SMSFD 2008/3EC - Compendium

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Ruling Compendium – SMSFD 2008/3

This is a compendium of responses to the issues raised by external parties to draft SMSFD 2008/D1 – Self Managed Superannuation Funds: is there any restriction in the *Superannuation Industry (Supervision) Act 1993* on a fund trustee accepting from a member a binding nomination of the recipients of any benefits payable in the event of the member's death?

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	*Paragraph 16 – include proviso* It has been suggested that paragraph 16 may be improved to clarify the proviso and better lead into paragraph 17 by changing the paragraph to insert wording (underlined) as follows: 16. Due to section 59 not applying to SMSFs it is possible, consistent with the SISA and SISR, for the governing rules of an SMSF to permit a member to make a binding death benefit nomination in a different manner and form to that set down in regulation 6.17 of the SISR , <u>however, that death benefit nomination will not be binding on the trustee to the extent that it nominates a person who cannot receive a benefit in accordance with the operating standards in the SISR</u>.	*Change made to paragraph 16 of the Determination* The suggested additional wording comes from a sentence appearing in paragraph 2 of the Ruling itself which also follows the Ruling that SMSF governing rules may permit binding death benefit nominations whether or not in accordance with regulation 6.17A of the SISR . It is considered appropriate that this paragraph 2 wording also appear in the Appendix 1 Explanation. It is also considered appropriate that it follows on immediately after the paragraph 16 statement so as to lead into the SISR operating standards discussion in paragraphs 17 to 26.

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2	*Paragraph 16 – clarity* It has been indicated that paragraph 16 is being interpreted by some as requiring that binding death benefit nominations made by an SMSF member *must be in a different manner and form* to that set down in regulation 6.17A. It has been suggested that the use of the word 'different' in that paragraph 16 may be the cause of such an interpretation and that the wording should make it clear that it is permissible for an SMSF to have binding death benefit nomination procedures that mirror regulation 6.17A.	*Change made to paragraph 16 of the Determination* Changes have been made to paragraph 16 so as to enable the word 'different' to be replaced with the phrase 'whether or not', aligning it with the terminology used in paragraph 1 of the Ruling.
3	*Reason why regulation 6.17A does not apply* It has been indicated that the reasons why regulation 6.17A does not apply to SMSFs needs to be clarified.	*Change made to paragraph 14 of the Determination* Paragraphs 13 to 15 explain why both subsection 59(1A) and SISR regulation 6.17A do not apply in relation to SMSFs. However, it is considered appropriate to specifically make the link that SISR regulation 6.17A is the regulation made for the purposes of subsection 59(1A). In this regard, it is considered appropriate to insert wording (underlined) into the first sentence of paragraph 14 as follows: 14. The content of regulation 6.17A of the SISR <u>, the regulation made for the purposes of subsection 59(1A),</u> confirms this view. This change results in paragraphs 13 to 15 more directly indicating why regulation 6.17A of the SISR does not apply to SMSFs. In this regards it clarifies the situation that regulation 6.17A does not apply to SMSFs because it is the regulation was made for the purposes of subsection 59(1A) which is a provision which does not itself apply to SMSFs.

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4	*Section 58 not addressed* It has indicated that the Determination focuses on section 59 of the SISA and suggested that section 58 also needs to be discussed. The context of the suggestion made is the view put forward that, subject to an appropriately structured trust deed, if a non-lapsing but revocable binding death benefit nomination was not possible under section 59, then, again subject to an appropriately structured trust deed, section 58 of the SISA permitted a non-lapsing but revocable binding death benefit nomination to be made by a member of an SMSF.	*No change to the Determination* It is not considered that the Determination needs to discuss the application or otherwise of section 58 of the SISA. Section 58 of the SISA requires that 'the governing rules a superannuation entity, other than a superannuation fund with fewer than 5 members ... must not permit a trustee to be subject, in the exercise of the trustee's powers under those rules, to direction by any other person'. Section 58 of the SISA clearly has no application to SMSFs as such funds have, by definition, fewer than 5 members. As such it is also clear, even if it could be considered that a binding death benefit nomination involves a trustee being subject to direction in terms of section 58, that section 58 does not prohibit the governing rules of an SMSF from permitting SMSF members to make binding death benefit nominations. As indicated by the title, the purpose of the Determination is to clarify whether there are any SIS legislation restrictions on an SMSF trustee accepting a binding death benefit nomination from a member. In this regard, the particular SIS issue which has been considered less than clear and thus requiring clarification is whether section 59 of the SISA and/or regulation 6.17A of the SISR applies in relation to SMSFs. That section 58 of the SISA does not apply to SMSFs does not require clarification. Further, as the Determination takes the view the restrictions provided by way of section 59 of the SISA and/or regulation 6.17A of the SISR do not apply to SMSFs there is no need to consider whether the non-application of section 58 of the SISA to SMSFs can be relied on in order that the governing rules may permit a binding death benefit nomination to be made outside the restrictions of section 59 of the SISA and/or regulation 6.17A of the SISR (e.g. a non-lapsing nomination).

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5	*Paragraph 12 of Explanation – include in Determination* It has been indicated that it is important for trustees to be given a more complete answer to the question posed by the Determination (i.e. by way of its title) by stating that while there are no restrictions in SIS legislation there may be restrictions in the governing rules of the SMSF. In this regard, it is suggested that the text appearing at paragraph 12 in the 'Explanation' section of Appendix 1 of the Determination should also be included in the Ruling itself (at paragraph 1).	*No change to the Determination* Paragraph 12 of the Determination states: 12. A member can make a death benefit nomination that is a binding direction on the trustee of an SMSF if that is provided for in the governing rules of the fund. This sentence appears at paragraph 12 of Appendix 1 in order to set the context for the discussion on the SIS legislation requirements that are set out in the paragraphs that follow it (i.e. paragraphs 13 to 26). While the statement at paragraph 12 sets the context of that discussion it does not in any way provide the answer to the question posed by the Determination which is purposely restricted to the application of SIS legislation. As indicated in the Preamble to SMSFD 2008/D1, SMSF Determinations provide the Commissioner's view about *the way in which provisions of the SISA, or regulations under that Act, apply* to superannuation funds that the Commissioner regulates. Accordingly, it is not considered appropriate for the text of paragraph 12 to also appear in the Ruling.
6	*Paragraph 9 – legal personal representative* It has been indicated that the paragraph 9 reference to 'legal personal representative' may cause difficulties for some trustees and that the meaning the term actually has in the context of the Determination (being that given to it under section 10 of the SISA) should be explained.	*Insert paragraph in the Determination* It is agreed that it is appropriate to indicate legal personal representative has the meaning given to that term under section 10 of the SISA. In this regard, a new paragraph has been inserted immediately above the discussion on 'Meaning of dependant' which appears in the Explanation section of the Determination. In this regard, the new paragraph states: *Meaning of legal personal representative* The term 'legal personal representative' is defined in subsection 10(1) 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'*.

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7	*Explanation on application of trust principles* The point has been raised that the trustee of an SMSF is required to observe trust principles in managing the trust. This being the case, and with there being no external review of such decisions, it has been suggested that a more complete explanation is required to guide trustees in the administration and management of the SMSF. In this regard, while acknowledging the general explanation provided in paragraph 5 of Appendix 1, it has been indicated that greater background and explanation should be given on the application of trust law as it applies to SMSFs with comments on the following areas being provided: • General trust law principles relating to the making of discretionary decisions by trustees. • Situations where the courts may interfere with discretionary decisions made by a trustee. • Other obligations trustees are obliged to observe. In this regard, it has been indicated that drawing attention to and explaining the operation of the Trustee Acts of each state and territory will assist the SMSF trustee in making discretionary decisions on binding death benefit nominations.	*No change to the Determination* It is not considered appropriate that the Determination discuss the application of general trust law in relation in any greater detail than that which is provided at paragraphs 5 and 6 of the Determination. As indicated in the Preamble to SMSFD 2008/D1, SMSF Determinations provide the Commissioner's view about *the way in which provisions of the SISA, or regulations under that Act, apply* to superannuation funds that the Commissioner regulates. The discussion at paragraphs 5 and 6 is considered sufficient in providing background context to the explanation set out in the Determination on the application or otherwise of relevant SISA and SISR provisions.