

Non-lapsing BDBNs ... (again) confirmation that there is no debate

by Matthew Burgess, Director, View Legal, 17 June 2022

For many years there was a level of debate about whether self managed superannuation funds (SMSFs) were permitted to offer binding death benefit nominations (BDBNs) and if so, whether any such BDBN would automatically lapse after 3 years.

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

The Tax Office ultimately answered the question succinctly in SMSF Determination 2008/3, where they confirmed that section 59 of the Superannuation Industry (Supervision) Act 1993 and regulation 6.17A of the Superannuation Industry (Supervision) Regulations 1994 (SISR) do not apply to SMSFs.

In the context of this debate the decision in *Hill v Zuda Pty Ltd as trustee for Holly Superannuation Fund* [2019] WASC 238 (and the subsequent related decision in *Hill v Zuda Pty Ltd as trustee for The Holly Superannuation Fund* [2020] WASC 89) is a useful cross reference.

In this case the key question the court considered was whether a purported BDBN was invalid due to the, alleged, noncompliance with regulation 6.17A.

The court was blunt in its conclusions that:

1. pursuant to section 59(1) of SIS, the conditions of regulation 6.17A do not apply to SMSFs, unless the terms of the constituent deed expressly provide to that effect.
2. the authorities all support the conclusion that regulation 6.17A has no application in relation to SMSFs.
3. there was therefore nothing to support a cause of action calling into question the validity of the BDBN on the basis that the trust deed for the SMSF failed to comply with regulation 6.17A.

The above conclusions have similarly now, very bluntly, been confirmed by the High Court in *Hill v Zuda Pty Ltd* [2022] HCA 21.

In this recent decision the High Court has confirmed:

1. Regulation 6.17A has no application to an SMSF.
2. The fact that the requirements of regulation 6.17A concerning the giving of notice by a member of a regulated superannuation fund to the trustee of that fund do not apply to an SMSF is not surprising given that an SMSF is, by definition, a superannuation fund in which members of the fund are also trustees of the fund.
3. In this context, the giving of notice of the kind envisaged by regulation 6.17A would be at best an exercise in formality - and at worst redundant. In other words, the two purposes of regulation 6.17A – of enabling members to compel trustees to distribute death benefits in accordance with their wishes and ensuring that members have sufficient information – are inapt to administration of an SMSF.

4. The inferior Court of Appeal should have reached its conclusion (ie that 6.17A has no application to an SMSF) by construing the regulation for itself, rather than relying on a decision of a court it was not bound by.

That is, 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 regulation 6.17A of the SISR.

Ultimately therefore the failure of the relevant nomination to comply with regulation 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.

According to regulation 6.17A(7) of SISR, a BDBN regulated by that provision lapses -

1. 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
2. if the governing rules of the fund fix a shorter period -- at the end of that period.

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, noting that APRA has specifically confirmed in Prudential Practice Guide SPG 280 that non-lapsing BDBNs are possible:

(a) 'standard' BDBNs are lapsing and will comply with section 59(1A) of SISA. This means they will also be regulated by regulation 6.17A (7) SISR (as set out above);

(b) it is possible however for non-lapsing BDBNs to be created under section 59(1)(a) of SISA. This section is not caught by regulation 6.17A (7) SISR 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 (for example, including the number of witnesses);

(c) in contrast, standard lapsing BDBNs do not require the consent of the trustee.

For ease of reference the provisions of section 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.

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(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.

