

SMSFs, non-lapsing BDBNs: there is no debate (as long as you *Read the Deed*)

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The decision in *Hill v Zuda Pty Ltd* [2021] WASCA 59, reported at para [387] of this *Bulletin*, further reinforces the oft-cited mantra in relation to all trusts – and particularly self-managed superannuation funds (SMSFs) – to: **Read the Deed**. I know (and readers know!) that I harp on about **Read the Deed**, but the mantra, if observed, really does repay itself many times over.

In this case, the Federal Court confirmed that s 59 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (SISR) do not apply to SMSFs.

This meant, in this case, that the failure of the binding death benefit nomination (BDBN) to comply with reg 6.17A (in that it was made more than 3 years before the death of the member and was not witnessed by 2 witnesses) was irrelevant to whether it was binding on the trustee of the SMSF.

History

For many years, there was a level of debate about whether SMSFs were permitted to offer BDBNs and if so, whether any such BDBN would automatically lapse after 3 years.

A similar level of confusion existed in relation to the form of a nomination, eg if witnesses are needed, how many should there be.

The ATO ultimately answered the question succinctly in SMSF Determination 2008/3, where it confirmed that s 59 of the SIS Act and reg 6.17A of the SISR do not apply to SMSFs.

This means that the governing rules of an SMSF may permit members to make death benefit nominations that are binding on the trustee, whether or not in circumstances that accord with the rules in reg 6.17A.

Read the Deed

According to reg 6.17A(7), a BDBN regulated by that provision lapses:

- at the end of the period of 3 years after the day it was first signed, or last confirmed or amended, by the member; or
- if the governing rules of the fund fix a shorter period – at the end of that period.

Despite the above comments however, the effectiveness of a purported BDBN will depend entirely on its compliance with the trust deed of the SMSF. Thus, as one critical example, a significant number of trust deed providers (perhaps a vast majority) will mandate that any BDBN must be signed, and dated, by the member in the presence of 2 witnesses, each of whom has turned 18 and neither of whom is a person mentioned in the BDBN. Requirements analogous to the valid signing of a will.

Non-SMSFs

Similarly, the position in relation to non-lapsing BDBNs for non-SMSFs (eg retail, industry, corporate and small APRA funds) has also been the subject of long standing debate.

The approach that appears generally accepted for non-SMSFs and BDBNs can be summarised as follows:

- "standard" BDBNs are lapsing and will comply with s 59(1A) of SISA. This means they will also be regulated by reg 6.17A(7) (as set out above);

- it is possible however for non-lapsing BDBNs to be created under s 59(1)(a) of SISA. This section is not caught by reg 6.17A(7) and therefore any BDBN made pursuant to this section does not automatically lapse. Arguably, the key aspects of ensuring the non-lapsing BDBN is in fact valid are that the trust deed for the fund must permit the approach and the trustee of the fund must consent to the nomination and the form it can be made in (eg, including the number of witnesses);
- in contrast, standard lapsing BDBNs do not require the consent of the trustee.

Section 59

For ease of reference, the provisions of s 59 of SISA are set out in full below.

Section 59 SISA - Exercise of discretion by person other than trustee

(1) Subject to subsection (1A), the governing rules of a superannuation entity other than a self managed superannuation fund must not permit a discretion under those rules that is exercisable by a person other than a trustee of the entity to be exercised unless:

(a) those rules require the consent of the trustee, or the trustees, of the entity to the exercise of that discretion; or

(b) if the entity is an employer-sponsored fund:

(i) the exercise of the discretion relates to the contributions that an employer-sponsor will, after the discretion is exercised, be required or permitted to pay to the fund; or

(ii) the exercise of the discretion relates solely to a decision to terminate the fund; or

(iii) the circumstances in which the discretion was exercised are covered by regulations made for the purposes of this subparagraph.

(1A) Despite subsection (1), the governing rules of a superannuation entity may, subject to a trustee of the entity complying with any conditions contained in the regulations, permit a member of the entity, by notice given to a trustee of the entity in accordance with the regulations, to require a trustee of the entity to provide any benefits in respect of the member on or after the member's death to a person or persons mentioned in the notice, being the legal personal representative or a dependant or dependants of the member.

(2) If the governing rules of a superannuation entity are inconsistent with subsection (1), that subsection prevails, and the governing rules are, to the extent of the inconsistency, invalid.