


# ***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 cover sheet is provided for information only. It does not form part of *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 document has been finalised by SMSFR 2010/2.

 There is a Compendium for this document: **SMSFR 2010/2EC** .



## Draft Self Managed Superannuation Funds Ruling

### Self Managed Superannuation Funds: the scope and operation of subparagraph 17A(3)(b)(ii) of the *Superannuation Industry (Supervision) Act 1993*

Contents	Para
<b>What this Ruling is about</b>	<b>1</b>
<b>Ruling</b>	<b>3</b>
<b>Funds to which the Ruling applies</b>	<b>13</b>
<b>Date of effect</b>	<b>14</b>
<b>Appendix 1: Examples</b>	<b>15</b>
<b>Appendix 2: Explanation</b>	<b>23</b>
<b>Appendix 3: Your comments</b>	<b>57</b>
<b>Appendix 4: Detailed contents list</b>	<b>59</b>

#### ***Preamble***

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which provisions of the *Superannuation Industry (Supervision) Act 1993*, or regulations under that Act, apply to superannuation funds that the Commissioner regulates: principally self managed superannuation funds.

Self Managed Superannuation Funds Rulings (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than the final version of this ruling indicates, the fact that you acted in accordance with the final version of this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion as to what action to take in response to a breach of that law. The Commissioner may, having regard to all the circumstances, decide that it is appropriate to take no action in response to the breach.

## **What this Ruling is about**

1. This draft Ruling explains how subparagraph 17A(3)(b)(ii) of the *Superannuation Industry (Supervision) Act 1993* (SISA)<sup>1</sup> applies to self managed superannuation funds (SMSFs). Subparagraph 17A(3)(b)(ii) allows a person who holds an enduring power of attorney in respect of a member to be trustee, or director of the corporate trustee, of a superannuation fund in place of the member without causing the fund to cease to be an SMSF.

2. This draft Ruling does not provide the Commissioner's views on how other SISA and Superannuation Industry (Supervision) Regulations 1994 provisions apply to any of the arrangements discussed in this draft Ruling.

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<sup>1</sup> All legislative references in this draft Ruling are to the SISA unless otherwise indicated.

# SMSFR 2009/D1

## Ruling

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3. Section 17A sets out certain conditions that a superannuation fund must satisfy in order to be an SMSF. The primary requirements are set out in subsection 17A(1) for funds with more than one member and in subsection 17A(2) for single member funds. One particular requirement is that each member of an SMSF is also a trustee, or a director of the corporate trustee, of the SMSF. Further, other than in the case of single member funds, each trustee, or director of the corporate trustee, is also a member of the SMSF.

4. Subsection 17A(3) sets out a small number of exceptions to the conditions imposed under subsections 17A(1) and (2). Under subparagraph 17A(3)(b)(ii) 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.

5. A person who holds an enduring power of attorney for a member qualifies as a legal personal representative.

6. In order to comply with subparagraph 17A(3)(b)(ii), the legal personal representative must be appointed as a trustee of the SMSF, or a director of the corporate trustee of the SMSF. If the legal personal representative is appointed as an alternate director, he or she must be so appointed in place of the member and not as the member's agent. The member must resign as a trustee of the SMSF or as a director of the corporate trustee.

7. The appointment of the legal personal representative as a trustee and the resignation of the member must be in accordance with the trust deed, the SISA and any other relevant legislation.

8. The appointment of the legal personal representative as a director of the corporate trustee and the resignation of the member from this position must be in accordance with the constitution (if any) of the corporate trustee, the SISA and the relevant provisions of the *Corporations Act 2001* (Corporations Act).

9. The legal personal representative performs their duties as a trustee of the SMSF, or a director of the corporate trustee of the SMSF, pursuant to their appointment to the position rather than as an attorney for the member. Consequently, any proscriptions contained in State or Territory legislation against conferring trustee duties and powers via a power of attorney or common law restrictions on attorneys undertaking directors duties do not affect the operation of subparagraph 17A(3)(b)(ii).

10. Once appointed as a trustee, or a director of a corporate trustee, the legal personal representative assumes the duties, responsibilities and obligations as trustee in their personal capacity and not as agent for the member. Further, as a trustee of the SMSF, or a director of the corporate trustee, the legal personal representative is subject to civil and criminal penalties for any breaches of their duties under the SISA or other legislation. A legal personal representative who is a director of the corporate trustee is also subject to civil and criminal penalties for breaches of the Corporations Act.

11. The enduring power of attorney must be current and accord with the relevant State and Territories legislation relating to enduring powers of attorney at all times during which the legal personal representative is a trustee, or a director of the corporate trustee, of the SMSF in place of the member. In addition, for the purposes of subparagraph 17A(3)(b)(ii), the authority conferred by the enduring power of attorney must include an authority to act in relation to the donor's financial, business and property affairs or an authority to act in relation to the donor's superannuation affairs. Conversely, the authority cannot have an exception relating to superannuation or financial affairs.

12. Where a member executes an enduring power of attorney in favour of more than one person, only one of those persons may be appointed as a trustee of the SMSF, or as a director of the corporate trustee of the SMSF, in place of the member.

## **Funds to which the Ruling applies**

13. This draft Ruling applies to SMSFs<sup>2</sup> and former SMSFs.<sup>3</sup> References in the Ruling to SMSFs include former SMSFs unless otherwise indicated.

## **Date of effect**

14. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling.

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**Commissioner of Taxation****8 July 2009**

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<sup>2</sup> As defined in section 17A.

<sup>3</sup> A former SMSF is a fund that has ceased being a SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee – see subsection 10(4).

## Appendix 1 – Examples

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**❶** *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached.*

### Example 1

15. Andrew works for a large international group of companies. He and his wife, Jane, have an SMSF into which his employer contributes. From 1 February 2009 Andrew is transferred to an overseas company for an indefinite period of time. He and his wife execute enduring powers of attorney in favour of their friend, Trevor, a retired accountant, in accordance with the relevant state legislation. The enduring powers of attorney give authority to Trevor to manage Andrew and Jane’s superannuation affairs during the period of their absence. In addition, Andrew and Jane step down as trustees of their SMSF and appoint Trevor as the trustee. The appointment of Trevor as trustee is in accordance with the terms of the trust deed. Other than the fact that Andrew and Jane are not trustees of the SMSF, the superannuation fund satisfies the other requirements of the definition of an SMSF in subsection 17A(1).

16. Trevor is a legal personal representative of both of the members, Andrew and Jane, by virtue of holding the enduring power of attorney in respect of each of them. In addition, Trevor is now the trustee of the SMSF in place of both Andrew and Jane. Provided that the enduring power of attorney remains valid during the period whilst Trevor is the trustee and given that the other requirements of subparagraph 17A(3)(b)(ii) are satisfied, the superannuation fund continues to be an SMSF, notwithstanding that Andrew and Jane are no longer trustees.

### Example 2

17. Taking the situation in Example 1 at paragraph 15 of this draft Ruling, if Andrew were to travel overseas by himself and execute an enduring power of attorney in favour of his wife, Jane, Andrew would still be required to step down as trustee of the SMSF. However, as Jane is already a trustee of the SMSF, she does not need to be re-appointed in her capacity as legal personal representative for Andrew.

**Example 3**

18. Clare is the member of a single member SMSF, the trustee of which is Clear Pty Ltd. Clare is the sole director of Clear Pty Ltd. Clare has found that, as she nears retirement, the responsibilities of being director of the trustee company of the SMSF have become too difficult and time consuming for her. She executes an enduring power of attorney to her daughter, Jan, giving her authority to manage Clare's superannuation affairs in accordance with state legislation. Clare resigns as director of Clear Pty Ltd and Jan is appointed in her place in accordance with the relevant provisions of the Corporations Act and the company's constitution. Other than the fact that Clare is not the director of Clear Pty Ltd as trustee for the SMSF, the fund satisfies the other requirements of the definition of an SMSF in subsection 17A(1).

19. Jan is a legal personal representative for Clare by virtue of holding an enduring power of attorney in respect of Clare. In addition, Jan is now director of the body corporate that is trustee of the SMSF in place of Clare. Provided that the enduring power of attorney remains valid during the period whilst Jan is the director of the corporate trustee and given that the other requirements of subparagraph 17A(3)(b)(ii) are satisfied, Clare's superannuation fund continues to be an SMSF, notwithstanding that Clare is no longer director of the body corporate that is the trustee of her fund.

**Example 4**

20. Chris and Marie are members and individual trustees of an SMSF. Chris and Marie own their own yacht and decide to go on a cruise around the world for an indefinite period of time. Chris and Marie have three children (Rick, Cassandra and Caroline) and they have granted an enduring power of attorney to all three of their children to be exercised jointly, in accordance with state legislation. Under the enduring power of attorney the children are authorised to take care of Chris and Marie's financial affairs.

21. At a trustee meeting prior to their departure, Chris and Marie decide that Rick and Cassandra will be trustees of the SMSF in their place while they are away. Chris and Marie step down as trustees of the SMSF and Rick and Cassandra are appointed in their place in accordance with the trust deed. Other than the fact that Chris and Marie are not trustees of the SMSF, the fund satisfies the other requirements of the definition of an SMSF in subsection 17A(1).

22. Rick and Cassandra are legal personal representatives for both Chris and Marie by virtue of jointly holding an enduring power of attorney in respect of Chris and Marie. In addition, Rick and Cassandra are now trustees of the SMSF in place of Chris and Marie. Provided that the enduring power of attorney remains valid during the period whilst Rick and Cassandra are trustees, and given that the other requirements of subparagraph 17A(3)(b)(ii) are satisfied, Chris and Marie's superannuation fund continues to be an SMSF, notwithstanding that Chris and Marie are no longer trustees of the fund.

## Appendix 2 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached.*

### Background information

23. The definition of a ‘self managed superannuation fund’ was inserted into the SISA in 1999.<sup>4</sup> SMSFs were formerly known as ‘excluded superannuation funds’. The policy reason for the conditions that essentially prohibit persons other than members from being a trustee of the fund (or a director of the corporate trustee of the fund) was explained as follows:

B. All members are trustees and there are no other trustees

Under the existing definition an excluded superannuation fund may contain members that are at arms length from the trustees, for example, non-related employees of the funds employer-sponsor. These members often lack a clear commonality of interest and equality of influence over the management of the fund in comparison to other members of the fund.

The requirement that all members be trustees will ensure that each member is fully involved and has the opportunity to participate equally in the decision making processes of the fund (*that is, that the fund is truly self managed*). (emphasis added)<sup>5</sup>

24. Another policy reason provided for this strict requirement was that SMSFs are exempt from many of the prudential requirements under SISA that have the effect of protecting members’ interests.<sup>6</sup>

### Explanation

25. Section 17A sets out the conditions that a fund must satisfy in order to be an SMSF. One particular requirement is that each member of an SMSF is also a trustee of the SMSF, or a director of the corporate trustee of the SMSF.<sup>7</sup> Further, other than in the case of single member funds,<sup>8</sup> each trustee of the SMSF (or director of the corporate trustee) is also a member of the SMSF.<sup>9</sup>

26. Subsection 17A(3) prescribes certain limited situations in which a person other than a member may be a trustee of an SMSF, or a director of the corporate trustee of the SMSF.

<sup>4</sup> *Superannuation Legislation Amendment Act (No. 3) 1999.*

<sup>5</sup> Explanatory Memorandum (EM) to the Superannuation Legislation Amendment Bill (No. 3) 1999, item 22.

<sup>6</sup> EM to the Superannuation Legislation Amendment Bill (No. 3) 1999.

<sup>7</sup> Paragraph 17A(1)(d).

<sup>8</sup> Single member funds may have two directors or two individual trustees (paragraphs 17A(2)(a) and (b)).

<sup>9</sup> Paragraphs 17A(1)(b) and (c).

## 27. Subsection 17A(3) states:

A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:

- (a) 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 of the fund has died; and
  - (ii) ending when death benefits commence to be payable in respect of the member of the fund; or
- (b) the legal personal representative of a member of the fund 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 any period when:
  - (i) the member of the fund is under a legal disability; or
  - (ii) the legal personal representative has an enduring power of attorney in respect of the member of the fund; or
- (c) if a member of the fund is under a legal disability because of age and does not have a legal personal representative – the parent or guardian of the member is a trustee of the fund in place of the member; or
- (d) an appointment under section 134 of an acting trustee of the fund is in force.

28. In both paragraphs 17A(3)(a) and (b) the person that may be a trustee of the SMSF, or a director of the corporate trustee, in place of the member is the legal personal representative of the member.

29. Consistent with the modern approach to statutory interpretation<sup>10</sup> the operation of subparagraph 17A(3)(b)(ii) should be determined by having regard to the context in which the provision appears. The relevant context includes the policy underpinning the provisions,<sup>11</sup> the scheme of the SISA as a whole and the powers of attorney and trustee legislation of each State and Territory of Australia.<sup>12</sup>

<sup>10</sup> *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384.

<sup>11</sup> Refer to paragraphs 23 and 24 of this draft Ruling.

<sup>12</sup> The courts have expressed the view that unless the trustee legislation or the rules governing the trust provide to the contrary, the principles of the general law of trusts applies to superannuation funds. See, for example, *Cowan v. Scargill* [1985] Ch 270 at 292; [1984] 2 All ER 750 at 764 and *Lock v. Westpac Banking Corporation* (1991) 25 NSWLR 593 at 609-610.



# SMSFR 2009/D1

## ***Legal personal representative of a member of the fund***

30. Subsection 10(1) defines a 'legal personal representative' 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.

31. In order for a person to be a legal personal representative they must satisfy one of the limbs of the definition in subsection 10(1). Where a person has been granted an enduring power of attorney by a member of an SMSF the person will qualify as a legal personal representative under the third limb of the definition. That person will also be a legal personal representative for the purposes of subparagraph 17A(3)(b)(ii).

## ***Enduring power of attorney***

32. A power of attorney that is not an 'enduring power of attorney' will not be sufficient to satisfy the requirements of either subsection 10(1) or subparagraph 17A(3)(b)(ii).<sup>13</sup> If the attorney in these circumstances becomes a trustee of the fund, or a director of the corporate trustee, the status of the fund as an SMSF will not be maintained.

33. The concept of an 'enduring power of attorney' is not defined in the SISA. This concept has a specific legal meaning. An enduring power of attorney is a power authorised by statute which survives the mental incapacity of the donor.<sup>14</sup> Each State and Territory in Australia has enacted legislation that deals specifically with enduring powers of attorney.<sup>15</sup> Regard must be had to these specific provisions to ensure that an enduring power of attorney is valid.

34. While an enduring power of attorney is intended to survive the mental incapacity of the donor, the legislation of each jurisdiction enables the donor to authorise the donee to exercise those powers while the donor is mentally capable. An enduring power of attorney that is invoked while the donor is mentally capable is one which satisfies the requirements of both paragraph 10(1) and subparagraph 17A(3)(b)(ii).

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<sup>13</sup> For more information on delegation of trustee's duties see paragraphs 123 to 127 of Taxation Ruling TR 2008/9 Income tax: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the *Income Tax Assessment Act 1997*.

<sup>14</sup> Collier B and Lindsay S 1992, *Powers of Attorney in Australia and New Zealand*, The Federation Press, Australia, p. 131.

<sup>15</sup> *Powers of Attorney Act 2003* (NSW) Part 4, Division 2; *Powers of Attorney Act 2006* (ACT) Chapter 5; *Powers of Attorney Act 1980* (NT) section 13; *Powers of Attorney Act 1998* (Qld) Chapter 3; *Powers of Attorney and Agency Act 1984* (SA) section 6; *Powers of Attorney Act 2000* (Tas) Part 4; *Instruments Act 1958* (Vic) Part XIA; *Guardianship and Administration Act 1990* (WA) Part 9.

*Nature of the authority conferred by the enduring power of attorney*

35. The donor of an enduring power of attorney may confer either a general grant of authority to the donee to act in relation to the donor's property, business or financial affairs or the donor may specify particular powers which the attorney is granted.<sup>16</sup>

36. As was noted at paragraph 23 of this draft Ruling, the policy for the strict requirements that relate to who can be a trustee of an SMSF was to ensure that each member is fully involved and has the opportunity to participate equally in the decision making processes of the fund.

37. Consistent with this policy intention, the Commissioner considers that for the purposes of subparagraph 17A(3)(b)(ii), the authority conferred by the enduring power of attorney must include an authority to act in relation to the donor's financial, business and property affairs or an authority to act in relation to the donor's superannuation affairs. Conversely, the authority cannot have an exception relating to superannuation or financial affairs.

***Requirement that legal personal representative be appointed as trustee of the SMSF or a director of the corporate trustee***

38. The exceptions in paragraph 17A(3)(b) apply only where the legal personal representative 'is a trustee of the fund or a director of a body corporate that is the trustee ... in place of the member'. In addition, there are proscriptions in some State or Territory legislation against transferring trustee duties under a power of attorney.<sup>17</sup> Further, under the common law, a power of attorney does not itself give a person authority to act in place of the director of a company.<sup>18</sup> Therefore, it is considered that paragraph 17A(3)(b) has the effect that:

- the legal personal representative does not become a trustee of the fund, or a director of the corporate trustee, merely by virtue of holding an enduring power of attorney. Rather, the legal personal representative must be appointed as a trustee of the SMSF, or a director of the corporate trustee; and

<sup>16</sup> The Laws of Australia, Thomson Legal Online at 20.9.12. Section 20.9.12 also notes that in some jurisdictions, an enduring power of attorney may be used to make decisions about personal matters including consent to medical treatment and health care. However, in such cases, the enduring power of attorney cannot be executed prior to the donor becoming incompetent.

<sup>17</sup> See for example *Powers of Attorney Act 2003* (NSW) section 10; *Powers of Attorney and Agency Act 1984* (SA) subsection 5(4); *Instruments Act 1958* (Vic) subsection 107(2).

<sup>18</sup> *Mancini v. Mancini* (1999) 17 ACLC 1570 at 1577-1578 where it was held that the office of a director is a personal responsibility and it is not a property right capable of being exercised by an attorney or other substitute or delegate of the person holding the office; see also *Cheerine Group (International) Pty Ltd v. Yeung* [2006] NSWSC 1047.

# SMSFR 2009/D1

- the member must be removed as a trustee of the SMSF, or as a director of the corporate trustee of the SMSF.

39. Further, in order to be appointed as a trustee or a director of the corporate trustee, the legal personal representative:

must consent in writing to the appointment as a trustee or as a director of the corporate trustee;<sup>19</sup> and

- cannot be a disqualified person as defined under section 120;<sup>20</sup> and
- must sign a declaration stating that they understand their duties as a trustee no later than 21 days after their appointment as trustee, or as a director of the corporate trustee.<sup>21</sup>

40. It should also be noted that no trustee, or director of a corporate trustee, can receive remuneration from the fund or any person for any duties or services performed by the trustee or director in relation to the fund.<sup>22</sup>

41. Further issues specific to individual trustees and directors of a corporate trustee are outlined in paragraphs 42 to 47 of this draft Ruling.

## *Individual trustee*

42. The legal personal representative will need to be appointed as a trustee, and the member removed as a trustee, in accordance with the relevant provisions of SISA, the SMSF's trust deed and State trustee legislation. In particular, the SMSF's trust deed will have to allow for the appointment of a person who is not a member of the fund as a trustee in place of the member.

43. In *Re Smith; Eastick v. Smith* Farwell J stated that:<sup>23</sup>

Every power given to trustees which enables them to deal with, or affect, the trust property, is prima facie given to them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being. Whether a power is so given *ex officio* or not, depends in each case on the construction of the document giving it; but the mere fact that the power is one requiring the exercise of a very wide personal discretion, is not enough to exclude the prima facie presumption.

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<sup>19</sup> Section 118.

<sup>20</sup> Under subsection 126K(1), it is an offence for a disqualified person to act as trustee of a superannuation entity and under subsection 126K(4) it is an offence for a disqualified person to act as a responsible officer of a corporate trustee.

<sup>21</sup> Section 104A. Note that this requirement only applies to appointments after 30 June 2007.

<sup>22</sup> Paragraphs 17A(1)(f) and (g).

<sup>23</sup> *Re Smith; Eastick v. Smith* [1904] 1 Ch 139 at 144.

44. Therefore, after appointment as a trustee of the SMSF, the legal personal representative derives his or her authority to administer from their position as a trustee of the fund, and not as an agent for the member under the enduring power of attorney. Consequently, any proscriptions contained in state legislation against conferring trustee duties and powers via a power of attorney do not affect the operation of subparagraph 17A(3)(b)(ii).<sup>24</sup>

*Director of corporate trustee*

45. In the case of an SMSF that has a corporate trustee, the legal personal representative must be appointed as a director of the corporate trustee, and the member removed as a director, in accordance with the company's constitution (if any) and the relevant rules for the appointment of directors contained in the Corporations Act.

46. An appointment of an alternate director may be made pursuant to the company's constitution or the replaceable rules in the Corporations Act.<sup>25</sup> An alternate director may be appointed as director in his or her own right or as an agent of the appointer.<sup>26</sup> The Commissioner considers that appointing a legal personal representative that holds an enduring power of attorney as an 'alternate director' of the corporate trustee in the capacity as agent for the member would not meet the requirements of subparagraph 17A(3)(b)(ii) as the member may still retain office in these circumstances. However, if a legal personal representative that holds an appropriate enduring power of attorney is appointed an alternate director in their own right, and the member is consequentially removed as a director, then the requirements of subparagraph 17A(3)(b)(ii) will be satisfied.

47. After the appointment, the legal personal representative administers the fund in their capacity as a director of the corporate trustee, and not as an agent for the member under the enduring power of attorney. Therefore, the legal personal representative's authority to perform the duties of a director of the corporate trustee is derived from his or her position as a director of the corporate trustee and not from the enduring power of attorney.

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<sup>24</sup> See paragraph 38 of this draft Ruling for examples of such proscriptions.

<sup>25</sup> Refer to section 201K of the Corporations Act for the specific requirements for appointing alternate directors.

<sup>26</sup> Austin RP, Ford HAJ and Ramsay IM 2005, *Company Directors: Principles of Law and Corporate Governance*, LexisNexis Butterworths, Australia, pp 124-125.

# SMSFR 2009/D1

## ***Validity of enduring power of attorney***

48. The exception in subparagraph 17A(3)(b)(ii) applies during any period when the legal personal representative has an enduring power of attorney in respect of the member'. It is implicit in this requirement that the enduring power of attorney is current and accords with the relevant State and Territories powers of attorney legislation at all times during which the legal personal representative is a trustee, or a director of a corporate trustee, in place of the member. Thus, if the enduring power of attorney has, for any reason, terminated, one of the conditions in the exception contained in subparagraph 17A(3)(b)(ii) is not satisfied. In such situations, the former legal personal representative must step down and the member must be re-appointed as a trustee, or a director of the corporate trustee, in order for the fund to continue to meet the definition of an SMSF.

## ***Obligations imposed on trustees of SMSFs***

49. Before accepting an appointment as a trustee, or a director of a corporate trustee, of an SMSF, the legal personal representative must ensure that they are aware of the duties, responsibilities and obligations of being a trustee or a director of a corporate trustee. The duties, responsibilities and obligations are imposed by the SISA and other legislation (such as the *Taxation Administration Act 1953* or, in the case of a director of a corporate trustee, the Corporations Act).<sup>27</sup>

50. As a trustee of the SMSF, or a director of the corporate trustee, the legal personal representative is subject to civil and criminal penalties for any breaches of their duties under the SISA or other legislation. A legal personal representative who is a director of the corporate trustee is also subject to civil and criminal penalties for breaches of the Corporations Act.

51. If a legal personal representative, as a trustee of an SMSF, is in breach of the trust deed, or fails to exercise their powers reasonably, in good faith and for the purposes for which they were conferred, civil action may be brought against the legal personal representative by members of the SMSF (as beneficiaries of the trust).<sup>28</sup>

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<sup>27</sup> For further detailed information on the duties, responsibilities and obligations imposed on SMSF trustees refer to the publication *Running a self managed superannuation fund* (NAT 11032) available on [www.ato.gov.au](http://www.ato.gov.au).

<sup>28</sup> Dal Pont, GE and Chalmers, DRC 2004, *Equity and Trusts in Australia*, 3<sup>rd</sup> edn, Lawbook Co, Australia, p 745.

***Enduring power of attorney conferred on more than one donor***

52. Where a member has granted an enduring power of attorney to a number of donees that is to be executed jointly and/or severally, each of those donees would meet the definition of 'legal personal representative' under subsection 10(1).

53. The Commissioner considers that in such a situation given:

- the wording of paragraph 17A(3)(b), in particular the use of the phrase 'in place of the member' and the use of the singular for 'legal personal representative' (that is, 'the legal personal representative'); and
- the purpose of section 17A as a whole to ensure equality of influence in the administration of the fund,

only one legal personal representative can be appointed as a trustee of the SMSF, or a director of the corporate trustee of the SMSF, in respect of each member for the purposes of subparagraph 17A(3)(b)(ii).

***The fund ceases to satisfy the definition of an SMSF***

54. If a fund ceases to satisfy the definition of an SMSF in section 17A, the Commissioner of Taxation will retain powers of administration as regulator of the fund until a registrable superannuation entity (RSE) licensee is appointed as trustee.<sup>29</sup> The trustee must notify the Commissioner within 21 days of the fund ceasing to be an SMSF.<sup>30</sup>

55. Funds that no longer meet the definition of an SMSF need to:

- restructure the fund to again meet the SMSF conditions;<sup>31</sup>
- appoint an RSE licensee as trustee and become regulated under APRA; or
- wind up the fund.

56. If the trustees of the fund do not rectify the situation, the fund's complying status may be removed. A non-complying fund is taxed at the highest marginal tax rate (currently 45%) on their income and the market value of assets just before the start of the year in which they are made non-complying rather than only on the income of the fund at the concessional rate of 15%.

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<sup>29</sup> Subsection 10(4).

<sup>30</sup> Section 106A.

<sup>31</sup> Subsection 17A(4) has the effect of granting a six month period to correct any structural issues in most circumstances.

# SMSFR 2009/D1

## Appendix 3 – Your comments

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57. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

58. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** 21 August 2009

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## **Appendix 4 – Detailed contents list**

59. The following is a detailed contents list for this draft Ruling:

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
<b>Ruling</b>	<b>3</b>
<b>Funds to which the Ruling applies</b>	<b>13</b>
<b>Date of effect</b>	<b>14</b>
<b>Appendix 1 – Examples</b>	<b>15</b>
Example 1	15
Example 2	17
Example 3	18
Example 4	20
<b>Appendix 2 – Explanation</b>	<b>23</b>
Background information	23
Explanation	25
<i>Legal personal representative of a member of a fund</i>	30
<i>Enduring power of attorney</i>	32
<i>Nature of the authority conferred by the enduring power of attorney</i>	35
<i>Requirement that legal personal representative be appointed as trustee of the SMSF or a director of the corporate trustee</i>	38
<i>Individual trustee</i>	42
<i>Director of corporate trustee</i>	45
<i>Validity of enduring power of attorney</i>	48
<i>Obligations imposed on trustees of SMSFs</i>	49
<i>Enduring power of attorney conferred on more than one donor</i>	52
<i>The fund ceases to satisfy the definition of an SMSF</i>	54
<b>Appendix 3 – Your comments</b>	<b>57</b>
<b>Appendix 4 – Detailed contents list</b>	<b>59</b>



# SMSFR 2009/D1

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- powers of attorney
- retirement income entities
- self managed superannuation funds
- SMSF structure
- SMSF trustee
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# SMSFR 2009/D1

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Status: **draft only – for comment**

Page 17 of 17

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