

# SMSFs and managing incapacity: A critical component of holistic estate planning

- by Matthew Burgess, Director, View Legal

**While enduring powers of attorney (EPA) are generally a key component of a holistic estate plan, it is critical to remember that special rules apply in relation to incapacity and self-managed superannuation funds (SMSF).**

As SMSF specialists know, a superannuation fund is an SMSF where all members of the fund are trustees or directors of a corporate trustee – see sections 17A(1) and (2) of the *Superannuation Industry (Supervision) Act 1993*.

A super fund is, however, also a complying SMSF where an EPA of a member is a trustee or a director for a corporate trustee in place of a member during any period that attorney has an EPA in respect of a member of the fund who themselves is unable to act (see section 17A(3)(b)(ii)).

In a recent View Legal webinar, team members Matthew Burgess and Melissa Toms said that it is critical to remember that in order for section 17A(3) to apply, the person seeking to become a trustee or director needs to be appointed under an EPA of the member who cannot act.

A general power of attorney will not be sufficient.

Practically, the only way in which an attorney under an EPA can act in the role as trustee for an SMSF is for the existing member to be removed from their role as trustee (or director of the corporate trustee as the case may be), and for the attorney under that member's EPA to be appointed as the new trustee or director in place of the member.

In addition to satisfying the statutory provisions, the trust deed for the SMSF must also be complied with.

Importantly, the attorney for the member performs their duties as a trustee of the SMSF, or a director of the corporate trustee of the SMSF, pursuant to their appointment to that position, rather than as an attorney or agent for the member.

The Tax Office has detailed its views in this area in *Self-Managed Superannuation Funds Ruling SMSFR 2010/2*.

Burgess and Toms confirmed that the legislation allows six months for an SMSF to ensure it is compliant. However, it does not automatically appoint the attorney as the replacement trustee or director. Therefore, to ensure compliance the provisions of the trust deed for the SMSF and, where there is a company acting as trustee, its constitution as these documents will regulate exactly how the attorney must be appointed.

They also confirmed that each of the above points is confirmed in the Tax Office's release *SMSF Ruling 2010/2*.

Helpfully, *SMSFR 2010/2* confirms the approach to take in a number of common factual scenarios for SMSFs, for example:

1. The attorney performs their duties as a trustee of the SMSF, or a director of the corporate trustee of the SMSF, pursuant to their appointment to that position, rather than as an attorney or agent for the member. This means that any restrictions contained in state legislation against conferring trustee powers via a power of attorney are irrelevant.
2. The EPA must be current and accord with the relevant state legislation at all times during which the attorney is acting on behalf of the member.

3. Where an EPA is executed in favour of multiple attorneys, one or more of those attorneys can be appointed as a trustee, or a director of the corporate trustee, in place of the member.
4. If a member executes an enduring power of attorney in favour of an existing member who is already a trustee, or director of the corporate trustee, in their own right the attorney will act in two roles. Namely on behalf of the incapacitated member (as their legal personal representative) and in their own capacity for themselves.
5. This means, for corporate trustees, the incapacitated member should be retired as a director, and for individual trustees, a formal deed of change of trustee should be signed, retiring the incapacitated member and appointing the attorney. This is the case even if that attorney is already a trustee and member in their own right and ensures there is not a sole trustee (even if the same person is superficially the “only” trustee, as they are in fact acting in two different capacities).