in place of the member while they are exercising the powers of that position. Further, the final Ruling states that provided that the alternate director can only exercise the powers of a director where the main director does not, it is not necessary that the member resign as a director of the SMSF to satisfy the exception in subparagraph 17A(3)(b)(ii). <i>Paragraphs 8 and 46 of SMSFR 2009/D1 have been rewritten as</i>

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	SMSR 2009/D1) will not meet the requirements of subparagraph 17A(3)(b)(ii) as their appointment as the member's alternate director will also cease. The appointment of an LPR as an alternate director for a member would not be effective for the purposes of subparagraph 17A(3)(b)(ii). There would be a breach of 17A(1)(c) as each director would not be a fund member, and the exception contained in subparagraph 17A(3)(b)(ii) could not be relied upon, as the alternate director would not hold office 'in place of' the member.	<i>paragraphs 10 and 51 – 54 of the final Ruling to reflect the change in view. In addition, a new example on alternate directors is included at paragraphs 29 – 31.</i>
11.	<i>Use of alternate directors</i> We do not agree with the view that a member who is a director of a corporate trustee would have to resign as director when appointing their LPR as an alternate director in order to ensure that the alternate director is 'in place of' the member rather than their agent for the purposes of subparagraph 17A(3)(b)(ii). There is a substantial body of case law and commentary that indicates that an alternate director does not act as agent of the appointing director, but acts as principal and is required to exercise independent judgment (irrespective of any attempt by the appointing director to direct the alternate director). If the alternate director were acting as an agent rather than in their own right it would only be if there was a provision in the company's constitution that modified the operation of the alternate directors provision – section 201K of the <i>Corporations Act 2001</i> (the Corporations Act). Therefore, the view expressed at paragraphs 45 to 47	In light of the revised view for Issue 10 above, no further action is required. <i>No further action required.</i>

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	should only relate to circumstances where the relevant company's constitution does not expressly state that an alternate director does not act as agent for the appointing director.	
12.	<i>Removal of trustee or director where the member has lost mental capacity</i> The ruling does not deal with the case where a person assumes the role of LPR of a member (under an EPOA) where the member is no longer able to act due to a loss of mental capacity. In this case, it would not be possible for the member to resign or perform any other administrative task. It would be very helpful if the ruling could provide guidelines as to what procedures, including medical certification/court orders etc should be followed in these circumstances.	The way in which a trustee of a fund is replaced by the LPR in such unforeseen circumstances is subject to the terms of the trust deed and relevant State or Territory trustee legislation. Replacement of a trustee by an LPR in these circumstances must be in accordance with the fund's constitution and relevant State or Territory trustee legislation. The way in which a director of a corporate trustee is replaced when there is an unforeseen situation that renders the director incapable of performing their duties is subject to the constitution of the corporate trustee and the Corporations Act. Replacement of a director by an LPR in these circumstances must be in accordance with the corporate trustee's constitution and the Corporations Act. In the situations described above, the requirements contained in State or Territory legislation will vary between jurisdictions and from fund to fund. Therefore, it is not appropriate to include an analysis of those requirements in the Ruling. <i>No action required.</i>
13.	<i>LPR prohibited from receiving remuneration once appointed as trustee or director</i> Possible adverse effects in implementation of the draft ruling is that a person appointed cannot be remunerated by the Fund or another person for the work involved in so acting as the trustee (refer to paragraph 40 of the document (paragraphs 17A(1)(f) and (g))). If a solicitor or accountant is appointed to act for a client in this capacity,	In a situation where an LPR is appointed as trustee or director of a corporate trustee in place of the member, all the other requirements in subsections 17A(1) and 17A(2) must be met. This means that the LPR cannot be remunerated for any duties or services performed in relation to the fund (paragraphs 17A(1)(f) & (g) and 17A(2)(c) and (d)). The prohibition on remuneration of trustees of SMSFs in subsections 17A(1) and 17A(2) is not within the scope of this Ruling. <i>No action required.</i>

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	they are unable to be remunerated for duties carried out as trustee even though they are also carrying out those duties in their own professional capacity. It is unreasonable to expect that such a professional would not be remunerated for their activities in this circumstance. The option of other, perhaps family members holding the EPOA may not be possible, e.g. if they were bankrupt or unwilling to act as a trustee of the SMSF. Therefore, a professional may be the only realistic option to hold the EPOA.	
14.	<i>Procedures for removal of trustee</i> In addition to the need for the LPR to consent to their appointment in writing and to sign a declaration within 21 days, it would also be useful for the administrative procedures for the removal and appointment of a trustee to be described. For example, recognition in the fund minutes etc.	Paragraph 39 of SMSFR 2009/D1 (paragraph 45 of the final Ruling) sets out certain requirements under the SISA that the LPR is required to meet if they are to be appointed trustee, or director of the corporate trustee, as a result of applying the provisions of subparagraph 17A(3)(b)(ii). The procedures for removal and appointment of a trustee are subject to the trust deed and trust law which will differ between jurisdictions. In addition, as the appointment and removal of trustees are generally subject to the trust deed, the procedures may vary from fund to fund. Consequently it would be inappropriate to outline a 'generic' administrative practice in the Ruling. <i>No action required.</i>
15.	<i>Clarification of expression</i> In paragraph 3 we suggest inserting the words, 'Subject to the exceptions set out in subsection 17A(3)' at the beginning of the third sentence.	<i>Paragraphs 3 & 4 of SMSFR 2009/D1 have been revised in the final Ruling.</i>
16.	<i>Clarification of expression</i> Technically, the statement at the end of the last sentence	<i>The last sentence of the relevant examples have been revised to correct the statement.</i>

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	of paragraphs 15, 18 and 21 is not correct We suggest starting this sentence with the words, 'As the SMSF satisfies one of the exceptions set out in subsection 17A(3), the fund does not fail to satisfy the definition of an SMSF in subsection 17A(1).'	
17.	<i>Clarification of example in relation to joint EPOA</i> We consider that the joint holding of the EPOA in example 4 needs to be clarified along with a statement that Rick and Cassandra are each appointed as trustees in their own right for the members of the fund. This example is not consistent with the wording at paragraph 53.	<i>Example 4 has been revised.</i>
18.	<i>Style of quotation contained in the Ruling</i> The quotation referred to in paragraph 23 should be in quotation marks.	The current ATO standards for Citations and References states that block quotations do not require quotation marks because the quote is already differentiated from the rest of the text. This standard is applied across all ATO publications. <i>No action required.</i>
19.	<i>Consistency of reference to 'States and Territories'</i> References to 'State and Territories' in paragraph 48 should be singular or plural and not one of each. It should be 'States or Territories' or 'State and Territory'.	<i>Such references in this Ruling have been standardised to 'State or Territory'.</i>
20.	<i>Circumstances in which the entity does not satisfy the basic conditions to remain an SMSF</i> For completeness, it may also be useful at paragraph 48 to explain the application of the six month rule in	<i>A footnote has been included in paragraph 56 of the final Ruling providing a brief overview of subsection 17A(4).</i>

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	subsection 17A(4). If the EPOA has, for any reason, terminated, the member must be re-appointed as a trustee within the timeframe stipulated in subsection 17A(4) in order for the fund to continue to satisfy the definition of an SMSF.	
21.	<i>Timing of when the trustee or director of corporate trustee must be removed for paragraph 17A(3)(b)(ii) purposes</i> The wording of the draft ruling seems to imply that people who arrange an EPOA must immediately resign as trustees from their super fund and install the holder of the EPOA as trustee (or director of the trustee). I'm sure this is not the intention of the Ruling and that an EPOA need not be invoked until the member, possibly with the agreement of the donor (assuming no ill health), deems it necessary to execute his or her power.	The discussion in the draft Ruling was not intended to convey a requirement that once an EPOA is executed by a member, the member is automatically required to resign as trustee or director. Paragraph 5 of the Ruling states that 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. Hence, the Ruling explains the operation of the exception in subparagraph 17A(3)(b)(ii) to the trustee/director rules in subsections 17A(1) and 17A(2). Consequently, the references in the Ruling to the requirement that the member cease to be a trustee of the SMSF, or a director of the corporate trustee, are made in the context of the appointment of the LPR as a trustee or director in the place of that member. Where the LPR is not appointed as a trustee or director, there is no requirement that the member resign from that position and the exception in subparagraph 17A(3)(b)(ii) will not have any operation in respect of the fund. <i>No action required.</i>
22.	<i>Interaction between the definition of 'self managed superannuation fund' in the SISA and 'Australian superannuation fund' in the ITAA 1997</i> I find it to be a set of potentially dangerous regulations for members of SMSFs who are forced by the ATO to comply.	The Ruling explains the operation subparagraph 17A(3)(b)(ii) as enacted. This subparagraph allows an LPR of a member holding an EPOA to be a trustee, or director of the corporate trustee, of a superannuation fund in place of that member without the fund ceasing to satisfy the definition of an SMSF. As such it is an exception to the basic conditions for a fund to

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	Specifically it forces members who are compelled to appoint LPRs via EPOAs to surrender their involvement in the day to day operation of their own fund. If for example a member has to resign as trustee and confer an EPOA on another person because he or she re-locates overseas, there is no guarantee that that donee will act in good faith or competently in line with the regulations governing SMSFs. It is a sad fact that not every person has a pool of loyal and intelligent family members or friends to assume the powers of an EPOA. Those that do not will be exposed to charlatans or unscrupulous strangers who will use this loophole provided by the ATO to embezzle funds from the hapless member who had to resign as trustee of his or her own fund in order to fulfil residency rules.	be an SMSF to which members of the fund can have recourse if they choose to do so. The Ruling does not require members to appoint an LPR holding an EPOA as trustee of their superannuation fund but rather explains the Commissioner's view of the application of the law if members choose to apply the exception in subparagraph 17A(3)(b)(ii) and maintain the status of their fund as an SMSF. Issues in relation to maintaining the Australian residency of the fund, whilst they might appear related, are separate from determining whether a fund will continue to be an SMSF for regulatory purposes (i.e.: for the purposes of the SISA). The Australian residency status of a fund is not maintained simply by members appointing an LPR as trustee or director of their fund whilst they are absent from Australia. There are a number of separate requirements which must be met in order for the fund to be an Australian superannuation fund for income tax purposes. Each requirement is discussed in detail in Taxation Ruling TR 2008/9: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the ITAA 1997.